



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



# **Decision Regulatory Impact Statement**

**The regulation of the Fitness Industry  
in Western Australia**

July 2019

This Decision Regulatory Impact Statement (D-RIS) has been prepared in compliance with the Western Australian (WA) Government's requirement for Regulatory Impact Assessment.

The purpose of this D-RIS is to recommend the preferred option for regulating the fitness industry in WA.

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## ABBREVIATIONS USED IN THIS PAPER

The following is a summary of abbreviations used in this paper.

TABLE 1 ABBREVIATIONS

Key Terms	Definition
2010 Fitness Industry Code.	Fair Trading (Fitness Industry Code of Practice) Regulations 2010 (WA).
2018 Interim Code.	Fair Trading (Fitness Industry Interim Code) Regulations 2018 (WA) – in force 1 Jul 2018 to 31 Dec 2018.
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).
CAC.	Consumer Advisory Committee.
CAV.	Consumer Affairs Victoria.
CCLSWA.	Consumer Credit Legal Services (WA) Inc.
Consumer Protection.	Department of Mines, Industry Regulation and Safety – Consumer Protection Division.
Cwlth.	Commonwealth.
DDR.	Direct Debit Request.
DLGSC	Department of Local Government, Sport and Cultural Industries.
Fitness Australia Code.	Fitness Australia National Fitness Industry Code of Practice (November 2018).
Fitness Australia.	Fitness Australia Limited.
FTA.	Fair Trading Act 2010 (WA).
NSW	New South Wales
NZ Commission.	Commerce Commission New Zealand.
Public Consultation Paper.	Fitness Industry Code of Practice Review – Public Consultation Paper.
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.
SBDC.	Small Business Development Corporation.
UCT.	Unfair Contract Terms.
VIC	Victoria
WA Fitness Code or the Code.	Fair Trading (Fitness Industry Interim Code) Regulations (No.2) 2018 (WA) – in force 1 Jan 2019 to 30 Jun 2019.
WALGA.	Western Australian Local Government Association.

## KEY TERMS USED IN THIS PAPER

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

TABLE 2 KEY TERMS

Key Terms	Definition
Client.	Client means a person who – <ul style="list-style-type: none"> <li>(a) Is, or was, supplied with a fitness service by a supplier; or</li> <li>(b) Enters into, or has previously entered into, a membership agreement with a supplier; or</li> <li>(c) Makes enquiries, or has previously made enquiries, with a supplier or an employee of a supplier about entering into a membership agreement.</li> </ul>
Cooling off period.	The time after entering into a membership agreement that the client can cancel the agreement without incurring a penalty.
Fitness centre.	The current code defines a fitness centre as ‘an indoor facility primarily used for providing fitness services’.
Fitness service.	<p>A fitness service under the current code can include:</p> <ul style="list-style-type: none"> <li>• An exercise screening;</li> <li>• An individual exercise program;</li> <li>• A group exercise program; or</li> <li>• The provision of fitness equipment at a fitness centre for use by clients.</li> </ul> <p>It does not include a service supplied by:</p> <ul style="list-style-type: none"> <li>• A doctor registered under the Medical Act 1950;</li> <li>• A physiotherapist registered under the Physiotherapist Act 1950;</li> <li>• A sporting club or organisation for the playing of, or training for, a sport;</li> <li>• An educational institution for exclusive use by staff or students; or</li> <li>• A person teaching someone to perform, or train for, martial arts, dancing or ballet.</li> </ul> <p>A fitness service also does not include:</p> <ul style="list-style-type: none"> <li>• The use of a spa bath, sauna bath, swimming pool or similar facility where no other fitness service is supplied;</li> <li>• A fitness service at a fitness centre provided for the sole purpose of medical rehabilitation;</li> <li>• The hire of a court or other facility for the playing of sport.</li> </ul>
Fixed term contract.	A contract where the client is required to make payments for a fixed term, sometimes in the fitness industry a fixed term contract will automatically renew and become an ongoing contract at the end of the fixed term.
Maximum contract cost.	This is the total cost of the contract over the specified period.
Membership agreement.	Means an agreement between a supplier and a client for the supply of fitness services, in the current code this is limited

Key Terms	Definition
	to a supplier providing a fitness service to a client at a fitness centre.
Minimum term contract.	A contract that specifies a period of time which is fixed where the client has an obligation to pay periodically and may be liable to a cancellation charge if the contract is terminated within that specified time period. At the end of the minimum term this typically becomes an ongoing contract.
Non-traditional fitness service.	A fitness service that takes place outside of a 'fitness centre'.
Ongoing agreement.	Means a membership agreement that does not end unless the client or the supplier terminates the membership agreement.
Supplier.	Means a person who is carrying on, or has carried on, the business of supplying fitness services, including a fitness trainer, but not an employee of such a person. The term 'supplier' is used throughout this document to refer to fitness service providers. A supplier may be a company, partnership or sole trader.
Third party billing agent.	An intermediary that for a fee handles the invoicing and payment between a supplier and a client.

## **EXECUTIVE SUMMARY**

### **BACKGROUND**

The Western Australian Government is committed to a regulatory gatekeeping process aimed at carefully considering the fundamental question of whether regulatory action is required or if policy objectives can be achieved by alternate measures, with lower costs for business, the community and government. In developing and reviewing legislation, the potential costs of regulation are carefully considered and weighed against the potential benefits.

The regulation of the fitness industry in Western Australia was last comprehensively reviewed in 2010. The Fair Trading (Fitness Industry Code of Practice) Regulations 2010 (WA) set out specific standards of conduct for the WA fitness industry. The code of practice is intended to increase public confidence in fitness centres and other fitness suppliers by establishing mandatory standards of conduct across the industry. Since 2010 there have been significant changes to the consumer law regulatory landscape, in particular the introduction of the Australian Consumer Law (ACL).

The WA fitness industry has changed since the last code review, with small businesses and sole traders embracing change in fitness trends to offer consumers personalised services conducted outside of traditional gym facilities. Many fitness services that operate outside of a fitness centre now often offer membership agreements and have employees. The way business is done has also evolved with electronic contracts, electronic communications and use of third party billing agents becoming the new normal.

As reflected in the code's current objectives the policy goals continue to be to support and promote the fitness industry in WA as it evolves and to encourage consumer confidence by ensuring appropriate standards of service are maintained.

### **CONSULTATION PROCESS**

In July 2018 the Western Australian Department of Mines, Industry Regulation and Safety – Consumer Protection Division (Consumer Protection) published a consultation paper on the Fitness Industry Code of Practice Review (the public consultation paper).

As part of the consultation, Consumer Protection asked stakeholders to consider current and emerging issues and types of fitness services being offered and whether there is a need for mandatory industry specific legislation in WA. Stakeholders were also asked to consider whether regulation should apply to the same range of providers that are currently covered, or should extend to new additional types of service providers.

We asked consumers and industry members if they had experienced problems with fitness transactions, terms of membership agreements or termination of agreements and how these problems were resolved. We also asked if the Fitness Industry Code of Practice (the WA Fitness Code) currently provides appropriate mandatory regulation of the fitness industry, and if not, how it could be improved. We invited submissions as a letter or email, as a response to questions in the public consultation paper or through completion of an online survey.

The three regulatory options were developed for consideration in response to the consultation:

- Maintain the status quo (Option A).
- Update and expand the WA Fitness Code (Option B).
- Repeal the WA Fitness Code (Option C).

### **CONSULTATION RESPONSES**

In response to the consultation paper Consumer Protection received eight written submissions and over two hundred completed surveys.

Consumer groups and individual consumers described difficulties with the cancellation of fitness memberships and experienced unexpected costs relating to fitness membership and direct debits. Consumer groups were also concerned that electronic 'scroll through' contracts have added further complexity to membership agreements and made them more difficult for consumers to understand. More than half of the consumer respondents had felt under pressure to sign a fitness membership and many had experienced difficulties in cancelling direct debits.

The majority of industry respondents believed that the application of the code should not be limited to fitness services that operate in a fitness centre. They confirmed that fitness services that operate outside of a fitness centre now often offer membership agreements and have employees. For example a business that runs outdoor boot camps is not currently obliged to comply with the code for membership agreements, cooling off periods, limits to prepaid memberships, or terminations.

### **PREFERRED OPTION**

#### **Update and expand on the WA Fitness Code (Option B).**

The majority of stakeholders favour updating and expanding the WA Fitness Code (Option B). Only the peak industry body Fitness Australia Limited (Fitness Australia) prefers full deregulation (Option C) so that its own code can apply. The Small Business Development Corporation prefers maintaining the Status Quo (Option A). Consumer Protection has selected Option B as the preferred option, because the benefits that this option will generate for business, the community and government outweigh the costs.

Proposed changes to the code (Option B) will:

- Offer opportunities for businesses to lower their costs by supporting the use of electronic membership agreements and email communications;
- Clarify the content and layout of membership agreements to provide guidance to industry and assist consumers understanding of costs;
- Update the definition of membership agreements to recognise that suppliers that operate outside of traditional fitness centres also offer membership agreements to clients.
- Simplify the cancellation process so consumers can cancel electronically and direct debits will stop when the membership is terminated; and
- Introduce requirements for fees to be disclosed publicly to provide consumers with timely and better quality information and save them time when comparing and evaluating fitness service.

The proposed changes will not change the current definition of suppliers or fitness services, but Consumer Protection is of the view that the changing landscape of the fitness industry warrants the updating of the code to include all fitness service suppliers that offer a membership agreement. An increase in complaints received by Consumer Protection for non-traditional fitness services, such as boot camps, supports the need for this reform. Including all fitness services in the code will help the industry maintain consistent and appropriate standards of service. Updating the code will also create a consistent regulatory environment and promote consumer confidence in the whole of what is an evolving industry. The proposed changes are covered in more detail later in this document, a table summarising the recommendations is available in [Appendix F Recommendations in this paper](#).

Consumer Protection recommends that the Government implement Option B.

## **INTRODUCTION**

### **STATEMENT OF THE ISSUE**

Historically, it has been recognised by the Western Australian Government and 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. For example, problems arising from consumer losses suffered as a result of industry misconduct in the early 2000s resulted in the introduction of compulsory fitness industry codes of practice under the respective Fair Trading Acts (FTA) in the Australian Capital Territory, Queensland, South Australia and Western Australia.<sup>1</sup>

The fitness industry has however changed considerably in the last two decades. When the code was developed the industry was dominated by full service gyms. Now, consumers have access to a wide variety of fitness arrangements and can access options via membership arrangements not contemplated by the original code. These include online membership agreements, the use of third party billing agents and gym memberships aimed at minors. This variety has generated a range of consumer protection issues warranting further consideration.

### **CURRENT LEGISLATIVE FRAMEWORK**

Section 45 of the FTA provides for regulations to prescribe a code of practice that has been submitted and approved by the Minister in accordance with the FTA.

A code of practice has a three year term, after which it expires, unless reviewed and renewed in accordance with section 44 of the FTA. Where it is not possible to review and consult on a code of practice under section 44, section 46 of the FTA provides for an interim code of practice to be made every six months.

In the same year that the Fair Trading (Fitness Industry Code of Practice) Regulations 2010 (WA) (2010 Fitness Industry Code) were gazetted, the ACL was introduced in all Australian jurisdictions.<sup>2</sup> The ACL includes provisions governing conduct in the course of 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 quality of goods and services supplied.

Regulation of the fitness industry in Western Australia was last comprehensively reviewed in 2010. Since then the 2010 Fitness Industry Code has been replicated

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<sup>1</sup> 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.

<sup>2</sup> For the text of the ACL as it applies in Western Australia, refer to *Fair Trading Act 2010* (WA), section 19 and *Competition and Consumer Act 2010* (Cwth), Schedule 2.

without review. The current code can be found in the Fair Trading (Fitness Industry Interim Code) Regulations (No.2) 2018 (WA).<sup>3</sup>

### **THE FUTURE OF THE FITNESS INDUSTRY**

Historically setting up a fitness service required a large capital investment, multiple staff and a significant membership base to make it cost effective. Research indicates that there has been a rapid expansion in the fitness industry with the emergence of 24 hour, 7 days per week fitness centres and gyms that challenge this model.<sup>4</sup> These gyms generally offer smaller premises, low levels of staffing, no group classes, lower fees and simpler membership agreements. The premium gym space has focussed on providing a more personalised service with specialist programs such as F45 Training that engages with technology and Instagram influencers to provide training and nutritional services for members.

The location of fitness services has also changed. In 2019 a fitness service is no longer limited to the traditional 'bricks and mortar' style gym with many consumers opting for personal training or small group boot camp sessions that can be based at a local park, yoga studio or other space in which the session may also be provided as "virtual" using social media. Research indicates that annual membership packages for these services in Western Australia can exceed \$4000<sup>5</sup>.

The peak industry association, Fitness Australia, recently published a National Fitness Industry Code of Practice (Fitness Australia Code)<sup>6</sup> for its members. Importantly not all fitness services in WA are members of Fitness Australia and Fitness Australia has limited ability to impose any sanctions for breach of its code.

Technology has also had a big impact on the fitness industry. There are now numerous fitness programs that are electronically based, for example on Instagram. Overseas fitness trends indicate a movement towards virtual personal trainers on sites such as powhow.com where users sign up to streamed personal or group training sessions.

Technology has also impacted the way consumers sign up to membership agreements with fitness contracts now usually presented and signed electronically. While this increases efficiency and lowers cost for the industry, it also reduces the opportunity for consumers to take away and read the contract or make alterations to membership agreements prior to signing up. When consumers scan through pages of terms and

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<sup>3</sup> [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc\\_41610.pdf/\\$FILE/Fair%20Trading%20\(Fitness%20Industry%20Interim%20Code\)%20Regulations%20\(No%202\)%202018%20-%20%5B00-a0-01%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_41610.pdf/$FILE/Fair%20Trading%20(Fitness%20Industry%20Interim%20Code)%20Regulations%20(No%202)%202018%20-%20%5B00-a0-01%5D.pdf?OpenElement)

<sup>4</sup> Magner L, "IBISWorld Industry Report R9111 Gyms and Fitness Centres in Australia", November 2016 p. 4 & 6.

<sup>5</sup> [Appendix C Current fee disclosure](#)

<sup>6</sup> Fitness Australia *National Fitness Industry Code of Practice* [https://bp-fitnessaustralia-production.s3.amazonaws.com/uploads/uploaded\\_file/file/346580/Fitness\\_Australia\\_Code\\_of\\_Practice\\_Digital.pdf](https://bp-fitnessaustralia-production.s3.amazonaws.com/uploads/uploaded_file/file/346580/Fitness_Australia_Code_of_Practice_Digital.pdf)



conditions on their phone there is increased risk that they will accept conditions without understanding the consequences.

Direct debit arrangements are now frequently utilised by fitness services and are often outsourced to third parties such as *Debitsuccess*, *Payadvantage* or *Payleader*. These offer online portals for member's bank or credit card details to be entered on hand held devices such as a tablet or smart phone. These third party arrangements are convenient for the supplier but may involve increased fees and a separate contract for the consumer. Consumer Protection has considered whether these arrangements are appropriate given that they prevent consumers seeking redress for unsatisfactory fitness services by withholding payment. As the payments are made to the third party and not the supplier, withholding payment can result in consumers unfairly incurring financial penalties for an arrangement that primarily benefits the supplier and / or the third party.

## **FITNESS INDUSTRY LEGISLATION**

The review process looked at fitness industry codes in Western Australia and in other jurisdictions and considered any overlap with other legislation. It also looked at guidance materials available to consumers and the fitness industry in jurisdictions that do not have a separate fitness code.

### **FAIR TRADING (FITNESS INDUSTRY INTERIM CODE) REGULATIONS (No.2) 2018 (WA)**

The code's definition of membership agreements mean that all sections of the code applies to suppliers that operate a fitness service at a fitness centre and only part of it currently applies to other suppliers of fitness services. In 2003 when the code was first drafted membership agreements were not offered outside of a traditional fitness centre. The key features of the WA Fitness Code include:

- Membership agreements are defined as agreements for the 'supply of fitness services by the supplier to the client at a fitness centre'.<sup>7</sup>
- Supplier is defined as 'a person who is carrying on, or has carried on, the business of supplying fitness services, including a fitness trainer, but not an employee of such a person'.<sup>8</sup>
- A supplier must not falsely claim membership or endorsement.<sup>9</sup>
- A supplier and their employees must not misrepresent qualifications.<sup>10</sup>
- A supplier, and the employees of suppliers in fitness centres, must not engage in high pressure selling techniques, harassment or unconscionable conduct for the purpose of entering into a membership agreement with a client.<sup>11</sup>
- A supplier, and the employees of suppliers in fitness centres, must not solicit through false and misleading advertisement.<sup>12</sup>
- A supplier must not disclose confidential information obtained in a membership agreement.<sup>13</sup>
- A 48 hour cooling off period is provided for all new fitness centre memberships.<sup>14</sup>
- Membership agreements are in writing, signed <sup>15</sup> and contain full fee disclosure.<sup>16</sup>
- Membership agreements are limited to 12 months in length.<sup>17</sup>
- Standard complaints handling procedures are used.<sup>18</sup>

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<sup>7</sup> Fair Trading (Fitness Industry Interim Code) Regulations (No.2) 2018 (WA) Div1 (2)

<sup>8</sup> ibid Div2

<sup>9</sup> ibid Div2 (5)

<sup>10</sup> ibid Div2 (6)

<sup>11</sup> ibid Div2 (7)

<sup>12</sup> ibid Div2 (8)

<sup>13</sup> Ibid Div2 (9)

<sup>14</sup> ibid Div4 (13) (2)

<sup>15</sup> ibid Div4 (14)

<sup>16</sup> ibid Div4 (15) (j)

<sup>17</sup> ibid Div4 (17)

<sup>18</sup> ibid Div5 (21)

## **FAIR TRADING (FITNESS INDUSTRY) CODE OF PRACTICE 2009 (ACT)**

Notable differences to the WA Fitness Code include:

- Qualification requirements for staff providing a fitness service are more detailed.<sup>19</sup>
- The cooling off period is 7 days.<sup>20</sup>
- Price of service is to be made available to consumers before membership agreement entered into and a comprehensive list of fees must be disclosed.<sup>21</sup>
- Disclosure clause states the supplier must provide information about the right to make a complaint and have a documented complaint handling policy.<sup>22</sup>
- Clauses requiring a consumer's physical condition pre exercise questionnaire.<sup>23</sup>
- Clauses on refunds or membership deferments for sickness or physical incapacity.<sup>24</sup>

## **FAIR TRADING (CODE OF PRACTICE – FITNESS INDUSTRY) REGULATIONS 2003 (QLD)**

Notable differences to the WA Fitness Code include:

- Examples of what is considered 'harassment' and 'unconscionable conduct'.<sup>25</sup>
- Examples of soliciting through false or misleading advertisements or communications.<sup>26</sup>
- Disclosure of fees clause states the supplier must provide consumers with a clearly expressed statement of the total cost of the agreement detailing all fees including termination, suspension or transfer fees that may be applicable.<sup>27</sup>
- Disclosure of information requirements that compel the supplier to give the client a copy of the membership agreement, rules and other information rather than simply giving the client the opportunity to peruse.<sup>28</sup>

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<sup>19</sup> Fair Trading (Fitness Industry) Code of Practice 2009 (ACT) Part IV

<sup>20</sup> *ibid.* Clause 11

<sup>21</sup> *ibid.* Clause 7

<sup>22</sup> *ibid.* Clause 17

<sup>23</sup> *ibid.* Clause 9

<sup>24</sup> *ibid.* Clause 12

<sup>25</sup> Fair Trading (Code of Practice – Fitness Industry) Regulations 2003 (QLD) Part 2 (7)

<sup>26</sup> *ibid.* Part 2 (8)

<sup>27</sup> *ibid.* Part 4 (15)

<sup>28</sup> *ibid.* Part 3 (12)

## **FAIR TRADING (HEALTH AND FITNESS INDUSTRY CODE) REGULATIONS 2007 (SA)**

Notable differences to the WA Fitness Code include:

- Fixed term agreements must be for a maximum of twelve months and if the consumer requires services for a further term a new agreement is required.<sup>29</sup>
- Membership agreements must clearly detail a time line for cancellation requests, and there must not be a financial penalty for terminating periodic agreements.<sup>30</sup>
- The supplier must notify the consumer of the requirement to cancel any direct debit authorisation for payment under the agreement if the agreement is terminated.<sup>31</sup>
- The total amount to be paid under the agreement and any consequences of failure to make a payment must be specified in the agreement.<sup>32</sup>
- The supplier must include in the membership agreement how the consumer can cancel a fixed term and an amount or basis for calculating the refund or release from obligation to pay, on such early termination.<sup>33</sup>
- Does not include clauses relating to claiming membership of an organisation, misrepresentation, high pressure selling, harassment, or soliciting through false advertising.

### **NSW FITNESS INDUSTRY**

NSW does not have a code. The NSW Office of Fair Trading refers consumers with disputes to Fitness Australia. For fitness suppliers that are not a member of Fitness Australia consumers can contact Fair Trading for help with dispute resolution.

### **VIC FITNESS INDUSTRY**

Victoria (VIC) does not have a code. Consumer Affairs Victoria (CAV) refers consumers to Fitness Australia. CAV also provides comprehensive information in a document titled "*Preventing unfair terms in health and fitness centre membership agreements*".<sup>34</sup> This details what CAV would consider unfair under the ACL, including the cancellation of agreements and requiring the consumer to cancel any separate direct debit arrangements. It references the relevant parts of the ACL. The main difference is that CAV or consumers can choose to take their own action at the Victorian Civil and Administrative Tribunal (VCAT) if they believe a term is unfair.

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<sup>29</sup> Fair Trading (Health and Fitness Industry Code) Regulations 2007 (SA) Part 4 (4) (b)

<sup>30</sup> Ibid. Part 4 (3) (f)

<sup>31</sup> Ibid. Part 4 (3) (i)

<sup>32</sup> Ibid. Part 4 (3) (d) and (4) (d)

<sup>33</sup> Ibid. Part 4 (4) (f)

<sup>34</sup> <https://www.consumer.vic.gov.au/products-and-services/business-practices/contracts/health-and-fitness-centres-unfair-contract-terms>

## NEW ZEALAND CONSUMER LAW

In March 2015 the New Zealand *Fair Trading Act 1986*<sup>35</sup> was amended to include provisions that prohibit unfair contract terms (UCT) in standard form consumer contracts. Under these provisions the Commerce Commission New Zealand (the NZ Commission) can apply to court for a direction that a term is unfair, and if a term is declared unfair, then it is an offence if it is subsequently included in a contract or relied upon. Following this the NZ Commission completed a review of consumer contracts in the fitness industry for compliance with these provisions. In August 2017 the NZ Commission published the results of the review<sup>36</sup> to provide guidance to businesses on the application of UCT provisions and educate consumers about the kind of terms it considers may be unfair under the Act.

