Queensland

Explanatory Notes for SL 2003 No. 65

Fair Trading Act 1989

FAIR TRADING (CODE OF PRACTICE—FITNESS INDUSTRY) REGULATION 2003

GENERAL OUTLINE

Objectives of the regulation

The *Fair Trading (Code of Practice – Fitness Industry) Regulation (No..) 2003* (the Code) is a mandatory code of practice made under section 88A of the Fair Trading Act 1989. Section 88A of that Act provides that a regulation may prescribe a code of practice for fair dealing between a particular type of supplier and consumer or particular type of person in relation to consumers.

The Code has been developed to ensure consumer protection by regulating the contractual conduct of providers of fitness services. Gym and fitness centre closures in recent years have resulted in consumers losing significant amounts of money in prepaid memberships, including memberships of up to five years in length.

The Office of Fair Trading regularly receives complaints from consumers who are unsure of their contractual rights and obligations with fitness centres and gyms. Consumers have also complained about unfair trading practices such as false and misleading advertising.

The policy objectives of the Code are to:

- Ensure appropriate standards of trading are maintained in the fitness industry;
- Promote client confidence in the fitness industry;

- Ensure fitness services are supplied to clients in an ethical and professional way, taking into account the interests of clients;
- Establish rights and obligations between suppliers and clients for:
  - fitness services offered and supplied; and
  - the disclosure of relevant information to clients entering into agreements for fitness services.

These objectives will be achieved by including in the Code the following key features to ensure fair dealing between fitness suppliers and consumers:

- introduction of a 48 hour cooling-off period for clients entering into membership agreements;
- an obligation on suppliers to disclose all fees in writing to prospective clients before a membership agreement is made;
- a requirement for membership agreements to be in writing and signed by the client and the supplier;
- a prohibition on a supplier receiving more than one years fees, where membership agreements are for longer than one year;
- where a membership agreement is made before the fitness centre opens, a prohibition on suppliers collecting any fees until the centre commences to operate - the client's cooling-off period commences from the time the centre opens;
- provision for membership agreements to be terminated during the cooling-off period or because a client suffers permanent incapacity. Fees paid will be refunded less an administration fee (capped at the lesser of $75 or 10% of the membership fee) and fees for services already provided; and
- the termination of membership agreements by written notice from a client.

Compliance with the Code will be mandatory for all suppliers of fitness services. Breach of the Code will expose a supplier to enforcement provisions contained in the Fair Trading Act 1989, including enforceable undertakings, injunctions and orders for compensation.

Administrative Cost

Funding of $200,000 for 2002-03 and $400,000 ongoing has been allocated to support the implementation of new marketplace regulatory regimes, including the Code of Practice for the fitness industry.

Fundamental Legislative Principles

The Code does not infringe Fundamental Legislative Principles.

Consultation - Community

In 1995, the former Office of Consumer Affairs sought to develop a means of regulating the fitness industry to reduce consumer detriment and improve service delivery. Industry stakeholders gave broad support for the development of a code of practice for the industry.

In April 2000, a Discussion Paper which included a draft code (the 2000 draft Code) was distributed to over 1,000 members of the fitness industry. Fitness Queensland, the key industry stakeholder group, was consulted extensively throughout the development of the Code.

Fitness Queensland was initially concerned about the removal of a requirement from the 2000 draft Code for mandatory qualifications to be held by employees at fitness centres. This provision was removed because strong concerns were raised by the Department of Employment and Training about the impact of the proposal on employment in fitness centres and because the Office of Rural Communities advised many gyms and fitness clubs in rural and regional areas would not be able to meet such a requirement. During consultation just prior to the making of the Code, Fitness Queensland expressed their support for the final version of the Code which does not contain any requirement for mandatory qualifications.

Government

During 2000, a National Competition Policy (NCP) assessment of the 2000 draft Code was conducted by an Interdepartmental Working Party (the IWP) which comprised representatives from the Department of the Premier and Cabinet, Queensland Treasury, Office of Fair Trading and the former Department of Communication and Information, Local Government and Planning. The IWP was assisted by a reference group of

stakeholders. The final version of the Code implements the majority of the recommendations made by the IWP.