Potentially unfair terms they identified were:

*‘Duration of the contract, specifically:*

- *Terms relating to minimum membership period and that provided for any automatic renewal.’<sup>37</sup>*

*‘Cancellation of the contract, specifically:*

- *Terms that require the gym to accept or acknowledge a member’s request to cancel the contract before the request is treated as effective, length of required notice periods, termination fees and terms that allow gyms to unilaterally exclude members.’<sup>38</sup>*

*‘Variation of the contract, specifically:*

- *Terms that allowed the gyms to unilaterally change the upfront price, characteristics of services, or terms of the contract without a right to terminate without cost.’<sup>39</sup>*

*‘Liability under the contract, specifically:*

- *Terms that limit the gym’s liability for breach of contract and civil wrongs, terms that potentially mislead members about their rights and ‘entire agreement’ clauses.’<sup>40</sup>*

Entire agreement clauses in the fitness industry are described by the NZ Commission as “*terms that state that the contract represents the whole agreement between the parties and seek to prevent the parties from relying on any previous agreement*

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<sup>35</sup> (New Zealand) Fair Trading Act 1986, Section 46H-L, 26A, and 40(1)

<sup>36</sup> *Gym contracts review – unfair contract terms* [https://comcom.govt.nz/data/assets/pdf\\_file/0020/86123/Unfair-contract-terms-Gym-contracts-review-August-2017.PDF](https://comcom.govt.nz/data/assets/pdf_file/0020/86123/Unfair-contract-terms-Gym-contracts-review-August-2017.PDF)

<sup>37</sup> *Gym contracts review – unfair contract terms* P9 CI 41.1

<sup>38</sup> *ibid.* P9 CI 41.2

<sup>39</sup> *ibid.* P9 CI 41.3

<sup>40</sup> *ibid.* P9 CI 41.4

*between the parties and seek to prevent the parties from relying on any previous agreement, negotiations or discussions that are not reflected in the contract document. It will in our view be unfair to state that the contract document records the whole agreement where any pre-contractual representations have occurred.”<sup>41</sup>*

The review also highlighted the need for accessible and ‘plain English’ contracts that are clear and transparent. By explaining key contractual terms and making them transparent, suppliers ensure gym members understand contracts better which reduces the risk that terms will be considered unfair.

## **AUSTRALIAN CONSUMER LAW**

Future reforms to the code need to take into account provisions of the ACL (WA) that commenced in 2011. The ACL provides a broad range of consumer protections that apply in addition to any that are provided by the WA Fitness Code. The general provisions of the ACL provide that a person or corporation shall not, in trade or commerce:

- Accept payment for goods or services when there is an intention to not supply the goods or services or to supply goods or services materially different from those for which payment is accepted.<sup>42</sup>
- Engage in misleading or deceptive conduct or conduct that is likely to mislead or deceive.<sup>43</sup>
- Make false or misleading representations in connection with the supply of goods or services.<sup>44</sup>
- Include unfair contract terms in their standard form consumer contracts.<sup>45</sup>

In March 2013 the ACCC published a report on Unfair Contract Terms<sup>46</sup> following a review of industries that offer consumers standard form contracts. With regards to the fitness industry, it noted problematic termination clauses in membership agreements with ‘*unnecessary and burdensome obstacles imposed on consumers*’<sup>47</sup> who exercise their rights to cancel contracts. The report also raised concerns regarding early termination fees on contracts when the consumer did not fully appreciate either the duration of the contract or the practical effect of exit and termination clauses.

The ACCC noted concerns with transparency and accessibility of contracts and that the UCT framework allows the court to consider the contract as a whole. Following consultation with the ACCC a number of businesses chose to amend contracts to improve accessibility. For instance Telstra implemented a one page consumer summary and other companies followed suit.

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<sup>41</sup> *ibid* P 22 Cl 147

<sup>42</sup> ACL section 36 (civil), section 158 (criminal).

<sup>43</sup> *ibid.* section 18.

<sup>44</sup> *ibid.* section 29 (civil); section 151 (criminal).

<sup>45</sup> *ibid.* section 23(3).

<sup>46</sup> ACCC report *Unfair contract terms – industry review outcome*

<sup>47</sup> *ibid.* P9

## **UNFAIR CONTRACT TERMS ACL (WA)**

The only remedy for unfair contract terms in WA is a court 'declaration' that the term is unfair. A superior court action filing fee is from \$2000 to \$4000, and there will be significant additional costs associated with obtaining legal advice and representation. This makes obtaining a court declaration an unrealistic option for most consumers.

Examples of terms that are commonly found in WA fitness centre agreements and direct debit agreements that may be considered unfair contract terms under the ACL are:

### Memberships:

- Terms relating to minimum membership periods that provide for automatic renewal. Consumers may not understand that at the end of the fixed term, the contract will not automatically terminate.
- Contracts with persons under 18 years that include terms that automatically roll the agreement into an adult contract.

### Cancellation of the membership agreement;

- Restrictions on cancellation that require consumers to visit the fitness supplier in person at certain times and use a specific form.
- Terms that require the consumer to separately cancel any direct debit agreement with a third party.
- Terms that state that the cancellation is only effective from when it is acknowledged by the fitness service, or that provide excessive notice periods and cancellation fees that are not directly associated with the financial cost incurred by the fitness service.
- Consumers being unable to cancel memberships whilst fees are outstanding which can lead to a spiralling debt situation.

### Variation of the contract, specifically;

- Terms that allow the supplier to unilaterally change the contract, this could include price, changes to location, services or terms of the contract without a right for the consumer to terminate without penalty.

### Liability under the contract, specifically;

- Terms that limit the fitness service's liability for breach of contract and civil wrongs, these terms potentially mislead members about their rights.

### Plain English requirements, specifically;

- Contracts that as a whole are unclear and difficult for the consumer to understand.

### Direct debit agreements, specifically;

- Blanket terms that allow unspecified amounts to be debited upon a payment default and immediate referral of the consumer to a debt collection agency.

### **FITNESS AUSTRALIA – NATIONAL FITNESS INDUSTRY CODE OF PRACTICE**

The peak industry body, Fitness Australia, published a National Fitness Industry Code of Practice<sup>48</sup> (Fitness Australia Code) in November 2018. The Fitness Australia Code is administered by the board of Fitness Australia. The code is designed to offer guidance to members of Fitness Australia that enables them to meet legislative requirements for the operation of a fitness business. Areas that differ from the WA Fitness Code are:

- The Fitness Australia Code applies to a *Supplier* which is defined as ‘*an exercise professional, body corporate, sole trader, independent contractor, partnership, trust, other entity or organisation that provides fitness services to the public.*’<sup>49</sup>
- Fitness service ‘*includes pre-exercise evaluation, exercise consultations, use of exercise equipment, exercise services or program whether it be in a group setting or individualised, supervised, unsupervised, provided by a supplier in any form or manner (including online).*’<sup>50</sup> This is far more inclusive than the current WA Fitness Code. The exclusions for physiotherapists and educational institutions are similar.
- Ensuring that personnel who provide a fitness service are qualified and hold current registration with Fitness Australia or another reputable body, and are providing fitness services at a level appropriate to that registration.<sup>51</sup>
- Appropriate screening of personnel, professionals and volunteers that are working with children under 18 at a fitness facility, such as requiring them to have a valid *Working with Children Check*.<sup>52</sup> Also if entering into consumer agreements with a consumer under the age of 18, the supplier must require a parent or guardian to sign the consumer agreement.<sup>53</sup>
- Guidelines for health and safety, specifically for suppliers that provide unsupervised fitness services.<sup>54</sup>
- Suppliers must comply with illicit drug laws, and cover the pre exercise questionnaire requirements before consumers can use a fitness service.<sup>55</sup>
- Consumer agreements can be in electronic format.<sup>56</sup>

<sup>48</sup> <https://fitness.org.au/articles/business-news/national-fitness-industry-code-of-practice/30/1603/175code-of-practice>

<sup>49</sup> *National Fitness Industry Code of Practice (Fitness Australia Code)* 3.25

<sup>50</sup> *ibid.* 3.14

<sup>51</sup> *ibid.* 4.3, 4.4

<sup>52</sup> *ibid.* 4.4(c)

<sup>53</sup> *ibid.* 5.2

<sup>54</sup> *ibid.* 4

<sup>55</sup> *National Fitness Industry Code of Practice (Fitness Australia Code)*. 4.7

<sup>56</sup> *ibid.* 5.3



- Membership agreements must include the details of any third party payment system.<sup>57</sup>
- Disclosure of the full price and list of specified fees that need to be included if applicable.<sup>58</sup>
- Consumer agreements can be cancelled by email.<sup>59</sup>
- Requirements around termination of a consumer agreement are more detailed, for example suppliers cannot charge termination fees that were not disclosed prior to entering the agreement. Consumers can cancel for medical reasons and suppliers must refund any balance to the consumer within 14 days of notice of termination.<sup>60</sup>

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<sup>57</sup> *ibid.* 5.13

<sup>58</sup> *ibid.* 5.6(d)

<sup>59</sup> *ibid.* 6.2

<sup>60</sup> *ibid.* 6

## **DECISION PROCESS**

### **OBJECTIVES**

The goal of the review is to develop and implement the most effective and efficient solution that:

- Ensures the fitness industry maintains appropriate standards of service.
- Encourages consumer confidence in the fitness industry.
- Supports and promotes the fitness industry.
- Reflects the way the fitness industry is evolving.

The first three of these are current objectives of the WA Fitness Code. In order to keep the WA Fitness Code relevant any solution developed and implemented must also consider changes to the fitness industry.

### **OPTIONS TO ADDRESS THE ISSUE**

Three options have been identified for evaluation. Each option is set out below.

#### **OPTION A – MAINTAIN STATUS QUO.**

Under this option current arrangements are determined to be working effectively, and the current version of the interim code can be re-implemented with minor changes only.

#### **OPTION B – UPDATE AND EXPAND THE WA FITNESS CODE.**

Under this option the code would be updated and expanded in response to feedback from the consultation process. Examples of additional issues that could be addressed include:

- Code to be expanded to recognise that additional types of fitness services now offer membership agreements.
- Disclosure requirements enhanced, specifically for fees and third party billing arrangements, so that consumers can review the total cost of the agreement online.
- Use of online agreements recognised and online options for cancellation mandated.
- Cooling off periods extended to not less than 7 days.
- Increased clarity about cancellation options and consequences and direct debits.
- Requirements for contracts to be in plain English with tables listing applicable fees.

#### **OPTION C – REPEAL THE WA FITNESS CODE.**

Under this option the WA Fitness Code would be repealed and the ACL and possibly the Fitness Australia Code would be relied on for the protection of consumers. This is the preferred option of the peak industry body, Fitness Australia, who requested that consideration be given to moving towards industry self-regulation. Interestingly no

other respondents to the public consultation or the industry survey think that the WA Fitness Code should be repealed.

### **IMPACT ANALYSIS FOR EACH OPTION**

This section outlines the potential benefits, risks and costs of each of the options. This section also assesses the potential for Options A, B and C to meet the policy goal set out in Objectives.

#### **OPTION A MAINTAIN STATUS QUO**

Option A has the following benefits:

- Minimal additional communication costs for government.
- Minimal consequential implications.

Option A has the following disadvantages:

- The code is outdated. Specifically the emergence of non-traditional fitness services that offer outdoor or online fitness memberships that are not covered by some of the current code because of the definition of 'membership agreement'.
- Modern business practices, specifically online membership agreements and email communications are not currently covered by the code.
- The code does not address the relationship with third party billing agents in which costs and risks are transferred to the consumer.
- Problems arising from inadequate fee disclosure would not be addressed.
- The issue of consumers failing to understand their obligations when signing up due to long and complex scroll through contracts would not be addressed.

#### **OPTION B UPDATE THE WA FITNESS CODE**

Option B has the following benefits:

- Promotes a consistent level of consumer protection by covering a broader range of fitness services that offer membership agreements.
- Saves time for consumers through promoting upfront and online fee disclosure. Removes the inconvenience of consumers having to book an appointment to obtain this information.
- Reduces the risk of financial hardship for consumers whose circumstances change. Upfront fee disclosure removes the opportunity for businesses to 'hard sell' a membership agreement that may not be financially affordable.
- Saves businesses and consumers time and money by permitting online agreements and specifying that consumers can send cancellation requests electronically.
- Improves consumer understanding of membership agreements by giving consumers time to review agreements during an extended cooling off period. Extending cooling off to not less than 7 days would align with ACT legislation

and mean that consumers in WA will not be disadvantaged by having shorter cooling off periods than those applying in other jurisdictions.

- Reduces misunderstanding and unexpected costs with plain English contract requirements to help businesses and consumers understand their obligations.
- Reduces calls and complaints to Consumer Protection and suppliers relating to cancellations and direct debits by allocating clear time frames and responsibility for cancellations including cancellation of any direct debit arrangements.

Option B has the following disadvantages:

- Costs for government in educating suppliers not currently covered by the code of their obligations under the code.
- Costs for government communicating the changes to the code.
- Costs for industry to update online material. Option B will require disclosure of fee information and information as to where the code can be accessed.
- Cost to industry of updating membership agreements.

### **OPTION C REPEAL THE CODE**

Option C has the following advantages:

- Reduces the cost for government to regulate in respect of the fitness industry in Western Australia.
- Fitness Australia the peak governing body has introduced a voluntary code that would apply to its WA members.
- Possible reduction in compliance cost for industry.

Option C has the following disadvantages:

- The fitness industry in Western Australia universally favours retaining a stand-alone code.
- Reduces redress options for consumers. The code offers consumers the opportunity to raise matters with the Commissioner and seek redress through SAT. Repealing the code will remove this option.
- Fitness Australia Code is voluntary and only covers their members, which they estimate to be 60% to 80% across the national fitness industry.
- Fitness Australia is active in WA but does not have local presence from a national level.<sup>61</sup>
- Removes the code's clear rules on legislative requirements for small businesses, such as personal trainers. If the code is repealed that guidance will be lost.
- Consumer Protection's regulatory role would change with fewer options for addressing consumer complaints.

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<sup>61</sup> The Department of Local Government, Sport and Cultural Industries (DLGSC) ceased funding Fitness Australia when they no longer provided representation in WA.

- The number of consumer complaints would be likely to rise.
- Possible increased cost for suppliers if consumers are encouraged to use only Fitness Australia members with cost of membership at \$275 / 24 months for a sole trader and \$750 / 12 months for a business.
- Possible conflicting commercial interest with Fitness Australia who sell fitness industry insurance and promote third party billers through their website.

## ASSESSMENT AGAINST THE OBJECTIVES

The following table outlines how well Option A, *Maintain status quo*, addresses the objectives.

TABLE 3 ASSESSMENT OF OPTION A AGAINST THE OBJECTIVES

Objective	Assessment
Ensures appropriate standards of service are maintained in the fitness industry.	The current code has worked well historically to ensure appropriate standards of service are maintained in the fitness industry. However as the fitness industry has changed there has been an increase in suppliers that offer membership agreements who do not need to meet the requirements of part of the code because of the location of their fitness service. This risks inconsistency in service standards across the industry.
Encourages and maintains consumer confidence in the fitness industry.	The current code has not addressed lack of consumer confidence with regards to understanding the total cost of memberships, perceived pressure to sign membership agreements and difficulties associated with cancelling membership. We have seen an increase in Consumer Protection complaints for sections of the industry that are not currently required to comply with membership agreement sections of the code.
Supports and promotes the fitness industry.	The code has supported the fitness industry by providing a clear legislative framework for industry members to work from. However as it needs updating to reflect changes to the way business is done with regards to electronic communication and electronic contracts.
Reflects the way in which the fitness industry is evolving.	By maintaining the status quo the Government will be missing the opportunity to ensure the legislation is still relevant to the changing industry.

The following table outlines how well Option B, *to update and expand the WA Fitness Code*, addresses the objectives.

TABLE 4 ASSESSMENT OF OPTION B AGAINST THE OBJECTIVES

<b>Objective</b>	<b>Assessment</b>
Ensures appropriate standards of service are maintained in the fitness industry.	By including all areas of the fitness industry in an updated and expanded code it meets the objective of ensuring appropriate standards of service apply across the industry.
Encourages and maintains consumer confidence in the fitness industry.	Consistent legislation across the whole industry promotes consumer confidence. Recommended changes address consumer concerns caused by unclear pricing and pressure sales. Disclosure changes will help consumers better understand who is offering a service, what their qualifications are and how much it will cost. Consumer Protection believe this will encourage and maintain consumer confidence in the fitness industry.
Supports and promotes the fitness industry.	The proposed changes to the code support and promote the fitness industry as a regulated industry that can be trusted. They provide clear guidance to industry on acceptable standards.
Reflects the way in which the fitness industry is evolving.	Option B covers a broad range of fitness services and considers e-commerce implications on membership agreements. It will provide clarity on cancellation of memberships when third party billing agents are involved.

The following table outlines how well Option C, repeal the WA Fitness Code, addresses the objectives

TABLE 5 ASSESSMENT OF OPTION C AGAINST THE OBJECTIVES

<b>Objective</b>	<b>Assessment</b>
Ensures appropriate standards of service are maintained in the fitness industry.	By repealing the current code and relying on a voluntary industry code, only those members of Fitness Australia are obliged to comply with their code. This could result in an inconsistency across the industry. Feedback from the industry in WA indicates that the physical presence of Fitness Australia in WA is limited to occasional visits and that they do not have the staff or the power to regulate. Repeal of the code means relying on the ACL for enforcement where suppliers are not members of Fitness Australia.
Encourages and maintains consumer confidence in the fitness industry.	The reputation of the fitness industry in WA risks being damaged by the suppliers in the industry that operate outside the voluntary code. By outsourcing consumer protection to an industry body there is limited redress available to consumers. Repeal of the code would mean consumers rely on the ACL for enforcement where suppliers are not a member of Fitness Australia.
Supports and promotes the fitness industry.	The fitness industry in WA favours retaining the code.
Reflects the way in which the fitness industry is evolving.	By repealing the code the Government would be ignoring problems consumers are experiencing with the industry. For example, consumers have lost the opportunity to peruse details when using online scroll through agreements and are unaware of the implications of contracts with third party billing agents

## **COST OF CURRENT FITNESS INDUSTRY REGULATION. OPTION A.**

This section looks at the cost involved in the current regulation of the fitness industry.

### *CONSUMERS*

The current code has offered savings to consumers by limiting the length of payment in advance to twelve months thereby reducing exposure to loss if a fitness service closes down. The current code also offers consumers a pathway to escalate complaints and an opportunity for redress through the Commissioner. The greatest proportion of phone enquiries to Consumer Protection relate to cancellation of memberships and unexpected costs and delays in cancelling direct debits.

### *INDUSTRY*

In responses to the industry survey the business costs of complying with the current code were generally described as minimal.

### *CONSUMER PROTECTION*

Consumer Protection's ongoing cost of regulating the Fitness Industry can be estimated from the number of complaints and phone calls that are received each year.

In the 2017/18 financial year Consumer Protection dealt with 131 fitness industry complaints and around 406 phone enquiries.

This accounts for 1.6% of all complaints and 0.3% of all enquiries received by Consumer Protection over that period. As complaints regarding the fitness industry are generally not complex or time consuming, the ongoing financial costs of regulating the fitness industry, including costs for education and communication, can be estimated at less than 1% of Consumer Protection expenses.

## **COST OF EXPANDING AND UPDATING FITNESS INDUSTRY REGULATION. OPTION B**

This section looks at the potential costs of Option B.

### *CONSUMERS*

Proposed changes to disclosure requirements will save consumers valuable time and money by allowing them to consider the full costs of comparable services online. Changes to membership agreements will also help consumers be aware of the total cost of fitness services and any third party direct debit arrangements, and thereby reduce the numbers of consumers experiencing financial difficulties from their fitness membership.

### *INDUSTRY*

Expanding and updating the code creates additional costs for businesses in changes to membership agreements and web pages. This is difficult to quantify as some suppliers still use paper agreements but many will only need to update electronic



agreements. In order to reduce this cost it is anticipated that suppliers will be provided with a nine month lead time in order to use up existing paper stock, or combine electronic updates of agreements with general electronic marketing reviews. Some suppliers may also need to amend the content of their electronic point of sale to meet disclosure requirements, again the nine month lead time will allow suppliers to time this update with other marketing changes to reduce costs. However it is recognised that there will be savings for the industry with the removal of the requirement to print and physically sign agreements.

Those fitness services not currently required to comply with the membership agreement requirements in the code will need to review and possibly update their membership agreements and will need to educate themselves on the code's requirements. The Department will provide electronic tools and guides for suppliers to assist with the changes and a nine month transition time. The cost for these fitness services updating their membership agreements to comply with the code is offset by the consumer benefit of having a fitness industry that has clear membership agreements.

In order to quantify the cost to the industry we have assumed that nationally 70% of suppliers are Fitness Australia members and ten percent of these members are likely to be based in WA. Based on this it is estimated that there are around five hundred WA fitness service suppliers. Assuming that every business will need time to update their website and membership agreements and train staff on any changes, the cost to each business to fully comply is estimated at ten hours. This would equate to a maximum cost of around \$500 each business. This is a one off cost for business that can be spread over nine months and will be offset by reduced printing costs.

#### *CONSUMER PROTECTION*

Consumer Protection will continue to incur costs to monitor and enforce compliance. It is expected that the number of complaints may increase due to the expanded areas for compliance for industry. An increase in the number of complaints would result in an increase in compliance costs. However improved conduct by a better informed industry would then reduce the number of complaints to Consumer Protection and subsequently reduce regulatory costs.

There would also be minimal one off costs to implement industry and community education initiatives. The three proposed industry email communications will be sent through Campaign Monitor to the 495 suppliers and interested parties outlined in the communication strategy and will cost \$450.

## **COST OF NOT REGULATING THE FITNESS INDUSTRY. OPTION C.**

This section looks at the cost of repealing the code.

### *CONSUMERS*

For consumers, removing the ability to refer complaints of breach of the code to the Commissioner will reduce available options for financial redress and conciliation. The only remedy for an unfair contract term is to apply to have an unfair contract term declared void. Declarations are only available in the Supreme or the Federal Court and so it will not ever be accessible to individual claimants because filing fees are \$2000 to \$4000 and there are significant additional costs associated with obtaining legal advice and representation. Consumer protection can take court action but this is limited to the more serious cases where there is a clear public benefit.