As the 2000 draft Code was subject to some policy refinements after the NCP assessment in 2000, a supplementary NCP assessment of the Code was conducted and concluded that the benefits to consumers, especially vulnerable consumers, outweigh the costs that will be imposed on business through the introduction of the Code.

NOTES ON PROVISIONS

Clause 1 sets out the short title of the regulation.

Clause 2 provides that the regulation commences on 1 July 2003.

Clause 3 provides that the regulation contained in the schedule is a code of practice prescribed under section 88A of the *Fair Trading Act 1989*.

SCHEDULE

FITNESS INDUSTRY CODE OF PRACTICE

PART 1—PRELIMINARY

Clause 1 provides the short title of the code of practice is the Fitness Industry Code of Practice (“the Code”).

Clause 2 provides for the objects of the Code.

Clause 3 provides that the dictionary, contained in the Schedule to the Code, defines particular words used in the Code.

Clause 4 defines the phrase “fitness service”.

Clause 4(1) defines a “fitness service” as including an exercise consultation, a supervised or unsupervised individual fitness program, a group exercise program, a fitness program and fitness equipment at a fitness centre for use by clients. For the purposes of the Code, the phrase

fitness equipment is defined in the Schedule to mean apparatus used in the supply of fitness services.

Clause 4(2) lists services not included in the definition of "fitness service".

Clause 5(1) provides that fitness suppliers must comply with the Code.

Clause 5(2) provides that suppliers must comply with the Code, even if a client asks a supplier to do something contrary to the Code, or if the supplier is employed by someone else, if the suppliers' employer asks the supplier to do something contrary to the Code.

PART 2—GENERAL RULES OF CONDUCT

Clause 6(1) provides that a supplier of a fitness service must not falsely claim to be a member of an organisation or association or be endorsed by an organisation or association.

Clause 6(2) provides that a supplier of fitness services must take reasonable steps to ensure an employee of the supplier does not falsely claim to be a member of an organisation or association or be endorsed by an organisation or association.

Clause 7(1) provides that a supplier at a fitness centre must not engage in high pressure tactics, harassment or unconscionable conduct for the purpose of entering into a membership agreement with a client. Examples are provided to assist with interpretation. These include examples of harassment and unconscionable conduct.

Clause 7(2) provides a supplier at a fitness centre must take reasonable steps to ensure an employee of the supplier does not engage in high pressure tactics, harassment or unconscionable conduct for the purpose of entering into a membership agreement with a client. Examples are provided to assist with interpretation. These include examples of both harassment and unconscionable conduct.

Clause 8(1) provides that a supplier at a fitness centre must not solicit clients through false or misleading advertisements or other communications the supplier knows are false or misleading. An example is provided to assist with interpretation.

Clause 8(2) provides that a supplier must not make deliberately misleading or false comparisons with a fitness service supplied by another supplier.

Clause 8(3) provides that a supplier at a fitness centre must take reasonable steps to ensure an employee of the supplier does not solicit clients through false or misleading advertisements or other communications the supplier knows are false of misleading. An example is provided to assist with interpretation.

Clause 8(4) provides that a supplier must take reasonable steps to ensure an employee of the supplier does not make deliberately misleading or false comparisons with a fitness service supplied by another supplier.

Clause 9(1) provides that a supplier at a fitness centre must display a sign complying with the section.

Clause 9(2) states the sign should be in a conspicuous position and clearly visible. Examples are provided to assist with interpretation.

Clause 9(3) and 9(4) outlines the two statements to be included in the sign.

Clause 9(5) permits substantial compliance with clauses 9 and 3.

Clause 9(6) requires that the two statements referred to in clauses 3 and 4 must be easily legible, in a colour contrasting with the back of the sign and conspicuous to a person looking at the sign.

PART 3—DISCLOSURE AND CONFIDENTIALITY

Clause 10 provides that a supplier must ensure enough information is available to a client about a fitness service to enable the client to make an informed decision about using the service and that promotional material about a fitness service is truthful, accurate and unambiguous and does not encourage unrealistic expectations of outcomes attainable from the service.

Clause 11 provides that a supplier must have a copy of the Code available for perusal by a client and if asked by a client promptly tell the client where to obtain a copy of the Code. A footnote to the clause directs that the Code may be purchased from Goprint or accessed at www.legislation.qld.gov.au.