The emergence of electronic contracts and the use of third party billing agents in recent years have significantly disadvantaged consumers. If the code is repealed Consumer Protection would expect to see an increase in consumers experiencing financial difficulty because contracts have been signed without a full understanding of the costs. In addition billing agent contracts give suppliers the option of immediate referral to debt collecting agencies for missed payments which can quickly spiral into a never-ending debt cycle for the affected consumer.

### *INDUSTRY*

The cost of membership for Fitness Australia begins at \$275 / 24 months for a sole trader and \$750 / 12 months for a company. The NSW Office of Fair Trading recommends that consumers check if the fitness service is registered with an industry body, such as Fitness Australia. If the Government repeals the code and has a similar approach to NSW service providers not currently members of Fitness Australia may be disadvantaged by consumers being redirected to Fitness Australia members. To avoid this possible disadvantage, a provider may choose to join the industry association, incurring membership costs they have not incurred to date.

When NSW repealed their code they estimated that businesses would save around 3 hours a year in compliance costs (\$150). Since then Fitness Australia have implemented a code that it requires members to comply with so this saving is now negligible.

### *CONSUMER PROTECTION*

The cost for government will remain the same or increase somewhat as instead of enforcing the code Consumer Protection will apply the ACL WA. As the ACL WA is not specific to the fitness industry it may require additional investigation to determine if a breach has occurred. As Fitness Australia have no enforcement capacity in VIC and NSW it still refers complaints to the state regulator that are not resolved through conciliation.

## **CONSULTATION PROCESS**

### **CONSULTATION PAPER**

On July 2 2018, Consumer Protection released a public consultation paper titled *Review of the Fitness Industry Code in Western Australia*. The purpose of this paper was to review the need or otherwise for industry specific regulation of the fitness industry in Western Australia and obtain feedback from fitness service suppliers, consumers, industry associations and other interested parties as to the effectiveness and appropriateness of the existing Fair Trading (Fitness Industry Interim Code) Regulations (No. 2) 2017 (WA). A full list of questions to stakeholders in the review is included in [Appendix G List of Fitness Industry Code Review Questions](#).

### **METHOD OF CONSULTATION**

In July 2018 Consumer Protection identified and wrote to over 495 stakeholders across the industry and consumer groups inviting them to make submissions outlining their views, responding to questions included in the paper, or to complete a survey published on the Department's web pages. Considerable work was undertaken to identify stakeholders that included traditional gyms, franchise owners, boot camp operators and Pilate studios. Facebook was used to inform consumers of the review and direct them to the Department's web pages to complete the survey.

#### *MEDIA STATEMENTS*

On 2<sup>nd</sup> July 2018 Consumer Protection issued a media statement that advised that the consultation was looking for feedback on whether the changing nature of the fitness industry required adjustment to the scope and application of the code. This statement was originally released on Facebook and reached 1374 people. It was covered by 6PR Drive, 6PR News and Bunbury community radio. By the end of July 2018 it was followed up on six other radio stations and included in community and regional newspaper articles.

#### *BOOSTED FACEBOOK POSTS*

In October and November 2018 we promoted the consultation three more times with paid boosted Facebook posts and sent a message by email to 460 Consumer Protection subscribers. By paying for the Facebook posts we were able to target them to Facebook users that are based in Western Australia and interested in fitness.

The first boosted Facebook post *Make sure the fitness code is fit* reached 8842 people and had 167 link clicks, the second post *Gym and fitness membership shouldn't stress you out* reached a further 1584 people. The final boosted Facebook post *Get ripped not ripped off* reached 2800 people. These posts were also shared by Curtin Stadium who have a further 2999 individuals following their page.

#### *CONSULTATIONS PAGE*

The Consumer Protection consultation page has had 750 views since 1 July 2018, and 213 individual users have opened the link to the consultation paper.

### *PEAK INDUSTRY BODY MEETING*

We met with Fitness Australia the peak industry body for the fitness industry to discuss the consultation. They estimate that 60% to 80% of Australian fitness suppliers are members.

### **SUBMISSIONS**

In response to the public consultation paper, Consumer Protection received eight written submissions from the following stakeholders.

- Western Australian Local Government Associations (WALGA).
- Department of Local Government, Sport and Cultural Industries (DLGSC).
- Small Business Development Corporation (SBDC).
- Consumer Credit Legal Service (WA) Inc. (CCLSWA).
- Department of Education.
- Curves Mount Lawley.
- Consumer Advisory Committee (CAC).
- Fitness Australia Limited.

### **ONLINE SURVEY RESULTS**

The results and comments from the online surveys for both the fitness industry and consumers are referred to throughout this paper.

The Industry Survey had a range of responses from sole traders, small businesses, franchise operators, owners of fitness centres, employees of fitness centres and local government suppliers. Industry respondents' offer a range of services from standard gym training to group exercise classes, personal training, outdoor group training, Pilates and online classes. The number of clients ranged from under 1000 to more than 1 million. Twenty six percent of respondents to the survey provide outdoor fitness services and fifteen percent are self-employed.

The original Consumer Survey obtained responses from consumers who had participated in a wide range of fitness services. Over half had participated in outdoor services, the majority had participated in group exercise classes and half had used a personal trainer. There was an even split between full service gym members and 24/7 type gym members. The participants in the survey offered valuable feedback on their experiences with the fitness industry that will be referred to later in this paper.

Consumers in the 18-34 age range have the highest rate of gym participation, according to 2016 figures.<sup>62</sup> The original Consumer Survey obtained only six responses in this age group, and no responses for consumers under 26. Given the limited response, Consumer Protection released a second, shorter, and more targeted survey in October 2018. The second survey was designed to engage consumers on key issues with simpler questions and a two minute response time. The survey was aimed at younger fitness industry consumers through Instagram, Facebook and TAFE

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<sup>62</sup> Fitness Australia's publication *Profile of the Fitness Industry in Australia Fitness Industry Consumers*

and University mail lists. This twelve question survey had 174 responses that corroborated the feedback Consumer Protection had received from the original survey. Examples of the questions asked in our consumer survey are included in [Appendix H List of consumer survey questions](#).

### OPTION PREFERENCE BY STAKEHOLDER

Written submissions received from stakeholders were assessed against the options. Some submissions dealt with isolated issues and expressed no preference for a specific option. Those that requested the code be updated varied in their reasons for choosing that option.

SBDC indicated support for the current code but did not support additional changes without evidence of the need for them. SBDC noted that current guidance materials need updating to include responsibilities under the ACL. Fitness Australia favoured full industry deregulation. In the absence of this it recommended applying the Fitness Australia Code under the Fair Trading Act in WA. If neither of these options is selected Fitness Australia would prefer that the code be updated and included suggestions on the updates required.

TABLE 6 OPTION PREFERENCE BY STAKEHOLDER

Stakeholder	Option A No Change	Option B Update Code	Option C Repeal Code	No Preference
WALGA.				No preference expressed.
DLGSC.		Preferred Option.		
SBDC.	Preferred Option.			
CCLSWA.		Preferred Option.		
Department of Education.				No preference expressed.
Curves Mount Lawley.		Preferred Option.		
CAC.		Preferred Option.		
Fitness Australia.			Preferred Option.	

### OPTION PREFERENCE - INDUSTRY SURVEY

Survey results from industry stakeholders were assessed against the options. The majority of industry stakeholders favour updating the code to cover a broader range of suppliers. No industry respondents favoured repealing the code. Responses from the industry survey are included in more detail later in this document.

### **OPTION PREFERENCE - CONSUMER SURVEY**

Survey results from consumers were assessed against the options. The majority of consumers favour updating the code to address the problems consumers report experiencing with the fitness industry.

## **PROPOSED CHANGES FOR OPTION B WITH POSSIBLE FINANCIAL IMPACT**

The review has highlighted which code provisions are working well and which provisions are now outdated because of changes in the business practices of the industry.

Option B, to update and expand the code, proposes changes that will have financial impact on government, industry and consumers however they are unlikely to have a major financial impact.

Costs likely to be incurred by industry from proposed changes will arise from the need to update web pages and membership agreements. These will be one off costs that can be spread over a period of time. Another potential financial impact will come from the requirement for fitness services to improve cancellation processes. This will address the unfair practices embedded in some current cancellation processes that allow consumers to be charged ongoing fees for no service. This will produce public benefits with increased consumer satisfaction and confidence in the industry. Fees for no service occur when fixed term memberships automatically roll over without the consumer's consent or when responses to cancellation requests are delayed and direct debits continue after the membership agreement has been cancelled. The industry costs are expected to be minimal and are outweighed by the public benefit.

There is also potential for industry savings with the increased use of electronic agreements, opportunities to align franchise membership agreements with other states and a code that mandates clear processes that small businesses can follow.

The majority of fitness centre complaints (77%) received by Consumer Protection over the last six years relate to fees, membership contracts and membership cancellations. This is therefore an important area of focus for consumers. Proposed disclosure requirements will empower consumers to make better financial decisions and proposed changes to membership agreements will clarify the full cost of membership so consumers can make better informed choices between fitness service suppliers. These measures should reduce financial hardship and reduce the need for Consumer Protection intervention.

The proposed changes may increase costs for government short term with industry and community education initiatives including updating guidance documents. The government will continue to incur costs associated with enforcement and responding to consumer complaints. However improved conduct by the industry, through greater awareness of conduct requirements will reduce government compliance cost.

Set out below are a number of recommendations that Consumer Protection has identified that may have a financial impact on consumers, industry and government. These recommendations are discussed in more detail in the following section.

TABLE 7 PROPOSED CHANGES WITH POSSIBLE FINANCIAL IMPACT

Recommendation	Details
Redefine membership agreements.	The code is expanded to cover a broader range of suppliers of fitness services who enter into membership agreements with consumers.
Contents of membership agreements.	Update the required content of membership agreements to provide clarity for consumers and allow consumers to more easily compare services.
Cancellations.	Expand the current cancellation clause to include an option for cancellation without penalty for clients that have become permanently ill or physically incapable, reflect in the code the use of electronic communications and clarify the requirements of the cancellation process.
Cooling off period.	Minimum cooling off period extended to seven days and applies to linked (credit or payment) contracts.
Disclosure of fees.	All fee information must be publically available to allow prospective clients to make an informed decision.

## REDEFINE MEMBERSHIP AGREEMENTS

### RECOMMENDATION 1 REDEFINE MEMBERSHIP AGREEMENTS TO INCLUDE ALL SUPPLIERS

**The code is expanded to cover any supplier of a fitness service who enter into membership agreements with consumers.**

### STATEMENT OF THE ISSUE

The current code applies to **suppliers** that offer a **fitness service**, however some clauses are restricted to **suppliers** that offer a **fitness service** in a **fitness centre**, which is defined in the code as an “indoor facility primarily used for providing fitness services”.<sup>63</sup> This is primarily related to the definition of **membership agreements** as the current code assumes that only fitness services in a fitness centre will offer a membership agreement. This limitation means that fitness services that take place outside of a fitness centre are not currently required to comply with some parts of the code.

For example, a fitness centre would include a business such as a health or fitness club that provides an indoor gym and group exercise classes but would not include a personal trainer or fitness instructor that supplies fitness services outdoors. Similarly

<sup>63</sup> Fair Trading (Fitness Industry Interim Code) Regulations 2018 (WA) Div 1 (2) Terms used



a business that runs group exercise classes at a local hall would not be offering services in a fitness centre because the hall is not 'primarily used for providing fitness services'.

The general rules of conduct apply to all suppliers of a fitness service, however other provisions only apply to suppliers at a fitness centre. For example, a supplier that runs a boot camp cannot engage in high pressure selling techniques or unconscionable conduct and neither can their employees but only suppliers at a fitness centre are required to take reasonable steps to ensure that their employees comply. The current confidentiality clause wording limits it to fitness centre suppliers as it applies to information obtained through a 'client's membership agreement'.<sup>64</sup>

Division 4 of the current code sets out requirements for membership agreements and cooling off periods that apply to all fitness services that are provided at a fitness centre, fitness services provided elsewhere are not referenced. The complaint process outlined in Division 5 only applies to 'supply of a service offered or provided under a membership agreement'.<sup>65</sup>

As a consumer contract, membership agreements offered by suppliers outside a fitness centre (for example a boot camp, yoga or Pilate's membership) are already included under a regulatory regime as they are subject to the ACL.

As previously stated the fitness industry has changed significantly since the last code review in 2010. It is proposed to update the code to capture a broader range of suppliers providing fitness services.

## **STAKEHOLDER RESPONSE**

The public consultation paper asked whether fitness services that take place outside of current definitions offer membership agreements, and whether these agreements are fair to consumers.

**Do you believe the 2018 Interim Code applies to an appropriate group of persons, businesses, fitness services in the fitness industry in Western Australia?<sup>66</sup>**

**Should the scope of the code be narrowed to apply to fewer people/businesses, or expanded to apply to more people/businesses?<sup>67</sup>**

**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?<sup>68</sup>**

<sup>64</sup> ibid Div2 (9) (1)

<sup>65</sup> ibid Div5 (21) (1)

<sup>66</sup> *Fitness Industry Code of Practice Review* P12 Q2

<sup>67</sup> ibid P12 Q3

<sup>68</sup> ibid P20 Q18

**Are these membership agreements fair, reasonable and transparent in the fees payable and terms and conditions applicable?<sup>69</sup>**

The Consumer Credit Legal Service WA (CCLSWA)<sup>70</sup> responded that the current code does not adequately cover the fitness industry in WA and requested that the definition be changed to protect consumers engaged in non-traditional fitness services. The Consumer Advisory Committee<sup>71</sup> (CAC) noted that the industry has evolved and consumer memberships in the current code are restricted to the “fitness centre” definition. The majority of industry respondents to the survey believed all fitness services should have to comply with the code.

Fitness Australia noted that the definition of fitness services needs to be broad due to the dynamic nature of the fitness industry.

SBDC commented in their submission that the current *‘standalone code performs an important function in clearly identifying specific industry concerns and setting the appropriate standards expected of market participants...and provides suppliers of fitness services with industry specific practices which enable them to easily understand the regulatory impact on their business’*.

Other stakeholders noted that the prevalence of membership agreements being offered in relation to fitness services that are not based in a fitness centre has increased significantly over recent years. As the code does not cover these fitness services, consumers engaging in these services are excluded from the protection offered by the code.

Industry survey responses, including those that were identified as operating outside of the current ‘fitness centre’ definition, were strongly in favour of extending the membership agreement requirements to all fitness services that offer membership agreements.

From July 2012 to June 2018 Consumer Protection has responded to 118 complaints relating to non-gym fitness services, 39 of these (or 30%) were in the last twelve months. These figures indicate that non-gym fitness services are a growing area of consumer difficulty and confirm the need for extending the codes application.

## **DISCUSSION**

The code needs to be updated to cover a broad range of suppliers of fitness services that enter into membership agreements with consumers, even when those services are not provided in a traditional gym. Consumer Protection’s fitness industry guide to

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<sup>69</sup> *Fitness industry code of practice review P21 Q19*

<sup>70</sup> Submission from Consumer Credit Legal Services WA A23986000

<sup>71</sup> Submission from Consumer Advisory Committee A24812660

the code of practice<sup>72</sup> will also need to be updated to support sole traders and small businesses that operate fitness services.

## IMPACT ANALYSIS

TABLE 8 IMPACT ANALYSIS ON INCLUDING ALL FITNESS SERVICES IN THE CODE

Potential benefits	Potential disadvantages
Industry	
Fitness services in WA have the same requirements regardless of their location. This creates an equal playing field for businesses.	Some fitness services will need to re write their membership agreement and update webpages.
Consumers	
The same protection for all fitness services.	Possible increase in fees if cost of setting up membership agreements and complying with the code are passed onto the consumer.
Government	
Clear guidelines for all fitness services will reduce the growing number of complaints regarding non gym based fitness services.	Cost of communicating and educating the changes to fitness services that were previously excluded from the code.

This impact analysis identifies that there may be a one off cost to some businesses if they will be required to amend their membership agreements and websites to comply with a code. This one off additional cost is expected to be minimal and is considered justified as it will create equity in the law for consumers and industry.

## WHAT A MEMBERSHIP AGREEMENT MUST CONTAIN

### RECOMMENDATION 2 CONTENT OF MEMBERSHIP AGREEMENTS

**Update the required content of membership agreements to provide clarity for consumers and allow consumers to more easily compare services.**

## STATEMENT OF THE ISSUE

The current code lays out some required content for membership agreements. This content needs to be updated to address concerns raised by stakeholders.

The review has considered the increased use of third party direct debit agreements by suppliers and the need to ensure that consumers understand that these involve a separate agreement.

The review also looked at membership agreements to identify whether these contain unfair terms. The review provides an opportunity to address the inappropriate use of common 'unfair terms' in the code.

<sup>72</sup> <https://www.commerce.wa.gov.au/sites/default/files/atoms/files/fitnessindustrycodeofpractice.pdf>

#### *UNCLEAR FEES.*

Membership agreements are often unclear and convoluted. For example, a review of membership agreements available online indicates that fees are often not clearly listed and it is not uncommon for fees to be scattered across multiple pages. Electronic scroll-through membership agreements have become common across the fitness industry. This increases the lack of clarity in membership agreements. Consumers would have greater clarity and certainty about cost if, like the telecommunications industry, a table listing all fees and a total minimum cost were provided at the beginning of each agreement.

#### *DISPROPORTIONATE AND UNFAIR FEES.*

Some membership agreements include unfair terms with regards to fees. These include:

- Fees for early termination that are disproportionate to the cost actually incurred by the supplier; and
- Additional fees for missed classes.

Possible unfair terms Consumer Protection have identified relating to direct debit defaults include:

- Terms that require immediate pay out of the entire contract plus, in some cases, a set fee and a further 25% on top of the outstanding balance;
- Immediate notification of default to a credit agency; and
- Immediate referral to a debt collection agency.

Consideration has also been given to fees associated with setting up the direct debit process. Any fee for setting up a direct debit should be proportionate to the cost incurred by the fitness service. Consumer Protection is concerned that disproportionate fees are being charged. For example one third party billing agent's Product Disclosure Statement (PDS) authorises suppliers to add a one off fee of up to \$110 as an establishment charge for the direct debit of which \$10 is credited to the third party billing agent. Under arrangements of this type the consumer is required to use the third party billing agent selected by the supplier and charging an administration fee appears to facilitate a commission payment for setting up the consumer's third party billing agreement. For example; one large supplier charges consumers a \$99 joining fee, which is split \$10 to the third party billing agent and \$89 to the supplier, other suppliers using the same third party billing agent choose to charge no administration fee.

#### *AUTOMATIC FIXED TERM CONTRACT ROLL OVER.*

Some suppliers offer 12 month, fixed term, or minimum term agreements that automatically roll into a new contract term at the end of the fixed term. This type of 'ongoing membership agreement' has proven a useful tool for the fitness industry and many of their clients. However complaints indicate this roll over often occurs without the consumer realising and so can penalise the consumer with unexpected cancellation costs. The current code requires a statement in bold type that explains

the key aspects of this type of agreement, however complaints indicate that this is being misunderstood by many consumers and perhaps is easily missed in scroll through contracts. Given that this misunderstanding continues despite current provisions, the code should be amended so that consumers have to actively opt into any arrangement whereby their agreement automatically rolls into a new contract term. They should also be given the opportunity to cancel without penalty before any roll over occurs.

If suppliers choose to use an 'on going agreement' and consumers agree to it, then the supplier must inform consumers when the minimum term is due to expire to permit them to cancel at the end of the term without penalty. It should be clear to consumers that a contract is ongoing. Calling an ongoing minimum term agreement 'fixed term' or '12 month' without ensuring that the consumer is aware of how the contract actually operates is misleading.

In the SA Fitness Code the supplier must inform the client that any fixed term contract will terminate at the end of the twelve month period and the contract cannot be automatically rolled over<sup>73</sup>. The SA Fitness Code also prohibits a supplier that is party to a fixed term agreement from renegotiating for an extension or further fixed term if the contract has more than three months to run.<sup>74</sup>

Consumer Affairs Victoria has worked with health and fitness centres to remove or modify unfair consumer contract terms that resulted in the automatic renewal of memberships without the opportunity to cancel at the conclusion of a minimum term.

#### *UNDER 18 MEMBERSHIP AGREEMENTS.*

The legislation does not currently address risks to consumers who are under 18 with fitness membership agreements. Consumer Protection has identified examples of disproportionate cancellation fees for under 18 memberships and agreements that automatically roll over into a full adult membership agreement once the child turns 18. Consumer Protection believes that the code should be tightened so at a minimum a parent or guardian is required to co-sign any membership agreement for a minor and that automatically rolling over an under 18 membership agreement into a full adult membership is prohibited. In addition cancellation fees for under 18 memberships that exceed the actual cost incurred by the provider should be prohibited.

#### *ONE SIDED AGREEMENTS.*

Our review of membership agreements revealed that many membership agreements contain conditions that are one sided. For example, membership agreements that state '*by signing these terms and conditions you agree to any future changes in membership terms*' has clearly been identified by regulators as permitting unilateral changes and is unlawful.

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<sup>73</sup> Fair Trading (Health and Fitness Industry Code) Regulations 2007 (SA) cl 6

<sup>74</sup> *ibid.* cl 5

*PLAIN ENGLISH.*

Consumers need to understand the contracts that they are entering. The review of contracts revealed that many use unclear language. This is particularly a problem when the membership agreement is presented electronically and the consumer must scroll through multiple pages.

*SEPARATE AGREEMENTS FOR DIRECT DEBIT REQUEST.*

There has been a dramatic increase in the use of third party direct debit agreements within the fitness industry with the majority of fitness membership agreements reviewed using a third party to process payments. If a fitness service has chosen to outsource their payment arrangements this should not be done in a way that is unfair or detrimental to the consumer.

When a fitness service engages a third party to conduct direct debiting or automatic payments there may be a separate Direct Debit Request Service Agreement that the consumer completes.

If a third party agreement is in place, the consumer should receive a copy of this agreement and there must be clarity for the consumer as to who to contact if there is a problem. This is particularly important for cancelling a direct debit or membership agreement. The current code does not require the supplier to provide this information in the membership agreement.

Consumer Protection has identified third party billing agent contracts that include immediate financial consequences for missing a payment and immediate referral to debt collection agencies. Such requirements adversely impact the consumer by creating a situation where they cannot withhold payments in the event of a dispute with a service provider. These have been recognised by other jurisdictions as unfair contract terms and despite other jurisdictions identifying such terms as unfair they continue to be used suggesting that the code needs clearer rules about such practices.

## **STAKEHOLDER RESPONSE**

The review examined the current provisions of the code dealing with the content of a membership agreement and asked stakeholders whether there were any areas that could be improved.

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**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?<sup>75</sup>**

**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?<sup>76</sup>**

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<sup>75</sup> *Fitness industry code of practice review P25 Q22*

<sup>76</sup> *ibid P31 Q28*

The DLGSC commented that the majority of fitness industry providers offer reasonably worded memberships and deliver the services that the membership is purported to provide.

The CCLSWA commented that they regularly advise clients on the meanings of terms and conditions and the binding nature of contracts. They provided case studies where consumers had not received a copy of the contract and were unaware of the cost of cancelling the fitness service, also where the contract was provided on an iPad and when emailed went to the consumer's junk mail leaving them unaware that what they thought was only a 30 day contract was actually ongoing. They are concerned that many consumers do not understand what they are signing and do not see a copy of any associated direct debit agreement.

The CCLSWA case studies highlighted that fitness service suppliers do not always disclose key details of membership agreements so that prospective clients can decide whether they want to enter the agreement. The case studies also demonstrate that consumers do not always appreciate the consequences of the terms that they agree to accept. CCLSWA acknowledged that a consumer will be bound by the terms and conditions contained in the agreement and suggested that fitness service suppliers institute disclosure methods that aim to improve the customer's understanding.

CCLSWA also cautioned about the use of 'click through' systems on iPads or other devices. This may not be an effective disclosure method as consumers may simply click through important aspects of the contract without understanding what they are agreeing to.

Fitness Australia supports clear consumer agreements that identify the services paid for and agreed to and that stipulate that should a person under the age of 18 wish to enter the agreement they must do so with a parent or guardian's signed consent. Fitness Australia considers inclusion of the following italicised items to be best practice:

- *Name and address of parties in the agreement.*
- *Australia Business Numbers and Australian Company Numbers.*
- *Facility where the service will be provided.*
- *The rights of the supplier and the consumer.*
- *The joining fee.*
- *The amount payable.*
- *The fee for service.*
- *Late payments and administrative charges.*
- *Termination of agreement fees.*
- *When the cooling off period starts and ends.*
- *Terms and conditions of the agreement.*
- *Whether the agreement is pre-paid or ongoing.*

- *That any ongoing agreement is structured to have a proportional relationship to any term or annual rate offered and not structured to discourage consumers from selecting this option.*
- *The inclusion of acknowledgement below in bold 14pt type in any ongoing agreement that must be signed and dated by the consumer.*

*I acknowledge that unless I provide written notice of termination of my membership prior to the end of the fixed term of my ongoing agreement, I will still be liable for my membership fees until 14 days after I provide written notice of termination to the fitness facility. I understand the fitness facility must respond to its receipt of a written notice within seven days.*

*If your agreement is for a fixed term, it automatically terminates at the expiry of the term and so a new agreement will be required if you require services after that time. If your agreement is ongoing, it is an agreement that will continue after the initial term until either you or we terminate it in the way described in the agreement.*

*If an automatic direct debit arrangement is in place, fees will continue to be debited from your credit card or account until you or the fitness business cancels the arrangement by 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 for damages for breach of contract.<sup>77</sup>*

They also noted that the industry would welcome the removal of bold 14 point type and its prescriptive nature.

Several other industry stakeholders informed us that the requirement to have the bold 14 point type is difficult for electronic agreements. Several stakeholders commented that electronic membership and cancellation is vastly better than paper forms.

Consumer Protection finds that small businesses and sole traders are using longer, more convoluted contracts that they have downloaded and adapted for their businesses. These contracts are often not compliant with the current code and are confusing to consumers.

Consumer Survey feedback and complaints to Consumer Protection show that common areas of contention are unexpected fees and expenses and difficulties cancelling contracts. In the view of Consumer Protection if fees are not clearly specified in a membership agreement then the fee should not be charged.

Our review of membership agreements produced examples of fifteen extra fees scattered across ten pages making it hard for consumers to understand what the true cost of membership will be. The proposed requirement to tabulate all fees clearly at the start of a contract, gives a better opportunity for consumers faced with a scroll-through contract to understand the full costs of the agreement. Examples of disclosure

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<sup>77</sup> National Fitness Industry Code of Practice Clause 5.10



of fees in current WA fitness agreements are in [Appendix C Current fee and membership agreement disclosure](#).

## DISCUSSION

The review of the code provides an opportunity to clarify what a membership agreement should contain. The membership agreement should be clear and easy for the consumer to understand and highlight important information to the consumer. The code should reflect the reality of electronic contracts, and include provision for electronic cancellation of contracts. It should also clearly state the cost of the membership and how the membership can be cancelled. If there is a linked direct debit agreement the membership agreement must clearly state this and that cancellation of the membership agreement will automatically cancel the direct debit agreement.

The requirement in the code to provide prescribed statements in 14pt bold type has not been effective for consumers and is difficult for the industry to reproduce on electronic contracts. The use of '12 month membership', 'fixed term' and 'minimum term' contracts that become ongoing is confusing. A table of important information at the beginning of every contract including all fees and charges, total contract cost, contract end date, final payment dates and payment amounts would be more effective for a consumer opening a scroll through contract. This table should also clearly state if the consumer has selected a minimum term contract that is ongoing and include the end date of the minimum term.

As there are a large number of sole traders and small businesses offering membership agreements Consumer Protection will update its guide notes to help industry understand the codes provisions. These will clarify what needs to be included in a membership agreement, what must not be included and rules regarding plain English and appropriate contract length.

At this stage Consumer Protection does not recommend including regulation on disproportionate and unfair fees in the code because of duplication with the ACL. For example early termination fees may be unfair if the fitness service is charging more than it legitimately needs to recover its legitimate business costs. Disproportionate administration fees charged by some suppliers to facilitate the setting up of a third party direct debit would be in breach of the *Competition and Consumer Amendment (Payment Surcharges) Act 2016* for being both excessive and not reflecting the cost of using the payment method for which they are charged. For example, Fitness First Australia Pty Ltd was issued an infringement notice in September 2018 for an alleged breach of the excessive payment surcharge provision of *Competition and Consumer Act 2010* for imposing a 50 cent flat fee on memberships paid by direct debits.<sup>78</sup>

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<sup>78</sup> <https://www.accc.gov.au/media-release/fitness-first-pays-penalty-for-excessive-surcharging>

In summary the proposed amendments to the required content of membership agreements include:

- A table at the beginning of the agreement of 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.
- The total cost of membership, any cancellation costs and any third party fees must be provided and clearly located at the beginning of the agreement.
- Requirements to use specified text size will be removed. This has been requested by industry and reflects the usual practice in online contracts.
- Mandatory provision of an email address for notification of cancellations. The inclusion of this will assist consumers and the industry in streamlining the cancellation process.
- For consumers with a fixed term agreement the date and amount of the final payment at the end of the fixed term.
- For consumers on a minimum term agreement the date and the amount of the final payment of the minimum term.
- If required, inclusion of an option to select an ongoing agreement. This should specify the date and the amount of the final payment of the minimum term and include the date that they can cancel the ongoing agreement without incurring a penalty.
- Under 18 memberships cannot include a provision for automatically rolling into adult memberships and must be countersigned by a parent or guardian.
- A clear statement that any request to terminate the agreement will also be treated as a request for the service provider to terminate any linked direct debit arrangement.

The following membership agreement requirements currently in the code should be retained:

- The suppliers name and address.
- In the case of a supplier that is a company – the supplier's Australian Company Number (ACN).
- The supplier and client rights and obligations under the agreement.
- The fitness service or services to be provided under the agreement.
- A statement that the agreement is subject to a cooling off period (see [Cooling off period](#)).
- The date and time at which the cooling off period starts and ends.
- A statement that if the consumer terminates the agreement or the automatic debit arrangement stopped in a manner not described in the agreement, then the consumer may be liable to the fitness service for damages for breach of contract.

- Ongoing membership agreements must be selected by the consumer and clearly state next to the fee table that: 'This is an ongoing membership. The agreement will continue until it is terminated by either you or the supplier in the way described in the agreement.'
- The circumstances under which the client or supplier may terminate the agreement and the procedure for terminating the agreement (see more details in [Terminating a membership agreement](#)).
- The administrative charge (if any) the client must pay to the supplier if the client terminates the agreement –
  - (a) During the cooling off period.
  - (b) For any other reason allowed by the agreement.
- The method of payment.
- Where the agreement is entered into before the supplier's fitness centre opens, the proposed opening day.

## IMPACT ANALYSIS

TABLE 9 IMPACT ANALYSIS ON PROPOSED CHANGES TO MEMBERSHIP AGREEMENTS

Potential benefits	Potential disadvantages
<b>Industry</b>	
<p>Easier when producing electronic format membership agreements not to use set text size.</p> <p>Updated guidelines will assist small businesses to understand what needs to be included in membership agreements.</p> <p>Using email to cancel agreements allows a clear time stamp and record of when a member requested cancellation.</p> <p>Clear fee table requirement will address impact on the industry of consumer concerns about unexpected costs.</p>	<p>Possible reduction in client retention opportunities by removing the requirement for them to visit in person to cancel membership.</p> <p>Possible reduction in revenue by removing automatic membership renewal.</p> <p>Possible reduction in revenue for fitness services that do not currently inform consumers of total cost of membership.</p> <p>Cost to redraft membership agreement, around \$250, however the supplier will have nine months to make these changes.</p>
<b>Consumers</b>	
<p>Easier to cancel an agreement without the requirement to visit a gym and complete a prescribed form.</p> <p>Cancelling the membership agreement will also cancel any direct debit arrangements.</p> <p>All fees detailed and tabulated on the membership agreement should remove surprise fees experienced by 55% of consumers surveyed.</p> <p>Getting consumers to opt in to automatic renewal should help awareness of agreements rolling over.</p>	<p>Costs to redraft membership agreements may be passed onto the consumer.</p>
<b>Government</b>	
<p>Simplifies legislation and makes it relevant to current practice.</p> <p>Listing the fees on membership agreements reduces the complaints from consumers about unknown fees and charges.</p> <p>Opting in to automatic renewal should reduce the number of complaints about contracts rolling over without the consumer's knowledge.</p>	<p>Cost to government to educate industry about required changes. Total cost of all three sets of mass email communication using Campaign Monitor is detailed in the Implementation Strategy is estimated at \$450.</p> <p>Cost to government to extend guidance notes to include what is considered an unfair contract term.</p>

## **TERMINATING A MEMBERSHIP AGREEMENT**

### RECOMMENDATION 3 CANCELLATIONS

**Expand the current cancellation clause to include an option for cancellation without penalty for clients that have become permanently ill or physically incapable, reflect in the code the use of electronic communications and clarify the requirements of the cancellation process.**

#### **STATEMENT OF THE ISSUE**

Under the code when a supplier receives a request to terminate a membership agreement they must reply to the request within seven days and as soon as practical make a record of the request. The code does not currently specify that the request to cancel or the acknowledgement must be in writing.

If the agreement is terminated in the cooling off period the supplier must refund fees and other charges paid by the client less the cost of providing any service and any reasonable administration charges.

Forty two percent of enquiries to Consumer Protection in the 18 month period to July 2018 related to cancellations. Key issues include the unexpected cost of cancelling, difficulty cancelling where suppliers require the client to physically visit the location at a specific time and fill in a specific cancellation form, suppliers not acting on cancellation requests and consumers continuing to be charged direct debits.

The responsibility to cancel direct debits with any third party billing agents needs to be clarified. Consumer Action Law Centre has raised issues of unfair direct debit contracts with consumers, and how under the separate contract consumers can be required to continue making payments even when they no longer receive services.

#### **Case Study**

Consumer Action Law Centre alleged that their client was misled by the supplier (in this instance a self-defence academy) and did not realise that when they were agreeing to a direct debit payment with the supplier that they were entering into a separate direct debit contract with a third party, DebitSuccess.

The client cancelled the contract with the service provider but continued to incur direct debit charges. The terms of the contract with DebitSuccess meant that the client could not terminate the contract before expiry and was bound to continue making monthly payments after the expiry unless she gave 30 days' notice. This was despite the fact that services of the supplier had not been provided because that contract had been cancelled.

In this instance Consumer Action Law Centre alleged that the clauses were unfair contract terms at a hearing of the Victorian Civil and Administrative Tribunal and the

matter was subsequently settled in the consumers favour, saving the consumer almost \$1,500.<sup>79</sup>

The use of third party billing agents advantages suppliers rather than consumers by ensuring efficient payment of fees and providing cost savings. Given this, it is inappropriate for suppliers to transfer onto consumers the responsibility for cancelling a direct debit agreement that is connected to a membership agreement that the supplier should be responsible for cancelling. If a contract with the fitness supplier is terminated the supplier should be responsible for terminating the direct debit immediately, and be liable for any costs associated with the termination.

## **STAKEHOLDER RESPONSE**

**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?<sup>80</sup>**

DLGSC noted that the majority of the fitness industry provide reasonable termination clauses within membership agreements and act on such clauses in a timely manner. Despite this concerns were raised that some cancellation processes are costly and time consuming for consumers. For example, CCLSWA provided a case study where consumers were charged for a twelve weeks cancellation period when a twelve month fixed term contract had expired.

The CAC agree that suppliers should be responsible for ensuring direct debit arrangements are cancelled when a consumer terminates a contract and that fixed term contracts should be prohibited from rolling over into a periodic contract.

Curves Mount Lawley<sup>81</sup> noted that the current code does not specify that cancellations must be in writing and this causes issues with record keeping when a consumer says they have verbally cancelled.

Fitness Australia note that the consumer should have the right to cancel their agreement should they be deemed permanently ill or physically incapable and that this should be offered without penalty excluding reasonable cost for services already rendered. They also state that requests to terminate should be in writing and able to be done electronically via email.

<sup>79</sup> <https://policy.consumeraction.org.au/2008/05/15/media-release-consumer-win-with-unfair-debit-success-contract/>

<sup>80</sup> *Fitness industry code of practice review P27 Q26*

<sup>81</sup> Curves Mount Lawley submission 13 July 2018

In the first consumer survey over half of respondents who had cancelled a fitness service felt that the cancellation was handled unfairly. The majority of cancellations had to keep paying membership fees, some for as long as 12 months.

This experience was identical to the second consumer survey with half of the respondents who have had a fitness membership indicating problems with cancelling memberships. Of those, 58% had experienced delays in cancelling their membership and a third of all respondents had incurred unexpected costs relating to the cancellation.

When asked in the industry survey about general rules that should be included in the Code or added to membership agreement requirements, several respondents specified cancellations.

When the industry was asked in the survey what new rules should be introduced to the WA Fitness Code 94% of respondents believed that consumers should be allowed to cancel membership agreements without penalty, due to sickness or physical incapacity and 82% believed that the code should require suppliers to action termination requests within a reasonable time. All respondents felt the code should include prohibiting fitness suppliers from wrongful and unauthorised debiting of fees and charges. When asked in the survey who these new rules should apply to the split was generally 30% of respondents thought they should apply to just gyms and fitness centres and 70% thought they should apply to all fitness services.

## **DISCUSSION**

Generally speaking it is clear that cancellations can take a long time and be expensive for the consumer. A number of changes are proposed which will address concerns in this area.

If a consumer cancels an ongoing membership agreement the supplier should be responsible for cancelling the membership and any future direct debits within seven days of receiving that instruction, allowing for any specified notification period (not exceeding 30 days).

Cancellation requests must be in writing and able to be sent electronically. The supplier must respond in writing within seven days confirming receipt of the request and acknowledging the cancellation of the membership agreement. The supplier must also confirm the cancellation of any direct debit agreement whether with a third party or not and must specify the amount and date of the last payment, if applicable. Any direct debits taken in error after the final payment date must be reimbursed within ten days

Currently some suppliers require members who wish to cancel to book an appointment and fill in a form. This requirement is unfair and unreasonable because it requires the consumer to physically visit at an appointed time and complete a paper form. Terms

that require the consumer to give excessive advanced notice of cancellation are also considered unreasonable.

Consumers should be able to cancel membership agreements without penalty due to sickness or physical incapacity.

The cancellation provision of the code will be expanded to include the following:

- All terminations must be in writing and suppliers must be able to provide an email address to accept cancellations electronically.
- Cancellation requests are effective from the date they are received.
- Membership agreements can be cancelled without penalty due to the consumer being permanently ill or for physical incapacity.
- A single written notice to the supplier of the consumer's intent to cancel must terminate both the membership agreement and any associated direct debit agreement.
- The supplier must send a written notice to clients under periodic agreements confirming the receipt of a cancellation notice within seven days. This must include the date the membership agreement and any direct debit arrangements are cancelled.
- For clients under a fixed term agreement the supplier must give written notice to the client of the date the direct debit is cancelled, whether this is at the end of any fixed term or on any earlier termination date under the agreement.
- Any direct debit fees taken by the supplier after cancellation must be returned to the consumer within ten business days.
- Notice required for cancellation of any fitness agreement should not exceed 30 days and any cancellation / termination fees charged must be directly associated with the financial loss incurred by the fitness service and must be specified in the membership agreement.
- If the intention is to roll a minimum term contract into an ongoing arrangement, the consumer must be informed in writing and be given time and the opportunity to cancel the contract at the end of the minimum term without incurring any further penalty.

The current requirements for terminating membership agreements should be retained:

- Where a supplier receives a request from a client to terminate a membership agreement, the supplier must respond to the request within seven days.
- The supplier must, as soon as practicable, make a record of the client's termination request or cause the termination request to be recorded.



## IMPACT ANALYSIS

TABLE 10 IMPACT ANALYSIS ON CANCELLATION PROCESS RECOMMENDED CHANGES

Potential benefits	Potential disadvantages
<b>Industry</b>	
<p>Makes it clearer for suppliers what they must do when membership agreements are cancelled.</p> <p>Email cancellations provide a date and time stamp for cancellation requests.</p> <p>Improve industry reputation by clarifying the cancellation process, timeframe and costs.</p> <p>This will address unfair practices that are used by some suppliers to delay cancellations that causes damage to the reputation of the industry.</p>	<p>Some fitness suppliers will need to improve their cancellation processes and will no longer be able to charge extra payments by delaying cancellations.</p> <p>Some suppliers will need to update internal procedures and communication to members about cancellation process.</p> <p>Minor cost for those that do not currently allow cancellation by email to update membership agreements and web page or other electronic platform with cancellation details.</p> <p>Costs for those providers that need to create cancellation procedures estimated at three hours, \$150.</p>
<b>Consumers</b>	
<p>Allowing consumers to terminate agreements by email will save them time and money.</p> <p>Allows consumers impacted by sickness or physical incapacity to cancel agreements.</p> <p>Providing notice to consumers about minimum term contracts ending and giving them an opportunity to cancel before becoming an ongoing agreement will reduce unexpected charges for cancellations.</p>	<p>Proposed changes do not go as far as some suppliers currently offer that allow consumers to cancel agreements if they move house and no longer reside near the fitness service. These benefits would not be excluded by the Code.</p>
<b>Government</b>	
<p>A clear cancellation process across the fitness industry will be easier to regulate.</p> <p>Cancellations via email provide a clear date for the cancellation request, this will give consumers clarity for the time frame for the cancellation and reduce conciliation requests.</p>	<p>Cost of providing information to industry about new cancellation requirements. Total cost for all email communication in Implementation Strategy estimated at \$450.</p>

## COOLING OFF PERIOD

### RECOMMENDATION 4 COOLING OFF PERIOD

**Minimum cooling off period extended to seven days and applies to linked contracts.**

#### STATEMENT OF THE ISSUE

The current wording of the cooling off period requirement means that it starts at the beginning of the day on which the agreement is signed due to the provisions of the *Interpretations Act 1984 (WA)*. This means that the consumer does not get the full 48 hours.

As membership agreements are more likely to be electronic than hard copy, it is unlikely that consumers take the agreement home to review it before signing it. The majority of consumers that responded to the survey were not made aware of the cooling off period.

It appears that many WA fitness suppliers already offer a cooling off period that exceeds 48 hours. Some franchises however offer 48 hours in WA but seven days in other states. Consumer Protection believe this is because the current wording that requires 48 hours in the code is too prescriptive.

For proposed fitness centres that are yet to open the wording of the current code limits the cooling off period to the first 48 hours of the centre opening which does not give the consumer the opportunity to cancel a membership agreement prior to this.

Linked contracts, such as a third party direct debit agreement, often do not have a cooling off period.

#### STAKEHOLDER RESPONSE

In the public consultation paper stakeholders were asked about how they felt the current 48 hour cooling off period was working.

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**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?<sup>82</sup>**

**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?<sup>83</sup>**

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<sup>82</sup> *Fitness industry code of practice review P22 Q20*

<sup>83</sup> *ibid P22 Q21*

Industry stakeholders noted that cooling off provisions are not widely promoted within the fitness industry and consumers do not have a clear understanding of their rights. All stakeholder feedback noted that cooling off provisions should be redrafted to include, as a minimum, a full 48 hour cooling off period.

CCLSWA's view that the cooling off period is especially important given that these agreements are usually for extended periods of time and incur substantial fees for terminating after the cooling-off period. They noted that in their experience the consumer was often unaware of the cooling off period and that fitness services may not be honouring cancellation requests within the cooling off period.

In our original consumer survey the majority of respondents were unaware of the 48 hour cooling off period and none had used it. In the second consumer survey 60% did not know of the cooling off period and the majority view was that the cooling off period should be extended.

In the industry survey the preferred cooling off period ranged from 24 hours to 14 days. Several industry respondents noted that they already offered a seven day cooling off period, in line with the cooling off period in the ACT code.

### **CURRENT COOLING OFF PERIODS**

Consumer Protection looked at the current cooling off periods offered by the fitness industry in WA and noted that many suppliers already offer more than the 48 hours specified. The suppliers reviewed that offer only 48 hours appear to be mainly WA businesses that have applied what is in the code. The two national franchises in our review that specify 48 hours cooling off period in WA offer longer cooling off periods in other states.

The cost of cancelling in the cooling off period was considered. Several suppliers stated clearly in membership agreements that fees would be charged if the member cancelled during the cooling off period, but not all specified the amount of the fee. One provider stated that any payments made in the 48 hour cooling off period were non-refundable. Information on current cooling off periods and fees is available in [Appendix D Current industry cooling off periods and fees](#).

### **DISCUSSION**

Consideration has been given to whether WA consumers are disadvantaged by limiting the cooling off period to 48 hours and whether the industry would be disadvantaged if the mandatory cooling off period is increased to seven days.

The majority of consumers indicated that they were not made aware of the cooling off period so Consumer Protection accepts that the cooling off period is not being widely promoted across the WA fitness industry.

As the industry moves towards electronic 'scroll through' contracts with copies sent by email it is important that consumers have adequate time to review the membership

agreement and that the cooling off period is long enough for this. It is proposed therefore that the cooling off period be extended to not less than seven days.

For fitness centres that are not yet open the cooling off period should start at the time of entry into the membership agreement and end a minimum of seven days after the facility opens. This should also apply to fitness services that have not yet started, for example a six month boot camp membership to start in the New Year should have a cooling off period that ends seven days after the service starts.

The current code provides suppliers with the opportunity to charge the client for any fitness services provided during the cooling off period if the consumer cancels in this time frame. Therefore extending the mandatory cooling off period will result in minimal cost to industry for those suppliers that currently offer less than seven days but give consumers a longer opportunity to consider the contract.

Third party contracts that are linked to membership agreements should have the same cooling off provision.

It is worth noting when assessing the impact of this change that none of the consumers in our survey had cancelled their membership during a cooling off period. It is proposed therefore that the cooling off period provision be amended to:

- Extend the cooling off period to not less than seven days.
- Extend the cooling off period for fitness services that are not yet open to start at the time the membership agreement is entered into and end not less than seven days after the supply of the fitness service starts.
- Any linked contract must have the same cooling off provision as the membership agreement.

## IMPACT ANALYSIS

TABLE 11 IMPACT ANALYSIS ON EXTENDING THE COOLING OFF PERIOD

Potential benefits	Potential disadvantages
Industry	
For franchises it allows industry to align membership forms across different jurisdictions.	Minimal impact to industry, but those that use the prescribed mandatory 48 hour text from the current code will need to update their membership agreement forms.
Consumers	
This will benefit consumers; by making them aware of the cooling off period and extending it will help offset the risks of consumers not understanding conditions on electronic contracts. Seven days gives the consumer a chance to visit the fitness service and have a better understanding of whether the service is right for them.	None.

## Government

The recommended change clarifies the cooling off period for unopened fitness centres, clarifies the start and finish times of the cooling off period and extends the cooling off period. This should reduce complaints from consumers that were unaware of their cooling off rights.

Cost of educating and communicating changes to the cooling off period, total cost of all email communications estimated as \$450..

## DISCLOSURE OF FEES

### RECOMMENDATION 5 DISCLOSURE OF FEES

**All fee information must be publically available to allow prospective clients to make an informed decision.**

## STATEMENT OF THE ISSUE

In the current code a supplier must ensure sufficient information is made available to a client about a fitness service to enable the client to make an informed decision about a fitness service.<sup>84</sup> The supplier is also required before entering into a membership agreement, to give the client the opportunity to peruse a copy of the membership agreement.<sup>85</sup> The membership agreement must state 'all fees and charges payable under the agreement.'<sup>86</sup>

In practice many suppliers do not provide information on the cost of memberships without first soliciting personal details from the consumer or requiring the consumer to physically meet with a sales person. The opportunity to peruse a copy of the membership agreement is limited to a scroll-through screen, and consumers have told us they often feel under pressure to sign the membership agreement, or tick the box agreeing to terms and conditions. This means that the current disclosure requirements do not provide consumers with sufficient information and the opportunity to make an informed and independent decision about affordability of a fitness service.

## STAKEHOLDER RESPONSE

In the public consultation paper stakeholders were asked to consider the following questions about disclosure.

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**In your experience does the fitness industry generally disclose details of membership agreements, rules, facilities offered, the existence if the Western Australian Industry Fitness Code, and any other relevant information to help prospective clients to enter into membership agreements?<sup>87</sup>**

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<sup>84</sup> Fair Trading (Fitness Industry Interim Code) Regulations (No2) 2018 (WA) Division 3 (11)(a)

<sup>85</sup> *ibid.* Division 3 (12)(a)

<sup>86</sup> *ibid.* Division 4 (15) (j)

<sup>87</sup> *Fitness industry code of practice review P20 Q15*

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**In your experience, is the fitness industry generally honest about fees and costs involved, realistic outcomes that can be achieved by fitness services and comparisons with other fitness service suppliers?<sup>88</sup>**

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Over 90% of respondents to the Industry Survey believed the code should include disclosure rules on fees and charges. Additional suggestions from the survey included requirements for suppliers to make all pricing and any related fees available on webpages so that consumers do not have to book an appointment or request the information via a consultant or sales person.

Over half of consumer respondents to our survey felt that their fitness membership had cost more than they expected and a third of consumers said they had experienced unexpected costs when cancelling.

The CCLSWA provided a case study of a client who had signed up for a one month membership of a gym but was not aware that the supplier's employee had ticked the ongoing membership box, because the contract was eleven pages long and was presented on an iPad. When the client found that the gym membership was more expensive than he realised he was told he was required to give 30 days' notice. CCLSWA suggested that suppliers need to institute better fee disclosure so that consumers have a clearer understanding of what they are agreeing to prior to signing a contract.

Fitness Australia stated that suppliers must ensure that sufficient information is available for consumers to make informed decisions.

### **CURRENT SITUATION**

Many fitness service websites in WA will advertise total savings and weekly fees 'from' a stated amount. A review of industry websites reveals that the fitness industry does not display fee information consistently or inform consumers of other fees and charges that may be incurred as part of their membership. Fees that may be incurred as part of a separate direct debit arrangement are also not always disclosed.

The code currently requires suppliers to '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'. Clients must also be given an 'opportunity to peruse a copy of the membership agreement and rules'.

Many of the WA fitness service websites reviewed do not supply details of fees until the consumer has entered their details and agreed to terms and conditions by ticking a box. Only at this point are fees disclosed.

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<sup>88</sup> *ibid.* P20 Q16

Other fitness services will only take the contact details of the consumer on-line and then insist on a meeting to discuss membership before disclosing fees.

Consumer Protection believes it is important for consumers to be able to make informed decisions, and that it is unreasonable to require consumers visit the fitness supplier in order to their have fees disclosed. Such practices prevent consumers doing a price comparison to assess affordability online. See [Appendix C Current fee and membership agreement disclosure](#) for further details on current fee disclosure practices.

The ACT and QLD fitness codes both state that prior to entering into a membership agreement the client must be provided with a detailed schedule of fees and the full cost of membership. By providing a complete schedule of fees, consumers are informed up front what the total cost of the fitness service will be. This will be similar to the critical information statement that must be disclosed for a mobile phone contract as detailed in the Telecommunications Consumer Protections Code.<sup>89</sup>

The example in [Appendix I](#) is an example of how a Queensland fitness service online membership agreement begins with a clear fee disclosure that lists all the fees that can be charged, cost of cancellations and the total value of the contract.

## **DISCUSSION**

Consumer Protection has considered whether consumers are being adversely impacted by inadequate disclosure of fees.

Nearly half of all fitness industry phone enquiries to Consumer Protection relate to consumers wanting to cancel their fitness memberships, many because of their inability to pay the fees. For many young consumers a fitness membership agreement is their first experience of a commercial contract.

Consumers felt they were not given enough time to read and understand the membership agreement and often felt pressured to sign membership agreements. It appears that although many membership agreements contain details of the fees, the details are not always presented in a timely and clear way. With the prevalence of third party payment agreements it is important that fees are presented clearly and consumers are aware of the consequences of missing payments.

In our industry survey 90% of respondents believed that the WA Fitness Code should include disclosure rules providing consumers with better information about fees and charges. Some suppliers already publish fees and information about membership costs on their website.

By expanding disclosure requirements to include disclosure of fees and charges associated with a membership on a provider's webpages and promotional materials,

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<sup>89</sup> [https://www.acma.gov.au/-/media/Networks/Regulation/pdf/TCP\\_code\\_C628\\_2015\\_incorp\\_Variation\\_No1\\_2018-pdf.pdf?la=en](https://www.acma.gov.au/-/media/Networks/Regulation/pdf/TCP_code_C628_2015_incorp_Variation_No1_2018-pdf.pdf?la=en)

consumers will be supported to make informed decisions. This removes the emotion from the decision making process so that consumers are better able to make decisions about whether they can afford a particular service.

The following disclosure of information requirements should be retained:

*A supplier –*

- a. Must 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. Must ensure promotional material about a fitness services –*
  - (i) Is truthful, accurate and unambiguous; and*
  - (ii) Does not encourage unrealistic expectations of outcomes attainable from the fitness service; and*
- c. Must not knowingly make false or misleading comparisons with a fitness service supplied by another supplier; and*
- d. Must not make any false or misleading statements or representations relating to the cost of a fitness services;<sup>90</sup>*

The sufficient information available to a consumer should be expanded or defined to include the following:

- Details of all fees and a total minimum cost and maximum cancellation cost associated with any membership package to be made publically available on any electronic medium used by the provider, and if requested, must provide a paper copy, without requiring consumers to first provide personal details to the service provider.
- ‘Sufficient information’ to include:
  - A clear description of the service.
  - The minimum term for the contract.
  - Any exclusion or important conditions, limitations or restrictions.
  - The minimum monthly charge for the service.
  - Details of all other fees.
  - Total minimum cost associated with membership.
  - Maximum fee for early termination.
- Suppliers must have available on their webpage or other electronic medium a link to a copy of this code, and if requested must provide a paper copy for perusal by any client or potential client.

The current provisions that require the supplier, prior to entering into a membership agreement, to give the client the opportunity to peruse a copy of the membership agreement and inspect the fitness centre should be retained and expanded to require

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<sup>90</sup> Fair Trading (Fitness Interim Code) Regulations 2018 (WA) Div 3 (11)



the supplier to give the client a copy (electronic or paper) of the membership agreement. These requirements should also apply to suppliers of fitness services that do not meet the current definition of a fitness centre.

## IMPACT ANALYSIS

TABLE 12 IMPACT ANALYSIS ON PROPOSED DISCLOSURE CHANGES

Potential benefits	Potential disadvantages
<b>Industry</b>	
<p>Making the pricing structure and maximum contract price available for all fitness services improves the transparency of fitness industry fees and charges.</p> <p>This will reduce the number of complaints from consumers paying higher than expected fees.</p> <p>National franchises that operate in Queensland should already disclose all fees before entering into a membership agreement.</p>	<p>Removes the opportunity for sales staff to contact potential clients to discuss their membership services.</p> <p>Cost of updating websites could be upwards of \$100 per extra page for small businesses. Estimated cost for those suppliers that need to update their content on Facebook, Instagram or website \$250. This would be spread over nine months.</p> <p>Franchises that have presence in other states that are not required to disclose fees will incur cost of updating WA based information.</p>
<b>Consumers</b>	
<p>With electronic contracts becoming the norm, being able to review fees easily on line prior to visiting the gym allows the consumer to make informed decisions.</p> <p>Consumers will be better informed about the possible extra costs of signing up to direct debit arrangements.</p> <p>Consumers will save time by being able to easily review the cost of comparative fitness services without booking appointments to get this information.</p> <p>Consumers no longer need to provide personal details to find out the cost of membership.</p> <p>Removes the pressure from consumers to sign up to a fitness service without due consideration.</p> <p>Should reduce the number of consumers incurring bad debts.</p> <p>Consumers having access to the WA Fitness Code will improve consumer knowledge of their rights.</p>	<p>Consumers are not as likely to get a separate paper copy of their contract and this may reduce the likelihood of reading it.</p>

Government

Will reduce the number of enquiries and complaints from consumers that have experienced financial difficulties after agreeing to contracts they did not understand.

Cost of educating and communicating changes to disclosure requirements, total cost of all email communications estimated as \$450.

## PROPOSED CHANGES FOR OPTION B WITH LOW OR NO FINANCIAL IMPACT

As part of the consultation process further recommendations for the improvement of the Fitness Industry Code were raised. These are all considered low or no financial impact but will meet the objectives for policy change and will improve the effectiveness of the code. These recommendations are discussed in more detail in the following section.

TABLE 13 PROPOSED CHANGES WITH LIMITED OR NO FINANCIAL IMPACT

Recommendation	Details
Code objective.	Keep the industry specific standalone code and expand the objective of the code to reflect the way the industry is evolving.
Claiming membership and endorsement.	Remove reference to claiming membership and endorsement, clauses 5(1) and 5(2).
Qualifications.	Expand the requirement for not misrepresenting qualifications to a requirement for supplier to provide upon request details of qualifications and professional registrations.
High pressure selling techniques and harassment.	Remove ACL duplication and focus on high pressure selling techniques and harassment prohibitions that are industry specific, this clause should also apply to employees of all fitness services.
False or misleading advertisements or representations.	Expand the current code so it covers the intention to mislead. This should also apply to employees of all fitness services.
Confidentiality.	Update the current confidentiality clause.
Electronic signatures.	Requirement for membership agreements to be signed and updated to allow electronic signatures.
Electronic copies.	Update to include reference to electronic copies of the membership agreement and any separate direct debit agreement.
Twelve month limit on prepaid membership.	Retain the twelve month limit on prepaid memberships and update to ensure suppliers are required to inform clients of any automatic renewal with enough notice to allow the client to comply with any notice period in the contract if they wish to cancel.
Prepayment where centre is leased.	Expand to include situations where a supplier has given notice to its landlord that they will not be renewing a lease.
Unfair terms.	Include additional membership agreement provisions to help address unfair terms and update the guide with specific examples of what Consumer Protection would consider unfair contract terms in a fitness service membership agreement.
Complaints.	Retain complaint handling provisions in the code but include reference to electronic lodgement of complaints and suppliers providing a link to the current code.

## OBJECTIVE OF THE CODE

### RECOMMENDATION 6 CODE OBJECTIVE

**Keep the industry specific standalone code and expand the objective of the code to reflect the way the industry is evolving.**

## STATEMENT OF THE ISSUE

The review considered whether the objectives of the code are still relevant in 2018 and whether any objectives in interstate mandatory fitness codes should be considered. The consultation paper asked the stake holders to consider the following question.

**Do you believe the objectives of the 2018 Interim Code are appropriate, or should they be changed?<sup>91</sup>**

## STAKEHOLDER RESPONSE

DLGSC suggested adding a requirement for ethical and professional conduct.

Fitness Australia proposed deregulating the WA fitness industry and moving towards an industry self-regulation model. All respondents to the industry survey were in favour of the WA Government continuing to regulate the fitness industry. Comments included that Fitness Australia do not have the staff or power to regulate and that currently there is not enough attention on this industry.

## DISCUSSION

The fitness industry in Western Australia is constantly evolving and the objectives of the code should acknowledge this and support continuous change.

## IMPACT ANALYSIS

TABLE 14 IMPACT ANALYSIS ON CHANGES TO THE CODES OBJECTIVES

Potential benefits	Potential disadvantages
Industry	
Industry reputation enhanced by recognition that the fitness industry is evolving and that the code reflects this.	None.
Consumers	
Consumers are supported by regulation that is up to date and recognises changes to the industry.	None.
Government	
Objective of the code reflects current industry practices.	Cost of updating guidance notes.

<sup>91</sup> Fitness Industry Code of Practice Review P10 Q1

## CLAIMING MEMBERSHIP OR ENDORSEMENT

### RECOMMENDATION 7 CLAIMING MEMBERSHIP OR ENDORSEMENT

**Remove reference to claiming membership and endorsement, clauses 5(1) and 5 (2).**

#### STATEMENT OF THE ISSUE

Sections 29 and 34 of the ACL prohibit all forms of misleading and deceptive conduct, or conduct likely to deceive or mislead. Should clause 5(1) '*A supplier must not falsely claim to be a member of, or endorsed by, an organisation or association*' and Clause 5 (2) '*A supplier must take reasonable steps to ensure an employee of the supplier does not falsely represent the employee or the supplier as being a member of, or endorsed by, an organisation or association*' be removed from the code and reliance placed on the ACL.

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**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?<sup>92</sup>**

**For the purpose of streamlining the 2018 Interim Code, should clauses 5, be deleted, and reliance placed solely upon the equivalent provisions in the ACL?<sup>93</sup>**

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#### STAKEHOLDER RESPONSE

The DLGSC and CAC commented that clause 5 should be removed and reliance placed on the ACL. They also suggested that guidance be placed in the code to help the industry find the ACL.

The CCLSWA submission commented that under the ACL, if a provider continues to be non-compliant after a formal complaint has been made by a consumer, in order to be able to take the claim further and be awarded any kind of remedy, the individual consumer will have to institute court proceedings. This can be expensive, with no guarantee of a satisfactory remedy. CCLSWA were concerned that by relying solely on the ACL the consumer loses the dispute resolution process detailed in the code and the opportunity for the Commissioner of Consumer Protection to apply, on their behalf, to the State Administrative Tribunal (SAT).

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<sup>92</sup> *Fitness Industry Code of Practice Review P14 Q4*

<sup>93</sup> *ibid.* P14 Q6

Over 80% of the respondents in the industry survey felt that the WA Fitness Code should include general rules about informing clients about membership of, or endorsement from, organisations or associations.

## DISCUSSION

For consistency of industry regulation it is preferable that provisions of the ACL are not unnecessarily replicated in industry codes. Consumer Protection has not taken action in SAT for breach of the code to date, and would be highly unlikely to utilise the option of going to SAT rather than taking action under the ACL if a supplier was in breach of the provisions 29 or 34 of the ACL. A number of enforcement options are available to the Commissioner for Consumer Protection in the event of breach of the ACL. In this instance clause 5 should be removed and reliance placed upon the ACL. There should be no adverse impact on consumers or industry.

## IMPACT ANALYSIS

TABLE 15 IMPACT ANALYSIS ON REMOVAL OF CLAUSES ON CLAIMING MEMBERSHIP PROVISIONS

Potential benefits	Potential disadvantages
Industry	
No change as industry already required to comply with ACL.	If not clearly specified in the code small businesses may not be aware of ACL requirements.
Consumers	
No change as consumers are already supported by ACL requirements.	No change as consumers are already supported by ACL requirements.
Government	
Simplify legislation.	Cost of updating guidance notes.

## MISREPRESENTING QUALIFICATION AND EMPLOYMENT OF STAFF

### RECOMMENDATION 8 QUALIFICATIONS

**Expand the requirement for not misrepresenting qualification to a requirement for suppliers to provide upon request details of qualifications and professional registrations.**

## STATEMENT OF THE ISSUE

The provisions of section 29 and 34 of the ACL prohibit all forms of misleading and deceptive conduct, or conduct likely to deceive or mislead. Is this specific enough for clause 6 to be removed and reliance placed on the ACL?

**In your experience, is specific industry regulation required to regulate fitness services suppliers' representations about: - claims of membership or**

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**endorsement of organisations / associations; - qualifications of staff; and - general advertising?<sup>94</sup>**

**For the purpose of streamlining the 2018 Interim Code, should clause 6 be deleted, and reliance placed solely upon the equivalent provisions in the ACL?<sup>95</sup>**

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## **STAKEHOLDER RESPONSE**

The DLGSC commented that clause 6 should be removed and reliance placed on the ACL. They also requested that guidance be placed in the code to help the industry find the relevant legislation. CAC also believed this provision should be removed as the provisions in the ACL are sufficient.

DLGSC also noted that valuable inclusions in the code would include competency of staff and safety standards. The relevant clauses in the ACT Fitness Industry Code appear to cover these areas.

The majority of respondents to the industry survey felt that clients should be informed about staff qualifications and general comments referred to the code being extended to specify what the required qualifications are and what the staff member is qualified to do. Over half of the respondents to our original Consumer Survey had not been given information on staff qualifications. One consumer commented that '*No fitness centre or provider gives you any details about staff qualifications*'.<sup>96</sup> The Fitness Australia Code refers to ensuring personnel who are employed to provide a service are qualified to do that service and hold appropriate registration.

## **DISCUSSION**

Consumer Protection would be unlikely to utilise the option of going to SAT for a breach of clause 6 rather than taking action under the ACL.

In this instance clause 6 should be replaced with a requirement to make available upon request the qualifications, accreditation and registrations of suppliers and their employees and what services they are specifically trained to provide. This is industry specific and in line with the views of Fitness Australia and respondents to our industry and consumer survey.

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<sup>94</sup> *Fitness Industry Code of Practice Review 2018 P14 Q4*

<sup>95</sup> *Ibid. P14 Q6*

<sup>96</sup> *Fitness Industry Code of Practice Review 2018 – Consumer – Summary data with comments Question 10 A24350201*

## IMPACT ANALYSIS

TABLE 16 IMPACT ANALYSIS ON EXTENDING CLAUSE ON STAFF QUALIFICATIONS

Potential benefits	Potential disadvantages
Industry	
Improves overall industry reputation as qualified professionals.	Training records will need to be updated and displayed by the supplier.
Consumers	
Listing the fitness service staff qualifications protects consumers from getting unqualified fitness advice.	Consumers will need to be aware of different qualifications and memberships offered by the industry to understand what training a service provider has completed.
Government	
Simplify legislation.	Unlikely to regulate what the appropriate registration and qualification of staff is required.

## HIGH PRESSURE SELLING TECHNIQUES, HARASSMENT OR UNCONSCIONABLE CONDUCT

### RECOMMENDATION 9 HIGH PRESSURE SELLING TECHNIQUES AND HARASSMENT

**Remove ACL duplication and focus on high pressure selling techniques and harassment prohibitions that are industry specific, this clause should also apply to employees of all fitness services.**

### STATEMENT OF THE ISSUE

The use of high pressure selling techniques, harassment or unconscionable conduct for the purpose of increasing the number of membership agreements entered into is prohibited by clause 7 of the 2018 Interim Code. Suppliers at fitness centres must also take reasonable steps to ensure their employees do not engage in such conduct. Similar clauses can be found in the ACT and QLD Fitness Industry Codes.<sup>97</sup>

The ACL also prohibits in Part 2-2 the use of unconscionable conduct by a person in the course of trade or commerce.<sup>98</sup>

Feedback indicates that some areas of the fitness industry are still using high pressure sales techniques which make consumers feel they have to enter into contracts.

<sup>97</sup> ACT Fitness Industry Code, clause 8; QLD Fitness Industry Code, clause 7

<sup>98</sup> ACL Part 2.2 – Unconscionable conduct



**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?<sup>99</sup>**

**Have you ever experienced high pressure selling techniques, harassment or unconscionable conduct in the fitness industry?<sup>100</sup>**

**Should clause 7 in the 2018 interim code be deleted, and reliance placed solely upon the unconscionable conduct provisions in the ACL?<sup>101</sup>**

**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?<sup>102</sup>**

## **STAKEHOLDER RESPONSE**

The CAC felt that this provision should be deleted and guidance notes developed.

CCLSWA observed that vulnerable consumers are at the greatest risk of being pressured into agreeing to sign up to membership agreements which they may not want or do not understand at the time of signing. They provided a case study<sup>103</sup> to support this and advocate retaining clause 7 because it offers consumers better protections than reliance in the ACL. They recommend Consumer Protection publish guidelines on high pressure selling techniques rather than defining it further in the code which could restrict the ability to apply it in real life situations.

DLGSC also commented on the ambiguity of ‘unconscionable conduct’ within the ACL and felt guidelines on high pressure selling techniques would be helpful.

Over a third of consumer respondents in the initial survey indicated that they had not been comfortable when signing a gym or other fitness service membership. They indicated that they thought they were subjected to high pressure selling techniques and unfair conduct.

The second consumer survey found that 56% felt uncomfortable or under pressure when signing up to a gym or fitness service membership. The majority of younger consumers reported that they had felt pressured to sign membership agreements.

## **DISCUSSION**

As unconscionable conduct is prohibited in the ACL those provisions should not be replicated in the code. However, the high pressure sales tactics reported by our consumer survey and feedback from stakeholders would not in most instances constitute unconscionable conduct for the purposes of the ACL. The consultation

<sup>99</sup> Fitness Industry Code of Practice Review P16 Q7

<sup>100</sup> *ibid.* P16 Q8

<sup>101</sup> *ibid.* P16 Q9

<sup>102</sup> *ibid.* P17 Q10

<sup>103</sup> CCLSWA\_20150822 FNL DOC Fitness Industry Code of Practice Review Page 6 Case study – Adam’s story [2014/069; C990855] A23986000

indicates that high pressure selling techniques and harassment still occur in the industry and can result in poor decisions by consumers so the prohibition should be retained in the code.

The proposed changes to disclosure requirements including publication of fees and costs upfront using electronic or paper media, should also reduce the opportunity for businesses to engage in high pressure selling techniques and harassment. The guide that accompanies the code will be updated to provide examples of inappropriate high pressure selling techniques and harassment.

The amendment to the code should:

- Remove the reference to unconscionable conduct from the provision and rely on the unconscionable conduct clause in the ACL, retain prohibitions for high pressure techniques and harassments, update the general guide notes with examples of conduct to be avoided by the industry.
- Expand the current clause so it is clear that high pressure selling techniques and harassment prohibitions apply to employees of all fitness services.

## IMPACT ANALYSIS

TABLE 17 IMPACT ANALYSIS ON CHANGES TO UNCONSCIONABLE CONDUCT HIGH PRESSURE TECHNIQUES AND HARASSMENT.

Potential benefits	Potential disadvantages
Industry	
Clear guidelines will benefit the industry and will help identify practices that are considered high pressure or harassment.	Potential reduction of income for those parties that rely on high pressure sales techniques.
Consumers	
Fitness industry consumers are still regularly subjected to high pressure sales techniques and need specific protection. Retaining part of clause 7 offers consumers better protection than relying solely on the ACL.	None.
Government	
Removing unconscionable conduct removes the duplication with the ACL. The provisions regarding high pressure selling and harassment in the code are industry specific and this assists government to address problematic conduct.	Cost of creating guidance notes that describe high pressure selling and harassment in the fitness industry.

## **SOLICITING THROUGH FALSE OR MISLEADING ADVERTISEMENTS OR REPRESENTATIONS**

### RECOMMENDATION 10 FALSE OR MISLEADING ADVERTISEMENTS OR REPRESENTATIONS

**Expand the current code so it covers the intention to mislead. This should also apply to employees of all fitness services.**

#### **STATEMENT OF THE ISSUE**

Sections 29 and 34 of the ACL prohibit all forms of misleading and deceptive conduct, or conduct likely to deceive or mislead. Clause 8 of the current code could be removed and reliance placed on the ACL. However there are still elements of the fitness industry that use promotional material and advertisements that promise unrealistic results that are likely to mislead the consumer. This clause in the current code offers consumers an easier and more cost effective dispute resolution process.

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**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?<sup>104</sup>**

**Should clause 8 of the 2018 Interim Code be expanded to prohibit fitness service suppliers from making advertisements, representations or statements that are false or misleading, or likely to mislead?<sup>105</sup>**

**For the purpose of streamlining the 2018 Interim Code, should clause 8 be deleted, and reliance placed solely upon the equivalent provisions in the ACL?<sup>106</sup>**

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#### **STAKEHOLDER RESPONSE**

The CAC and DLGSC support the repeal of clause 8 to rely on the ACL.

All respondents in the industry survey felt that the code should include disclosure rules that ensure promotional material is truthful and accurate and avoids false and misleading comparisons with other organisations. Industry survey participants were also in favour of the code ensuring that promotional material does not encourage unrealistic expectations. The industry survey supported the retention of clause 8 in the code.

The CCLSWA provided a case study<sup>107</sup> which highlights the need for specific protection against misleading and deceptive conduct in the fitness industry where individuals were misled by suppliers. They also stated that the requirement that a

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<sup>104</sup> Fitness Industry Code of Practice Review P14 Q4

<sup>105</sup> *ibid.* P14 Q5

<sup>106</sup> *ibid.* P14 Q6

<sup>107</sup> CCLSWA\_20150822 FNL DOC Fitness Industry Code of Practice Review Page 4 Case study – Carl's story [2014/069; C990855] A23986000

supplier actually “know” their statements are false is extremely narrow, and in practice is likely to be difficult to prove. They also noted that under the 2018 Interim Code there is a set dispute resolution procedure which consumers can use to remedy disputes. In contrast, under the ACL, a consumer will have to bring court action in order to remedy any misleading or deceptive conduct unless the Commissioner for Consumer Protection elects to take enforcement action.

Consumer Protection has observed an increase in marketing and promotions that use images of very fit young people to promote membership to vulnerable consumers who cannot expect to obtain similar results and it is unrealistic to suggest otherwise. It is also aware that some of these images and testimonials are false and in some cases they have been published without the subject’s knowledge and consent.

If clause 8 is retained, CCLSWA recommended that the prohibition be expanded to include advertisements, representations and statements that are false or misleading and those that are likely to mislead. This will broaden the scope of this provision and place increased responsibility on suppliers of fitness services.

## **DISCUSSION**

Consumer Protection has dealt with complaints where suppliers have solicited clients through false and misleading advertisements which have been subject of much media coverage.<sup>108</sup> Over the last six years there have been 61 complaints where services were not as described. Consumer Protection is aware that the conciliation and escalation process it offers through the code allows consumers the opportunities for remedies provided by SAT.

The changes should include:

- Soliciting through false and misleading advertising, statements and representations should be made more specific rather than a general statement.
- This should be worded so that it is clear that it applies to all employees of all fitness services.

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<sup>108</sup> ‘Boss Fitness’ this trader was reported on 22 January 2017 by Perth Now [<http://www.perthnow.com.au/news/western-australia/special-report-the-perth-people-falling-for-a-dud-of-a-diet/newsstory/6ad75b009dadb66652bf8cf0808b918b>], and was also featured on Channel 7’s *Today Tonight* on 1 March 2017.

## IMPACT ANALYSIS

TABLE 18 IMPACT ANALYSIS ON MAKING FALSE AND MISLEADING ADVERTISING MORE SPECIFIC TO THE FITNESS INDUSTRY

Potential benefits	Potential disadvantages
Industry	
Protecting the industry's reputation as all suppliers required to ensure that their employees do not mislead consumers.	None.
Consumers	
Better protection as it will apply to employees of all fitness services.	None.
Government	
None.	None.

## CONFIDENTIALITY

### RECOMMENDATION 11 CONFIDENTIALITY

**The current confidentiality clause is updated.**

### STATEMENT OF THE ISSUE

Confidentiality is governed for the majority of fitness businesses by the Commonwealth *Privacy Act 1988*.<sup>109</sup> However sole traders, most partnerships and some associations are exceptions to this general rule, as they are not subject to the requirements of that Act, and in that case consumers' personal information is protected by the confidentiality clause in the code. The current drafting does not include employees and only applies to information obtained under the client's membership agreement. The current definition of membership agreements mean that this confidentiality clause only applies to suppliers at a fitness centre.

**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?<sup>110</sup>**

**Should Clause 9 in the 2018 Interim Code be deleted, and reliance placed solely upon the *Privacy Act 1988* (Cwlth) to govern client confidentiality?<sup>111</sup>**

<sup>109</sup> <https://www.legislation.gov.au/Details/C2014C00076>

<sup>110</sup> Fitness Industry Code of Practice Review P17 Q11

<sup>111</sup> *ibid.* P18 Q12

## STAKEHOLDER RESPONSE

The CAC and DLGSC noted that confidentiality is already covered under the *Privacy Act 1988* and this provision should be deleted.

Consumers commented in the Consumer Survey that some 24/7 gyms had not been good with keeping personal details safe and allowing all staff to access them, even for their own personal business. Consumer Protection has received calls this year where emergency contacts provided on membership forms have been contacted to solicit memberships.

## DISCUSSION

Currently clause 9 reads that '*A supplier must not use, or disclose to another person, confidential information about a client obtained under the client's membership agreement.*' Consumer Protection believes that confidential information needs to be replaced with personal information to align with the Privacy Act and to clarify the obligation also applies to employees and all suppliers and not be limited to personal information provided in a membership agreement. As not all fitness services are covered by the Privacy Act this obligation must be included in the Code.

## IMPACT ANALYSIS

TABLE 19 IMPACT ANALYSIS OF PROPOSED CHANGES TO CONFIDENTIALITY CLAUSE

Potential benefits	Potential disadvantages
Industry	
Encourage and maintain consumer confidence in the fitness industry by retaining focus on consumer privacy.	Possible training cost to ensure employees are aware of their obligations.
Consumers	
Greater protection of personal information.	None.
Government	
Clear legislation on privacy for all suppliers and their employees.	None.

## MEMBERSHIP AGREEMENT TO BE SIGNED

### RECOMMENDATION 12 ELECTRONIC SIGNATURES

**Requirement for membership agreements to be signed to be updated to reflect electronic transactions.**

#### STATEMENT OF THE ISSUE

Membership agreements are more often electronic so this provision needs to be updated to reflect consent given electronically.

#### STAKEHOLDER RESPONSE

In our industry survey respondents were asked if there was anything else that they felt the WA Fitness Code should include. There were numerous requests for more information in the WA Fitness Code relating to online memberships, electronic sign ups and electronic signatures.

#### DISCUSSION

Updating this provision for electronic agreements keeps the code relevant with current business practices.

#### IMPACT ANALYSIS

TABLE 20 IMPACT ANALYSIS OF INCLUDING ELECTRONIC MEMBERSHIP AGREEMENTS

Potential benefits	Potential disadvantages
Industry	
Reduces printing and paperwork for small businesses. Many membership agreements are already electronic; this just clarifies how the fitness industry can use electronic agreements.	None.
Consumers	
Contract copies that have been emailed may be easier to find than a paper copy.	None.
Government	
None.	None.

## PROVIDING COPY OF MEMBERSHIP AGREEMENT BEFORE AND AFTER SIGNING

### RECOMMENDATION 13 ELECTRONIC COPIES

**Update to include reference to electronic copy of the membership agreement and any separate direct debit agreement.**

#### STATEMENT OF THE ISSUE

Currently the requirement is to provide consumers with a true copy of the signed membership agreement immediately after it has been signed. Often there is a separate

third party direct debit agreement that is completed for payment. The code does not at present require suppliers to provide a copy of this.

As the industry has moved towards using electronic contracts, the code needs to be updated to reflect this. The current code requires the supplier to give the client the opportunity to peruse a copy of the membership agreement and rules (if any) before signing.

### **STAKEHOLDER RESPONSE**

Many stakeholders commented on the need to provide copies electronically. CCLSWA noted that often consumers do not receive a copy of their membership agreement or separate direct debit payment agreement. They also cautioned about providing these electronically.

In the second consumer survey 40% said they did not get a chance to read and understand the membership document before they signed it.

### **DISCUSSION**

A website review of popular fitness service suppliers in WA shows that the ability to view a membership agreement prior to signing is not consistently provided by the industry. The details of the review are in [Appendix C Current fee and membership agreement disclosure](#).

The changes should include:

- Reference to providing either paper or electronic copy of the membership agreement.
- Reference to providing a paper or electronic copy of any separate direct debit or payment agreement. Both documents should be available for the consumer to view before and after the agreement is entered into.



## IMPACT ANALYSIS

TABLE 21 IMPACT ANALYSIS ON REQUIRING SUPPLIER TO PROVIDE COPIES OF AGREEMENTS BEFORE AND AFTER SIGNING

Potential benefits	Potential disadvantages
Industry	
Easier to do business, cheaper to email agreements.	Not all consumers currently get copies of any separate direct debit agreements so possible cost in providing these.
Consumers	
Better informed about direct debit and membership agreements. Easier to find electronic copies of agreements in the future.	Risk of not reading long membership agreements that are sent by email or displayed on scroll through screens.
Government	
Better informed consumers should reduce the number of consumer enquiries and complaints regarding fees and agreements.	Cost to communicate changes to industry.

## TWELVE MONTH LIMIT ON TERM OF PREPAID MEMBERSHIP AGREEMENTS

RECOMMENDATION 14 TWELVE MONTH LIMIT ON PREPAID MEMBERSHIP

**Retain the twelve month limit on prepaid membership and update to ensure suppliers are required to inform clients of any automatic renewal with enough notice to allow the client to comply with any notice period in the contract if they wish to cancel.**

### STATEMENT OF THE ISSUE

Historically there have been instances of fitness centres in Western Australia who have offered lifetime memberships going out of business and leaving consumers disadvantaged. The industry no longer offers prepaid memberships of more than twelve months.

This clause seems to be working well, however consumers are often confused by 'fixed term' and 'minimum term' contracts which frequently do not finish after the twelve month period but become ongoing and require a further notice period to cancel.

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**Are the provisions restricting prepayment of membership fees to no more than twelve months in advance working well for consumers and the fitness industry?<sup>112</sup>**

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<sup>112</sup> Fitness Industry Code of Practice Review P25 Q23

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**How are fitness membership payment plans currently structured and how common are twelve month fitness agreements?<sup>113</sup>**

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**STAKEHOLDER RESPONSE**

The fitness industry is generally compliant with the provisions contained within Division 4 of the code and the provision restricting payment of membership fees to not more than twelve months in advance. The CCLSWA submission included a case study where a twelve month membership was automatically rolled over and the consumer was subsequently required to give a three month notice period to cancel.

Fitness Australia has requested that the minimum term on a pre-paid agreement be increased to fifteen months. It believes that this will allow the consumer and businesses flexibility to insure they are compliant with the code should a member choose to renew their agreement for a further twelve months, three months prior to the expiry of the existing agreement.

**DISCUSSION**

The industry seems to be complying with the requirement to limit the length of prepaid membership to twelve months.

Consumer Protection does not agree with Fitness Australia's position that the length should be extended to fifteen months to enable consumers to purchase contracts three months in advance. This would increase the financial exposure to consumers if a fitness centre closes.

The current clause restricting prepayment of membership fees to no more than twelve months should be retained and include all fitness services.

**IMPACT ANALYSIS**

TABLE 22 IMPACT ANALYSIS OF CONTINUING TWELVE MONTH LIMIT ON PREPAID MEMBERSHIP

<b>Potential benefits</b>	<b>Potential disadvantages</b>
<b>Industry</b>	
No change to current practice.	None.
<b>Consumers</b>	
Consumers' financial exposure on pre-paid memberships limited to twelve months.	None.
<b>Government</b>	
None.	Cost to communicate changes to industry.

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<sup>113</sup> *ibid.* P25 Q24

## **PREPAYMENT OF FEES WHERE A FITNESS CENTRE IS LEASED**

### RECOMMENDATION 15 PREPAYMENT WHERE CENTRE IS LEASED

**This should be expanded to include situations where a supplier has given notice to its landlord that it will not be renewing a lease.**

### **STATEMENT OF THE ISSUE**

The current code has provisions to prevent a fitness service selling membership that extends beyond the period of its lease. This only currently applies if the landlord has given notice that the lease will not be renewed but not if the fitness service has given notice to cancel the lease.

**Are the provisions preventing a fitness centre from selling a membership agreement which extends beyond the expiry of its lease working well for consumers?<sup>114</sup>**

### **STAKEHOLDER RESPONSE**

The provisions preventing a fitness centre from selling membership agreements that extend beyond the end date of a current lease are working as intended.

### **DISCUSSION**

Previous drafting notes recommended that this clause be extended to apply in a situation where the supplier has given notice to its landlord that it will not be renewing a lease.

This should also be extended to include all fitness services including outdoor fitness services that are required to apply for permits to use parks from local councils.

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<sup>114</sup> Fitness Industry Code of Practice Review P25 Q25

## IMPACT ANALYSIS

TABLE 23 IMPACT ANALYSIS ON PROVISIONS RESTRICTING MEMBERSHIP AGREEMENTS BEYOND LEASE AGREEMENTS

Potential benefits	Potential disadvantages
Industry	
Better industry reputation.	Membership agreements are limited to the length of lease or length of time local government will agree to park use in advance.
Consumers	
Protection for consumers against suppliers selling membership then moving to a different location.	None.
Government	
Reduced complaints.	Cost to communicate changes to industry.

## UNFAIR CONTRACT TERMS

### RECOMMENDATION 16 UNFAIR TERMS

**Include additional membership agreement provisions to help address possible unfair contract terms and update the guide with specific examples of what Consumer Protection would consider unfair contract terms in a fitness service membership agreement.**

## STATEMENT OF THE ISSUE

In addition to the 2018 Interim Code, contract terms in standard membership agreements are regulated by the 'unfair contract terms' provision in Part 2-3 of the ACL.<sup>115</sup> These provisions allow a term in a standard form contract to be declared void if it is found by a court to be 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 but the contract will otherwise continue to operate if it is capable of operating without the unfair term.

If 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 having unfair contract terms declared void by the courts.

Consumer Protection has looked at a selection of current membership direct debit agreements and found several examples of what could be considered to be an unfair

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<sup>115</sup> Sections 23 to 28

contract term. These include statements that allow the supplier to unilaterally vary the cost of the contract at any time, unfair penalties for cancellations and complicated cancellation processes and terms that limit the supplier's liability for negligence.

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**Should provisions for membership agreements be retained under the current 2018 Interim Code or should reliance be placed on the unfair contract term provisions in the ACL?<sup>116</sup>**

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### **STAKEHOLDER RESPONSE**

CCLSWA commented that in order for a consumer to enforce their rights under the ACL in relation to unfair contract terms, the term must be deemed to be unfair by a court. This would be more costly for consumers and therefore they would recommend that the current protections for unfair contract terms are retained in the code.

DLGSC also believes it is appropriate for the Commissioner for Consumer Protection to retain the right under the *Fair Trading Act 2010* to apply to the SAT seeking recompense for contravention of the code, and / or the Supreme or District Court seeking compensation or remediation.

### **DISCUSSION**

Retain the provision for contents of membership agreements in the code. Update the guidance notes to make the industry and the consumer aware of what would be considered an unfair contract term in the fitness industry.

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<sup>116</sup> *Fitness Industry Code of Practice Review P25*

## IMPACT ANALYSIS

TABLE 24 IMPACT ANALYSIS ON RETAINING PROVISIONS FOR SPECIFICS THAT ADDRESS UNFAIR CONTRACT TERMS IN THE CODE

Potential benefits	Potential disadvantages
Industry	
Informed suppliers will be aware of what is considered an unfair contract term.	Extra cost to suppliers to update contracts that contain unfair terms.
Better industry reputation.	
Consumers	
Consumers educated and better informed by guidance notes on what is an unfair contract term in a fitness membership agreement.	None.
Consumers are provided with examples and the language to address potential unfair contract terms with the supplier.	
Including more specific requirements in the code will allow Consumer Protection to address unfair terms removing the cost of having to take Court action to have a term declared unfair.	
Government	
None.	Cost to update guidance notes and educate industry.

## COMPLAINTS

### RECOMMENDATION 17 COMPLAINTS

**Retain complaint handling provisions in the code but include reference to electronic lodgement of complaints and suppliers providing a link to the current code.**

## STATEMENT OF THE ISSUE

Division 5 of the code provides a framework for handling general complaints about services and other matters. This wording does not reflect current business practices such as providing options for consumers to lodge complaints electronically.

There have been a number of cases in recent years where fitness centres have closed with little notice to members, leaving members out of pocket. This has prompted 113 consumers to lodge complaints with Consumer Protection seeking compensation for

loss of prepaid membership fees. There is currently no provision for compensation in the code.

Consumer survey results indicate that the majority of fitness service clients do not know of the existence of the WA Fitness Code.

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**In your experience, does the Western Australian fitness industry demonstrate clear, written and effective complaint handling procedures for consumer complaints?<sup>117</sup>**

**Does the fitness industry make every attempt to resolve each consumer complaint quickly and fairly?<sup>118</sup>**

**Do you think there is a continuing need to mandate a complaint handling procedure for the fitness industry?<sup>119</sup>**

**What avenues are currently available to, or should be made available to, consumers who suffer financial losses when fitness centres close down?<sup>120</sup>**

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## **STAKEHOLDER RESPONSE**

DLGSC recognised that complaint handling procedures are not widely promoted within the fitness industry and as a result consumers are generally not aware of the appropriate course of action when making a complaint. Whilst the majority of the fitness industry operators do seek to resolve complaints quickly and fairly there is the potential for some providers not to do so. It is therefore important the code continue to include a complaint handling procedure for the fitness industry. The CAC agreed that there is a continuing need to mandate complaint handling procedures for the fitness industry.

The majority of industry respondents to the survey agreed that the code should include a requirement to resolve clients' complaints about fitness services and membership agreements quickly and fairly. Information should be provided to clients on how to lodge complaints and all complaints should be recorded on file and acknowledged within seven days. There was also clear preference for the rules in the code regarding complaint handling to be applied across all fitness industry providers. Eighty eight percent of industry survey respondents stated they already had a clear complaints procedure in place.

CCLSWA recommends that the new WA Fitness Code introduce compulsory disclosure by suppliers of the existence and availability of the WA Fitness Industry Code to consumers. This will promote transparency between consumers and

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<sup>117</sup> Fitness Industry Code of Practice Review P32 Q30

<sup>118</sup> Fitness Industry Code of Practice Review P33 Q31

<sup>119</sup> *ibid.* P33 Q32

<sup>120</sup> *ibid.* P31 Q28

suppliers. It will also make consumers more comfortable in knowing their rights and facilitate more effective and transparent dispute resolution.

DLGSC suggest that in the instance where consumers suffer a loss when a fitness centre closes down, consumers should be able to seek guidance from Consumer Protection, in the case of insolvency they should be considered a creditor.

Examples of the availability online of the current complaint process is included in [Appendix E Current Availability of Complaints Online](#).

## **DISCUSSION**

The stakeholder feedback indicated that the industry did not generally promote complaint handling procedures. Requiring the industry to provide links to their complaint process and the code in webpages would ensure that consumers have access to information on what to expect from the complaint process and the industry code. It is likely that this would reduce calls to Consumer Protection without excessive additional costs to the industry.

Consumer Protection does not recommend requiring fitness services that take annual fees in advance to place a portion of their funds in trust accounts as this would result in unreasonable costs for both the business and Government that cannot be justified and is inconsistent with most other sectors.

The complaint handling provision currently states that 'information on how to lodge a complaint must be readily available to a client'<sup>121</sup> this should be updated to:

- Specify that information on complaint resolution should also be made available electronically whenever possible, for example on the supplier's web or Facebook page. This should also include a requirement to provide customers with a link to the current WA Fitness Code.

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<sup>121</sup> *Fair Trading (Fitness Industry Interim Code) Regulations No2 2018 (WA) Div 5 (21) (2)*



## IMPACT ANALYSIS

TABLE 25 IMPACT ANALYSIS ON RETAINING COMPLAINT PROVISIONS AND REFERENCING ELECTRONIC LODGEMENT

Potential benefits	Potential disadvantages
<b>Industry</b>	
Better industry reputation.  Consumers and suppliers will have a common understanding of what to expect from the industry and how to raise issues.	Minimal cost to suppliers to update websites.
<b>Consumers</b>	
Consumers will be educated and better informed on how to deal with an issue and what the escalation process is.	None.
<b>Government</b>	
Clarity for consumers on suppliers' webpages will reduce number of issues that are referred to government for advice or investigation.	Cost to update guidance notes on complaint process and educate industry.

## **PREFERRED OPTION**

**Recommendation: It is recommended that Option B be implemented.**

Option B would see an updated WA Fitness Code that supports an evolving fitness industry and addresses the key areas of concern for consumers.

Retaining the current Interim Code under Option A would not adequately address the current industry practices. As such the Interim Code no longer offers appropriate legislative support to WA fitness service consumers or suppliers.

The advantages of Option B outweigh any savings associated with Option C, and do not result in the costs and disadvantages that would result from repealing the code and relying on voluntary industry self-regulation.

## **IMPLEMENTATION AND EVALUATION STRATEGY**

### **IMPLEMENTATION STRATEGY**

Implementation of the preferred option (Option B) requires amendments to regulations, principally the Fair Trading (Fitness Industry Interim Code) Regulations (No. 2) 2018 (WA) and the accompanying guide.

Transitional issues arising from the implementation of Option B include the disclosure changes required by fitness service providers and amendments that will be required to membership agreements. An appropriate lead in time to allow for education and compliance with new proposed legislation will be determined in consultation with industry stakeholders.

Option B will also require a community education campaign prior to the commencement of the changes to inform key stakeholders about the amendments. Key stakeholders include SBDC, suppliers, consumer groups and the general public.

Some possible initiatives could include:

- Workshops with stakeholders
- A community education campaign.
- Coordinating with providers of fitness education qualifications about the changes for those working in the fitness industry.
- Updating the current Consumer Protection guidelines that accompany the WA Fitness Code.
- Revised and updated information about the WA Fitness Code on Consumer Protection's website.
- Working with the peak industry body to inform their WA members of changes to the WA Fitness Code.
- Media releases, radio interviews, articles in print and on social media.

## STAKEHOLDER LIST

The stakeholder list that was used in 2018 for the consultation paper will be used to communicate the results of the consultation and the proposed changes to the WA Fitness Code. The stakeholders will be sent a letter or email directing them to information on the department's web site, including downloadable PDF posters that fitness service providers can use to inform clients of the upcoming changes to the code.

Identified stakeholders include:

- Fitness service suppliers
- Consumers
- WA Local Government Association
- Fitness Australia Limited
- Small Business Development Corporation
- Consumer Credit Legal Services WA
- Department of Local Government Sport and Cultural Industries
- Consumer Advisory Committee.
- Consumer's Association of WA
- Education providers that offer fitness qualifications

## TIMEFRAME FOR CHANGE

It is recognised that the main changes for the fitness industry introduced in the updated WA Fitness Code will be updating membership agreements and updating their electronic points of sale (for example Facebook or Instagram pages). Some of these changes will incur a cost, and will take time. It is proposed that the consultation outcomes will be communicated to the industry after approval to publish the D-RIS is received. The proposed changes can then be communicated when the code is gazetted with implementation spread over a nine month period. All fitness services are expected to be fully compliant nine months after publication of the code in the *Government Gazette*.

TABLE 26 KEY DATES IN CHANGE TIME FRAME

Key Dates	Action	Supporting communication
On approval to publish the D-RIS.	Communication to fitness industry about consultation results and proposed changes.	Industry provided with links on DMIRS website, community education on consultation outcomes and proposed changes.
Publication of code in the <i>Government Gazette</i> .	New Fitness code is introduced.	Web pages are updated with new information, tool kit for change rolled out and webpages link to new code.

<b>Key Dates</b>	<b>Action</b>	<b>Supporting communication</b>
Three months after publication of code in the <i>Government Gazette</i> .	Communication to fitness industry advising them to prepare for new regulations.	Send letter to industry stakeholder list, send communication to local government to distribute to fitness services using parks and public buildings, and publish articles reminding of compliance needs.
Six months after publication of code in the <i>Government Gazette</i> .	Communication to fitness industry about upcoming requirement to be compliant with new code.	Fitness service providers to do self-assessment using tool kit tick list to check compliance with new code.

### WHAT ARE THE CHANGES

Some of the changes to the fitness code are very minor and the wording is simply changed to reflect changing business practices (for example electronic contracts) or changes in other legislation. We have removed some duplication with the ACL and have aligned the confidentiality requirements with the privacy act. In other instances the legislation has been reworded to include employees of all fitness services, not just employees of gyms, this is relevant to high pressure selling and false and misleading advertisements.

Other changes will require the fitness service to review and rearrange their contracts, update webpages or other electronic media for disclosure, comply with new cooling off periods and improve their cancellation policies. This is especially relevant for fitness services that have not previously needed to comply with membership agreement provisions in the code. We understand that for small businesses these things can take time, so we have recommended extending the time for industry to implement the changes out to nine months after the publication of the code in the *Government Gazette*.

TABLE 27 CHANGE TO BE IMPLEMENTED

<b>Change</b>	<b>Implementation</b>
Redefine fitness services	All fitness services to comply with new membership agreements.
Content of membership agreements	All new membership agreements to be compliant.
Cooling off period	Cooling off period changed in membership agreements to at least 7 days where change required.
Cancellations	Cancellation compliance to be in membership agreements and on website.
Cancellations	Fees taken after cancellation date to be returned in 14 days.
Disclosure of fees	All fees to be disclosed
Qualifications	Fitness service providers to produce qualifications upon request.

<b>Change</b>	<b>Implementation</b>
High pressure selling techniques	Fitness services to be already compliant.
False or misleading or the intention to mislead.	Fitness services to be already compliant.
Confidentiality	Fitness services and employees to be already compliant.
Electronic signatures	This is legislation catching up with the industry practice.
Electronic copies	This is legislation catching up with the industry practice.
Twelve month limit on prepaid membership	No change to traditional gyms, outdoor fitness services to check that membership agreements from this date do not exceed 12 months.
Prepayment where centre is leased.	No change to traditional gyms, outdoor fitness services to check that new contracts do not exceed Local Councils permission to use parks.
Complaints	Fitness services to provide link to complaints process and allow electronic lodgement if they have an electronic presence.

### **PROACTIVE COMPLIANCE**

From the date of approval to publish the D-RIS to nine months after publication of the code in the *Government Gazette*. Consumer Protection will take on proactive compliance initiatives to discuss proposed changes with industry members. This is standard procedure with the implementation of new legislation and would be part of their business as usual costs.

### **LETTERS TO STAKEHOLDERS**

It is proposed that there will be a series of written communications sent by email to stakeholders about the changes to the code. The estimated cost of using Campaign Manager to send out all three mass email communications to fitness service suppliers is \$450. The email response to the smaller number of stakeholders that sent in written responses will come under business as usual costs.

TABLE 28 LETTERS TO STAKEHOLDERS

<b>Recipient</b>	<b>Purpose</b>	<b>Date</b>
To all stakeholders that sent in written responses to the consultation.	To advise them of the information received through the review process and the changes to the code proposed in the D-RIS.	One week after the publication of the D-RIS.
To identified fitness services suppliers in WA.	To advise them of the information received through the review process and the changes to the code proposed in the D-RIS.	In the month following the publication of the D-RIS

<b>Recipient</b>	<b>Purpose</b>	<b>Date</b>
To identified fitness service suppliers in WA.	To advise them of the changes that come into effect from the publication of code in the <i>Government Gazette</i> and a link to the webpage with the tools to identify changes required.	After approval of the code by EXCO.
To identified fitness service suppliers in WA.	Reminder that they need to be fully compliant with the new code nine months after the date of publication of code in the <i>Government Gazette</i> and link to webpage tool kit for change.	Six months after the date of publication of code in the <i>Government Gazette</i> .

## COMMUNITY EDUCATION

The following articles will be written to communicate the results from the consultation process to industry and consumers. These should be short, engaging and informative to take the industry and consumers through the results of the consultation process and help understand the reasons for the key changes to the WA Fitness Code. These articles can be published electronically, emailed to industry members on the stakeholder list, and promoted through Fitness Australia Limited to their WA members. Creating these articles comes under business as usual costs.

TABLE 29 PROPOSED INDUSTRY ARTICLES ON CONSULTATION RESULTS

<b>Document</b>	<b>Summary</b>
<i>How fit is the WA fitness industry</i>	A one page information sheet providing the key consumer issues raised in the consultation process.
<i>Fitness performance 2019</i>	A one page information sheet providing the key industry issues raised in the consultation process.
<i>Get Fit for 2020</i>	Key changes in the WA Fitness Code and the changes that need to be implemented by fitness service providers.
<i>WA Fitness industry changes A4 PDF</i>	Key changes in an engaging PDF for display electronically or to be displayed in fitness centres outlining industry changes for consumers.

## WEBSITE UPDATE

Consumer Protection will need to create a webpage that addresses the key results from the consultation and the upcoming changes. This page will also contain links to all articles on the consultation results and the tool kit for change created for the new code. Updating Consumer Protection webpages comes under business as usual costs for the Department.

The following Consumer Protection web pages will also need to be reviewed and updated by DMIRS.

TABLE 30 CHANGES TO WEBPAGES

Webpage	Key changes
Cooling off periods for gym memberships.	Update the length of cooling off period.
Choosing a gym.	Update details about cooling off period and links, include information on ending agreements electronically, disclosure requirements for fees.
Signing up for a gym membership.	Update code of practice link and what agreement must contain and add details about linked agreements.
Cancelling a gym membership.	Update cooling off period information, cancelling direct debits, cancelling electronically, effective date of cancellation.
Fitness centre concerns and complaints.	Update complaints to provide electronic lodgement of complaint.
Fitness services Code of Practice.	Update to include disclosure requirements.
Gym membership agreements.	Update ongoing membership agreements, cancellations, note that electronic contracts are common and hard to amend,

## TOOL KIT FOR CHANGE FOR THE FITNESS INDUSTRY.

The implementation strategy is to enable WA fitness services to clearly understand the required changes and to easily check that they are compliant with amendments to the WA Fitness Code. Tool kit documents will be available on the Consumer Protection webpages and will include an email link for queries. Creating these tools and publishing them electronically comes under business as usual costs for the department.

The following documents will be produced by DMIRS to help the WA fitness industry through key areas of change to the code.

TABLE 31 TOOL KIT FOR CHANGE

<b>Document</b>	<b>Summary</b>
<i>Fitness Industry Guide to the Code of Practice</i>	This existing document will be updated to include all the changes to the WA Fitness Code so that fitness services in WA have clearly documented the requirement of the code.
<i>Membership agreement tick list</i>	Required content for membership agreements formatted as a tick list to help members understand what is required.
<i>Changes to the WA Fitness Code tick list</i>	A clear list to enable fitness services check that their business meets the code requirements.
<i>Time line for changes</i>	A document for the fitness industry that indicates the changes and when the changes need to be in place.

## **EVALUATION**

Consumer Protection will monitor complaints and enquiries in relation to the implementation of the changes proposed in this paper.

We will record the levels of calls to the contact centre concerning the changes to the fitness code from suppliers and all emails received. This information and feedback from stakeholders will be used to identify any issues in the sector that may necessitate further review.

The effectiveness and impact of the proposed changes will be monitored and a post implementation review will be undertaken at the Minister's discretion.

The fitness industry has evolved significantly in the past decade and future changes are inevitable. The proposed changes do not take into account online subscription memberships that are becoming more popular and virtual trainers. As the industry is dynamic it is important to regularly evaluate the effectiveness of any revised code.

## **EVALUATION MEASURES**

In the 2017-2018 financial year there were 131 conciliation complaints, of which 30% related to fitness services outside of a traditional fitness centre. Over 100 of these were related to membership cancellations and fees. Through the changes in the code we would expect to see a decrease in the number of conciliation complaints in the twelve months after the proposed changes to the code are fully implemented.

The contact centre received around 700 enquiries relating to fitness suppliers from January 2017 to June 2018. We would anticipate that giving consumers a better opportunity to understand the key information in membership agreements and removing opportunities for suppliers to prolong payments after cancellation would



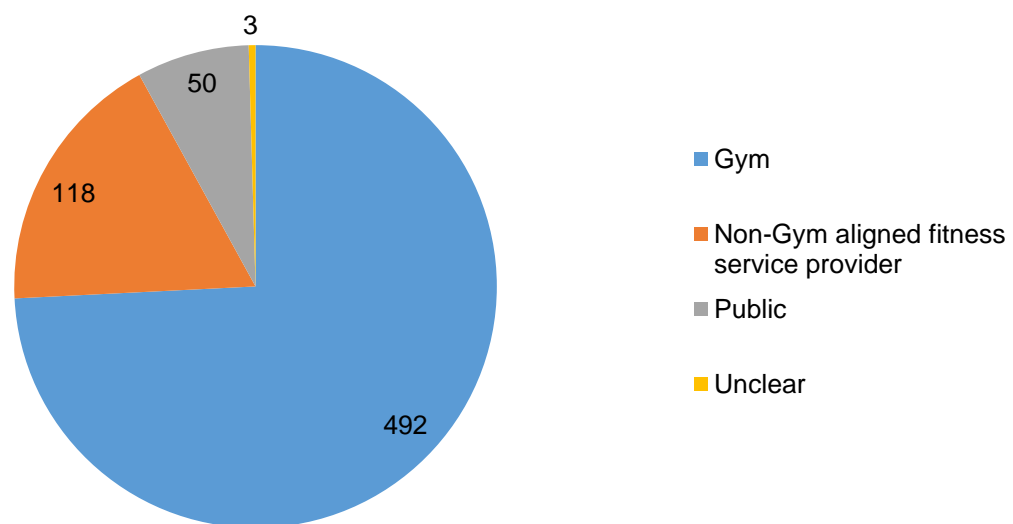
mean a reduction in the number of fitness enquiries in the eighteen months after the proposed changes to the code are fully implemented.

## APPENDICES

### APPENDIX A CONSUMER PROTECTION COMPLAINTS ANALYSIS

In the six years between 2012 and 2018, Consumer Protection recorded 663 complaints against the fitness industry. Consumers who sought conciliation with suppliers of fitness services lodged most complaints. The remainder were compliance matters issued against fitness service suppliers that were found non-compliant with industry regulation. Traditional gyms accounted for around three quarters of all complaints and issues with membership cancellations and contract terms were the most commonly raised problems.

FIGURE 1 FITNESS INDUSTRY COMPLAINTS BY TYPE OF SERVICE PROVIDER



From July 2012 to June 2018 Consumer Protection has looked into 118 complaints relating to non-gym aligned fitness service providers, 39 of these (or 30%) were in the last 12 month period. This indicates that non-gym fitness services are a growing area for consumer difficulties.

TABLE 32 FITNESS INDUSTRY CONSUMER COMPLAINTS BY ISSUE TYPE

Types of issues	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	Total
<b>Membership cancellation.</b>	20	28	38	45	50	60	241
<b>Fees and Membership Contracts.</b>	11	20	23	25	96	46	219
<b>Facilities issues.</b>	12	8	7	19	27	17	90
<b>Pre-membership/cooling off period issues.</b>	2	1	4	17	10	8	42
<b>Compliance issues.</b>						2	2
<b>Grand Total.</b>	45	57	72	106	183	131	594

### Membership cancellation complaints.

Accounting for 241 of 594 complaints (or 41%), the greatest portion of consumer complaints arose because consumers wanted to cancel an existing membership with a fitness service supplier. Complaints in this category concerned contracts that were “ongoing agreements” that do not have an expiry date and only cease when a consumer requests cancellation.<sup>122</sup>

Several issues with cancellation processes were commonly complained about – see Table 25.

TABLE 33 MEMBERSHIP CANCELLATION COMPLAINTS

Issue description	No of complaints
Consumer dissatisfied with the conditions of cancellation.	80
Supplier continued to charge fees despite membership cancellation.	64
Supplier failed to enact consumer’s request for cancellation.	59
A fixed-term contract has been rolled over without consumer’s knowledge or consent.	23
Other cancellation issues.	11
Supplier has banned consumer from using facility.	4
<b>TOTAL</b>	<b>241</b>

The 80 consumers dissatisfied with conditions of cancellation typically referred to excessive exit fees, or overly long notice periods before membership fees would cease to be charged. Consumers regarded such conditions are unfair, especially when

<sup>122</sup> ‘Ongoing agreement’ is defined under section 15(2) of the code.

conditions were not made known at or prior to the commencement of the membership contract.

Sixty four complaints cited suppliers continuing to periodically charge membership fees (typically direct debits or credit card charges) despite the consumer having cancelled their membership. Consumers with these complaints typically lodge a complaint with Consumer Protection following unsuccessful attempts to have the supplier refund incorrectly charged fees and cease taking further payments.

The 59 complaints involving the supplier’s failure to cancel a membership contract were similar in nature to those discussed in the preceding paragraph. However, specific to these complaints was the supplier’s deliberate unwillingness or negligence to deal with a clear request from the consumer to cancel their membership. Many of these consumers continued to be charged fees by the supplier who still considered them to be members.

While most fitness complaints concerned ongoing agreements, several complaints presented issues unique to fixed-term membership contracts. There were 23 complaints citing the supplier’s prolongation of fixed term memberships without the consumer’s knowledge or consent. Typically, consumers expected to be relinquished from the terms of fixed-term contracts and from any further payments upon expiry of the fixed term.

### **Gym complaints involving debt collecting agencies.**

Twenty five complaints specifically mentioned fitness suppliers using debt collectors in the event of unpaid financial liabilities. Twenty three of the complaints about debt collectors were made against gyms that were large companies. Many of these use a third party billing agent.

### **General fees and membership contracts complaints.**

Complaints in this category (221) concerned general contractual issues that are not attributable to a request for membership cancellation. Complaints in this category are generally prompted by consumers perceiving inconsistencies between what was agreed to in the contract and the conduct of the supplier.

TABLE 34 GENERAL FEES AND MEMBERSHIP CONTRACTS COMPLAINTS

Issue description	No of complaints
Facility has suddenly closed without notice.	113
Other fees and membership contract issues.	42
Supplier has incorrectly charged members.	34
Consumer dissatisfied with changes to membership terms (and inclusions).	23
Consumer dissatisfied with changes to membership terms (and inclusions), due to change of ownership of a facility.	6
<b>TOTAL</b>	<b>221</b>

The sudden closure of a facility without notice was dominated by two specific closures, Selby Health and Fitness in February 2017 and CBD Health and Spa in January 2014. Many consumers lodged complaints seeking compensation for the loss of prepaid membership fees.

### **Facilities and standards of service complaints.**

Under this category, complaints were prompted by the quality of service not meeting the consumer's expectations. Numerous typical sets of circumstances were identified, and are listed in Table 27.

TABLE 35 FACILITIES AND STANDARDS OF SERVICE COMPLAINTS

<b>Issue description</b>	<b>No of complaints</b>
Services were not as described.	61
Conditions of facility were unsatisfactory.	20
Other facilities and standards of services issues.	5
Consumer dissatisfied with facility's change of location.	4
<b>TOTAL</b>	<b>90</b>

Gym complaints in this category were typically prompted by a consumer's dissatisfaction with internally provided services (most often, personal trainers and group exercise classes) which were provided to a standard below expectations. In many instances, services were not provided at all and consumers considered that reasons given by the gym for non-provision were unsatisfactory. Non-gym fitness services were well-represented among these complaints. Among these, 13 were made against "Boss Fitness", an independent personal fitness coach (Angus Fairbairn), in the year 2016-17. Boss Fitness' substandard service, misleading advertising and plagiarised teaching material were the subject of much media coverage in February 2017.<sup>123</sup>

### **Pre-membership / cooling off period complaints.**

Relatively few fitness complaints concerned pre-membership procedures including the cooling off period. This may be attributed to the specific provisions that deal with new memberships contained principally in Division 4. Despite these regulations, several potential breaches were recorded. The issues and circumstances of complaints are summarised below in Table 28.

<sup>123</sup> This trader was reported on 22 January 2017 by Perth Now [<http://www.perthnow.com.au/news/western-australia/special-report-the-perth-people-falling-for-a-dud-of-a-diet/newsstory/6ad75b009dadb66652bf8cf0808b918b>], and was also featured on Channel 7's *Today Tonight* on 1 March 2017.

TABLE 36 PRE MEMBERSHIP PROCESSES / COOLING OFF PERIOD COMPLAINTS

Issue description	No of complaints
Free “trial membership” rolled over into full membership without consumer’s knowledge or consent.	16
Consumer was charged despite cancellation during the cooling-off period.	10
Supplier used excessive pressure or unreasonable sales practices to coerce consumer to enter a membership.	9
Other pre-membership/cooling off period issues.	7
<b>TOTAL</b>	<b>42</b>

## APPENDIX B CONSUMER PROTECTION ENQUIRIES ANALYSIS

The number and subject of fitness industry related calls that were received by the Consumer Protection contact centre in the 18 months prior to the review have also been considered. This information is important as it provides a snapshot of current consumer concerns.

FIGURE 2 FITNESS INDUSTRY ENQUIRIES JAN 2017 – JUNE 2018 BY TYPE OF SERVICE PROVIDER

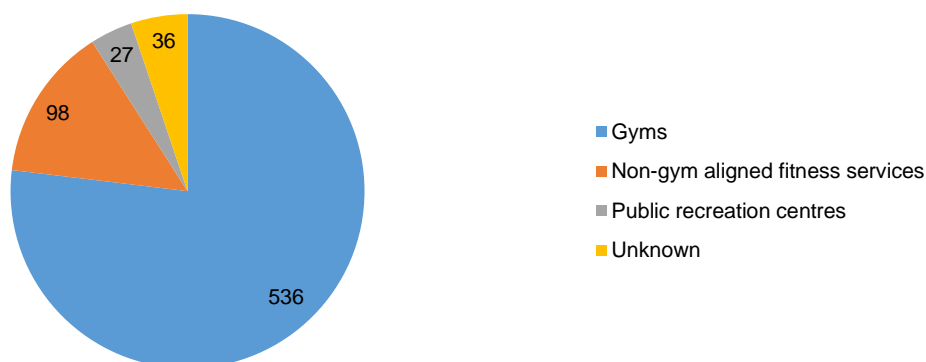


TABLE 37 CONSUMER PROTECTION ENQUIRY DATA 1 JANUARY 2017 – 30 JUNE 2018

Type of Issues	No. of enquiries	Percentage
Membership cancellation.	296	42%
Fees and Membership contracts.	182	26%
Facilities issues.	70	10%
Complaint enquiry/follow-up.	51	7%
Pre-membership/cooling off period.	43	6%
Compliance issues.	23	3%
General.	18	3%
Other.	7	1%
Unclear.	7	1%
<b>Grand Total.</b>	<b>697</b>	<b>100%</b>

The greatest portion of consumer enquiries (42%) concerned requests for cancellation of an existing membership with a supplier. The following table sets out circumstances encountered during the cancellation process or when consumers want to cancel a membership.

TABLE 38 MEMBERSHIP CANCELLATION ENQUIRIES

Type of Issue	No. of enquiries	Percentage
Membership cancellation.	296	42%
Other membership cancellation issues.	147	21%
Facility continues to charge, despite cancellation.	71	10%
Dissatisfaction with conditions of cancellation.	44	6%
A membership that was understood as having a fixed term has rolled over.	17	2%
Facility refused or failed to enact request for cancellation.	16	2%
Unknown.	1	0%

Other membership cancellation issues consisted of 147 enquiries mainly relating to consumers wanting to know if a membership contract can be cancelled and the terms and process of cancellation. Most consumers had experienced a change in circumstances like moving house; change of employment, health conditions and injuries etc. and the trader was unwilling to cancel their membership. In some instances consumers had not been to the gym or used facilities for a long period of time only to realise later that they were still being charged. These consumers were seeking refunds. In other cases consumers were no longer happy with the service or had changed their mind and were calling to enquire about contract cancellations.

Seventy one enquiries cited suppliers continuing to periodically charge membership fees (typically direct debits or credit card charges) despite the consumer having cancelled their membership. Some members had cancelled their contracts verbally and the trader had accepted the verbal cancellation but continued to deduct charges. The data suggests that consumers were not aware of the conditions for cancellation.

Sixteen enquiries involving the supplier's deliberate unwillingness or negligence to act on a clear request to cancel a membership. Many of these consumers continued to be charged fees by the supplier.

Consumers who were dissatisfied with the conditions of cancellation typically referred to exit fees, or a requirement for a long notice period before the membership fees would cease to be charged.

Other enquiries cited the supplier's prolonging memberships without the consumer's knowledge or consent. Typically consumers expected to be relinquished from the terms of fixed-term contract and further payments at the end of the agreed contract term.



## **Involvement of debt collecting agencies.**

Approximately 21 enquiries made specific mention of fitness suppliers using debt collecting agencies against consumers in the event of unpaid financial liabilities. All but two enquiries involving debt collectors were made against gyms, particularly larger companies, many of which use a third party billing agent.

## **General fees and membership contracts enquiries.**

The 182 enquiries in this category concern general contractual issues that were not attributable to a request for membership cancellation. Enquiries in this category are generally prompted by consumers' perceived inconsistency between that which was agreed to in the contract, and the conduct of the supplier.

TABLE 39 GENERAL FEES AND MEMBERSHIP CONTRACTS ENQUIRIES

<b>Type of Issue</b>	<b>No. of enquiries</b>	<b>Percentage</b>
Fees and Membership contracts.	182	26%
Other fees and membership contract issues.	65	9%
Facility has closed and consumer dissatisfied with outcomes.	57	8%
Facility has overcharged or incorrectly charged members, or slow to providing refunds.	43	6%
Dissatisfaction with an increase in fees.	8	1%
Dissatisfaction with membership changes due to change of ownership.	6	1%
Dissatisfaction with changes to membership terms and inclusions.	2	0%
Unknown.	1	0%

Sixty-five enquiries were categorised under other fees and membership contract issues and consisted of a variety of matters ranging from payment issues and charges, contract discrepancies, courses and programs and other issues.

Of the 57 enquiries relating to closure, 42 related to the sudden closure of Selby Health and Fitness in February 2017. Some consumers were concerned about compensation for the loss of prepaid membership fees.

The 43 enquiries prompted by suppliers overcharging members were attributed to a diverse range of circumstances. These include consumers being charged fees higher than those agreed to, and being charged fees for periods of time for which consumers had requested a temporary membership pause.

Cumulatively a total of 16 enquiries were received where consumers were dissatisfied with changes to membership terms and inclusions including an increase in fees. Enquiries refer to an increase in fees since the commencement of membership, changes to management and other aspects of fitness services.

## APPENDIX C CURRENT FEE AND MEMBERSHIP AGREEMENT DISCLOSURE

Consumer Protection looked at a selection of WA fitness services to see what information they currently provided on their webpages to assess how the cost of a fitness service is currently disclosed online and whether it would be a significant change for the industry to expand disclosure provisions to include the full cost.

TABLE 40 CURRENT INDUSTRY FEE DISCLOSURE

Organisation	Pricing available on line	Membership terms available on line
F45.	Package and membership pricing online and purchase online.	Scroll through membership agreement online.
Fernwood.	No.	Yes.
Goodlife.	Pricing online for packages.	Yes.
Surge Fitness.	No.	Yes.
Snap Fitness.	Requires personal information to view packages.	Not available – website requires you provide personal detail for contact.
Jetts Fitness.	Yes.	Scroll through membership agreement online.
Plus Fitness.	Per week membership fees listed on website.	Yes.
Anytime Fitness.	Has recommended pricing but each club sets its own prices.	Yes.
Perth YMCA Narrogin Regional Leisure Centre.	Yes.	Yes.
WA Bootcamp. <sup>124</sup>	Yes.	Yes (limited).
Mums on a mission. <sup>125</sup>	Limited pricing online, need to provide personal information to receive full pricing detail.	No.
Inspire Fitness. <sup>126</sup>	No.	Yes.

Although there is some pricing information listed on the webpages, our review shows it tends to be limited and include just a ‘from’ weekly amount rather than the total amount. If the membership agreement was found on the website then it generally

<sup>124</sup> *WA Bootcamp* offers an annual membership but does not need to comply with the membership agreement requirements of the code as they provide outdoor group training.

<sup>125</sup> *Mums on a mission* offers indoor and outdoor group training at multiple locations that do not meet the current definition of a fitness centre so their membership agreements are not required to comply with the current code. They offer a top annual membership for a fee around \$4000.

<sup>126</sup> *Inspire Fitness* offers outdoor group training at multiple locations so does not meet the current definition of a fitness centre so their membership agreements are not required to comply with current code.

contained fees relating to the fitness service, although not always a dollar amount and did not always include the fees for any third party direct debit arrangement.

For example, looking at a basic 24 hour fitness centre, the *Jetts Fitness* website does not give access to the full joining fee amount until personal details are entered, and although advertised as \$14.95 per week the first payment is \$158. The terms and conditions need to be ticked as agreed to and are viewed through a scroll through screen. When copied and printed they are 18 pages long in 12pt font. They include a direct debit service agreement with *Ezidebit*, the *Jetts* membership terms and conditions and a *release indemnity*. The material also referred to other fees not specified on the webpage.

Goodlife Healthclub website promotes 12 month membership for around \$15 a week, however the online contract includes over fifteen extra fees over ten pages that can be charged by either the fitness service or the direct debit agent. One of these fees is the one off administration fee of \$99 for members paying by direct debit, \$10 goes to *Debitsuccess* and \$89 to Goodlife.

Anytime Fitness has a fee table in their membership agreement that collates all the membership fees but does not include any fees for the direct debit agent except for the Billers Administration Fee and refers to the separate Direct Debit Payment Agreement. Anytime Fitness membership agreement lists their third party biller as *Debitsuccess*.

The separate direct debit agreement is not available on their website, but generally a *Debitsuccess* agreement allows them to charge \$10 for each late payment, and a direct debit set up charge of up to \$100 split between the fitness centre and *Debitsuccess*. If the consumer defaults on the payment the agreement authorises them to charge \$50 plus the full outstanding fee plus an extra 25% and to refer the full amount to the debt collection agency.

Fernwood Fitness centre website advertises packages starting from \$22 per week with a one off payment of \$199. The terms and conditions for members is available on their website and refers to over fifteen extra fees and charges over seven pages but does not provide dollar amounts, it also refers to a price list which is available from the home club when you sign up to membership.

F45 franchise seem to have different disclosure depending on the centre, some only allow the consumer to purchase blocks of classes but some F45 centres have scroll through 12 month contracts available for members on their website which includes extra fees for missing classes, late cancellation fees, time freeze fees and a cancellation fee of 50% of the remaining term.

## APPENDIX D CURRENT INDUSTRY COOLING OFF PERIODS AND FEES

Analysis of cooling off periods and cooling off fees from a selection of WA suppliers are included below.

TABLE 41 CURRENT INDUSTRY COOLING OFF PERIODS

Organisation	Current cooling off period	Cooling off fees
F45.	14 Days. <sup>127</sup>	Refund less set up fee and the value of any promotional items.
Fernwood.	Seven Days.	Cooling off cancellation fee.
Goodlife.	Seven Days.	\$99 admin fee payable if access card and / or other merchandise not returned.
Snap Fitness.	48 Hours (seven days in ACT).	Unknown.
Surge Fitness.	48 Hours.	Joining and administration fee are non-refundable and must pay all unpaid fees from the start of agreement to date of termination.
Jetts Fitness.	Ten Business Days.	Refund all membership fees.
Plus Fitness.	48 Hours (even days except for WA and SA).	Money returned on pro rata basis.
Anytime Fitness.	Seven Days.	Fob key fee and charged for any services or products already supplied.
Perth YMCA Narrogin Regional Leisure Centre.	48 Hours.	\$10 administration fee plus any costs incurred by the centre.
WA Boot Camp. <sup>128</sup>	Not specified.	Not specified.
Mums on a mission. <sup>129</sup>	Not specified.	Not specified.
Inspire Fitness. <sup>130</sup>	48 Hours.	Any fees paid are non-refundable and taken as administration costs.

## APPENDIX E CURRENT AVAILABILITY OF COMPLAINTS PROCESS ONLINE

Analysis of industry complaint processes from a selection of WA suppliers are included below.

TABLE 42 CURRENT AVAILABILITY OF COMPLAINT PROCESS ONLINE

<sup>127</sup> Not all F45 franchises offer memberships agreements, some you buy a block of classes for around \$500, not all scroll through contracts on line offer a cooling off period and some annual memberships have been offered through the online store with just a buy now button and no contract.

<sup>128</sup> WA Boot Camp are currently excluded from the membership agreement cooling off requirements of the WA Fitness Code as the exercise takes place outside of a fitness centre.

<sup>129</sup> Mums on a mission are currently excluded from the membership agreement cooling off requirements of the WA Fitness Code as the exercise takes place outside of a fitness centre.

<sup>130</sup> Inspire Fitness are currently excluded from the membership agreement cooling off requirements of the WA Fitness Code as the exercise takes place outside of a fitness centre

Organisation	Complaint process
F45.	Facebook, Instagram and email address contacts provided. No link to complaints.
Fernwood.	Complaint process in terms and conditions published on website with address for head office for complaints that cannot be resolved by the club manager. No email address.
Goodlife.	Complaint form under Support link on website but no link to complaint process.
Snap Fitness.	Email address for each club provided – can be used for cancellation, on line form for head office, but no link to complaint process.
Surge Fitness.	Complaints procedure included in membership terms on website with request to lodge complaint in writing to club manager. Email address not provided.
Jetts Fitness.	No complaint process on website, form available to contact head office and email address available.
Plus Fitness.	Complaint handling email address included in website with commitment to respond 'within a reasonable timeframe'.
Anytime Fitness.	Provide email address for complaints in online membership agreement and refers to Anytime Fitness complaints policy but does not have a link to it.
Perth YMCA Narrogin Regional Leisure Centre.	Complaints are invited through online feedback form or in person, no online complaint procedure.
WA Boot Camp. <sup>131</sup>	Email address and online contact form provided. No reference to complaints. Fitness Australia member so should have provision in the consumer agreement that they can lodge a complaint with Fitness Australia. <sup>132</sup>
Mums on a mission. <sup>133</sup>	Offer emails for sales and administration, no reference to a complaint procedure and not a member of Fitness Australia.
Inspire Fitness. <sup>134</sup>	Email address provided.

<sup>131</sup> Note *WA Boot Camp* are currently excluded from the complaint requirements of the WA Fitness Code as the exercise takes place outside of a fitness centre.

<sup>132</sup> Fitness Industry Code Of Practice 5.6 (f)

<sup>133</sup> *Mums on a mission* are currently excluded from the complaint requirements of the WA Fitness Code as the exercise takes place outside of a fitness centre.

<sup>134</sup> *Inspire Fitness* are currently excluded from the complaint requirements of the WA Fitness Code as the exercise takes place outside of a fitness centre.

## APPENDIX F RECOMMENDATIONS IN THIS PAPER

The following is a summary of recommendations in this paper.

TABLE 43 PROPOSED CHANGES WITH POSSIBLE FINANCIAL IMPACT

Recommendation	Details
Redefine membership agreements.	The code is expanded to cover a broader range of suppliers of fitness services who enter into membership agreements with consumers.
Contents of membership agreements.	Update the required content of membership agreements to provide clarity for consumers and allow consumers to more easily compare services.
Cancellations.	Expand the current cancellation clause to include an option for cancellation without penalty for clients that have become permanently ill or physically incapable, reflect in the code the use of electronic communications and clarify the requirements of the cancellation process.
Cooling off period.	Minimum cooling off period extended to seven days and applies to linked contracts.
Disclosure of fees.	All fee information must be publically available to allow prospective clients to make an informed decision.

TABLE 44 PROPOSED CHANGES WITH LIMITED OR NO FINANCIAL IMPACT

Recommendation	Details
Code objective.	Keep the industry specific standalone code and expand the objective of the code to reflect the way the industry is evolving.
Claiming membership and endorsement.	Remove reference to claiming membership and endorsement, clauses 5(1) and 5(2).
Qualifications.	Expand the requirement for not misrepresenting qualifications to a requirement for supplier to provide upon request details of qualifications and professional registrations.
High pressure selling techniques and harassment.	Remove ACL duplication and focus on high pressure selling techniques and harassment prohibitions that are industry specific, this clause should also apply to employees of all fitness services.
False or misleading advertisements or representations.	Expand the current code so it covers the intention to mislead. This should also apply to employees of all fitness services.
Confidentiality.	Update the current confidentiality clause.
Electronic signatures.	Requirement for membership agreements to be signed to be updated to allow electronic signatures.
Electronic copies.	Update to include reference to electronic copies of the membership agreement and any separate direct debit agreement.

<b>Recommendation</b>	<b>Details</b>
Twelve month limit on prepaid membership.	Retain the twelve month limit on prepaid memberships and update to ensure suppliers are required to inform clients of any automatic renewal with enough notice to allow the client to comply with any notice period in the contract if they wish to cancel.
Prepayment where centre is leased.	Expand to include situations where a supplier has given notice to its landlord that they will not be renewing a lease.
Unfair terms.	Include additional membership agreement provisions to help address unfair terms and update the guide with specific examples of what Consumer Protection would consider unfair contract terms in a fitness service membership agreement.
Complaints.	Retain complaint handling provisions in the code but include reference to electronic lodgement of complaints and suppliers providing a link to the current code.

## APPENDIX G LIST OF FITNESS INDUSTRY PUBLIC CONSULTATION QUESTIONS

TABLE 45 LIST OF FITNESS INDUSTRY PUBLIC CONSULTATION QUESTIONS

#	Questions	Topic	Code Clause	Paragraph
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	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?	Who and what does Code apply to?	2, 3, 4	4.1.2.
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	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?	Misleading and deceptive conduct.	5, 6, 8	4.2.1.
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?			
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.			
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?	High pressure selling techniques, harassment, unconscionable conduct.	7	4.2.2.
8	Have you ever experienced high pressure selling techniques, harassment or unconscionable conduct in the fitness industry?			
9	Should clause 7 in the 2018 Interim Code be deleted, and reliance placed solely upon the unconscionable conduct provisions in the ACL?			



#	Questions	Topic	Code Clause	Paragraph
10	<p>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?</p> <p>Please provide details in your response.</p>			
11	<p>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?</p>	Confidentiality.	9	4.2.3.
12	<p>Should clause 9 in the 2018 Interim Code be deleted, and reliance placed solely upon the Privacy Act 1988 (Cwlth) to govern client confidentiality?</p> <p>Please provide details in your response.</p>			
13	<p>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?</p>	Free or discounted services.	10	4.2.4.
14	<p>Should clause 10 of the 2018 Interim Code be deleted, and reliance placed solely upon the misleading and deceptive conduct provisions in the ACL?</p> <p>Please provide details in your response.</p>			
15	<p>In your experience, does the fitness industry generally disclose details of membership agreements, rules and 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?</p>	Disclosure of information.	11, 12	4.3.1.
16	<p>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?</p>			
17	<p>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?</p> <p>Please provide details in your response.</p>			

#	Questions	Topic	Code Clause	Paragraph
18 19	<p>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?</p> <p>Are these membership agreements fair, reasonable, and transparent in the fees payable and terms and conditions applicable?</p> <p>Please provide details in your response.</p>	Membership agreements.		4.4
20 21	<p>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?</p> <p>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?</p> <p>Please provide details in your response.</p>	Cooling off period & Termination during this period.	13, 19	4.4.1.
22 23 24 25	<p>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?</p> <p>Are the provisions restricting prepayment of membership fees to no more than 12 months in advance working well for consumers and the fitness industry?</p> <p>How are fitness membership payment plans currently structured and how common are 12-month fitness membership agreements?</p> <p>Are the provisions preventing a fitness centre from selling a membership agreement which extends beyond the expiry of its lease working well for consumers?</p> <p>Please provide details in your response.</p>	Form & content of membership agreements.	14, 15, 16, 17, 18, 20	4.4.2.
26	<p>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?</p>	Consumer complaints about cancellation issues.		4.4.2.

#	Questions	Topic	Code Clause	Paragraph
	Please provide details in your response.			
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?	Consumer complaints about general membership issues.		4.4.2.
28	What avenues are currently available to, or should be made available to, consumers who suffer financial losses when fitness centres close down?  Please provide details in your response.			
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	In your experience, does the Western Australian fitness industry demonstrate clear, written and effective complaints handling procedures for consumer complaints?	Complaints by clients.	21	4.5.1.
31	Does the fitness industry make every attempt to resolve each consumer complaint quickly and fairly?			
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.			
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.

## APPENDIX H LIST OF CONSUMER SURVEY QUESTIONS

The following questions are from our second consumer survey.

TABLE 46 SECOND CONSUMER SURVEY QUESTIONS

Question	Yes	No	Not Applicable
Did you know there was a Fitness Code?	52	115	
Have you ever signed up to a gym or fitness service?	162	5	
Have you ever felt uncomfortable or under pressure when signing up to a gym or fitness service membership?	94	73	
Did you get a chance to read and understand the membership document when you signed up?	101	66	
Were you made aware of all fees and charges that you would have to pay as part of the membership?	121	46	
Did you know there is a cooling off period when signing up to a gym or fitness service membership?	67	100	
If you raised a complaint with the gym/fitness service, was it handled in a timely manner?	43	36	88
Was the complaint handled successfully?	56	31	78
Have you ever tried to cancel a membership and had any issues?	83	84	
Was the cancellation acted on immediately?	55	75	37
Did joining a gym or fitness service cost you more than you expected?	90	77	
Did you experience any unexpected costs when cancelling your gym or fitness membership?	90	77	
What do you think would be a good length of time for a cooling off period?	10 days	14 Days	Greater than 1 month
	29	49	87

## APPENDIX I QLD EXAMPLE OF FEE DISCLOSURE

Example of how the QLD fitness code fee disclosure requirements are met on an online membership form by a fitness service in Queensland.

FIGURE 3 EXAMPLE OF FEE DISCLOSURE FOR ONLINE MEMBERSHIP.

### Direct Debit Request

Register to become a customer

START
CUSTOMER DETAILS
PAYMENT
TERMS

National Passport membership 12 months ▼

**Description**

Join World Gym National Passport membership and gain access to all World Gyms Nationwide for only \$18.95/week.

This Membership is a minimum of 12 Months. From 11 months onwards, 30 days written notice, given in person at facility, is required to cancel. Cancellation must be done at facility with a staff member.

A \$65 admin fee will be collected at the gym.

**Special Conditions**

Cancellation prior to expiry of minimum term attracts a cancellation fee of \$200.00 and cancellation must be provided in writing. Cancellation must be done at facility with a staff member.

If you permanently relocate your residence to a location that is more than 20km away from the facility, and a further 20km from your current address, a reduced cancellation fee of \$100.00 is applicable. The reduced cancellation fee of \$100.00 is only applicable upon evidence of relocation. Acceptable evidence includes lease of residential property, mortgage documents, change of address on drivers licence and electricity/gas bill. All memberships fees are due and payable under the agreement until such time as member provides acceptable evidence and pays reduced cancellation fee.

\$18.95/Week

Minimum Payment Period	12 Months
Weekly Payment Amount	\$18.95
First Payment Date	12/12/2018
Total First Payment	\$28.95
Total Value of Contract	\$995.40

- You are committing to Weekly payments of \$18.95 for a minimum of 12 months.
- A Debitsuccess Establishment Fee of \$10.00 will be collected along with your first payment.
- This is an ongoing agreement.
- A Payment Dishonour Fee of \$10.00 will be charged for each dishonoured payment.

**Department of Mines, Industry  
Regulation and Safety**

**Consumer Protection:**

**1300 304 054**

Gordon Stephenson House Level 2/140 William Street  
Perth Western Australia 6000

Hours 8.30 am – 5.00 pm Mon, Tue, Wed and Fri  
9.00 am – 5.00 pm Thurs

Locked Bag 100 East Perth WA 6892

Administration: 08 6251 1400

Email: [consumer@dmirs.wa.gov.au](mailto:consumer@dmirs.wa.gov.au)

[www.dmirs.wa.gov.au](http://www.dmirs.wa.gov.au)

**Regional Offices**

Goldfields/Esperance ..... (08) 9021 9494

Great Southern ..... (08) 9842 8366

Kimberley ..... (08) 9191 8400

Mid-West ..... (08) 9920 9800

North-West ..... (08) 9185 0900

South-West ..... (08) 9722 2888

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