Clause 12(1) provides that before a client enters into a membership agreement with a supplier, the supplier must give the client a copy of the membership agreement, the rules of the fitness centre and other information to enable the client to make an informed decision about entering into the agreement. If the fitness centre is open when the client enters the agreement the supplier must also allow the client to inspect the centre.

Clause 12(2) provides that a supplier must have copy of the rules available at the fitness centre for perusal by a client.

Clause 12(3) provides that if a rule of the fitness centre is changed, or added to the rules of the centre, the change to the rule or the new rule must be displayed for two months in a conspicuous position so it is clearly visible to a person who enters the fitness centre.

Clause 13(1) provides that a supplier must not use or disclose confidential information about a client obtained through the supplier's business of supplying fitness services to a client.

Clause 13(2) provides that clause 13(1) does not apply to information used or disclosed for a purpose authorised in writing by the client or that must be lawfully used or disclosed. An example of compliance with legal process is provided to assist with interpretation of the clause.

Clause 13(3) provides that a supplier must take reasonable steps to ensure an employee of the supplier does not use or disclose confidential information about a client obtained through the supplier's business of supplying fitness services to the client.

Clause 13(4) defines for the purpose of clause 13 a "client" to include a former client and a "supplier" to include a former supplier.

PART 4—MEMBERSHIP AGREEMENTS

Division 1—Interpretation

Clause 14(1)(a) outlines when the "cooling-off period" starts if the client enters the agreement on a day before the fitness centre opens.

Clause 14(1)(b) outlines when the "cooling-off period" starts if the client enters into a membership agreement with a supplier after a fitness centre opens.

Clause 14(2) provides that the "cooling-off period" ends 48 hours after the cooling-off period starts.

Division 2—Supplier's obligations before entering into membership agreements

Clause 15(1) provides that before a client enters into a membership agreement with a supplier, the supplier must give the client a clearly expressed written statement containing:

- each fee the client must pay to the supplier under the membership agreement;
- for what service or services each fee is payable;
- when each fee is payable; and
- the total amount of fees payable for the term of the agreement.

Clause 15(2) provides for the mandatory disclosure of fees listed in paragraphs (a) through to (i) as noted below.

Clause 15(2)(a) provides for the disclosure of the initial fee for joining the fitness centre.

Clause 15(2)(b) provides for the disclosure of the fee for membership.

Clause 15(2)(c) provides for the disclosure of the fee for each visit to the fitness centre.

Clause 15(2)(d) provides for the disclosure of the fee for services provided at the centre.

Clause 15(2)(e) provides for the disclosure of any administration fee if the client terminates the agreement during the cooling-off period or because of the client's permanent sickness or physical incapacity.

Clause 15(2)(f) provides for the disclosure of the fee for terminating the agreement if the client terminates other than during the cooling-off period or because of the client's permanent sickness or physical incapacity.

Clause 15(2)(g) provides for disclosure of any fee to transfer membership to another fitness centre or another person.

Clause 15(2)(h) provides for disclosure of any fee to suspend membership.

Clause 15(2)(i) provides for the disclosure of any other fee payable or that may be payable.

Clause 15(3) provides for disclosure of usual fees and any differences in the quality of services or restrictions on services when a supplier offers a free or discounted service under a membership agreement.

Division 3—Requirements for membership agreements

Clause 16(1) provides that a supplier must ensure that a membership agreement is in writing, easily legible and clearly expressed and is signed by the client and by or for the supplier.

Clause 16(2) requires a supplier to give a copy of the membership agreement to the client immediately after the agreement is entered.

Clause 17 provides that a supplier entering a membership agreement with a client must ensure the agreement states:

- the supplier's name and address;
- the supplier's and client's rights and obligations (including for example, a requirement that a client inform the supplier of any risk to the client's health by participating in a fitness service at the supplier's fitness centre);
- each fee the client must pay to the supplier under the membership agreement;
- for what service or services each fee is payable;
- if there are no fees payable for a part of the term of the agreement, that part of the term;
- when each fee is payable;
- the total amount of fees payable for the term of the agreement;
- that the agreement is subject to a cooling-off period;
- when the cooling-off period starts and when it ends;

- the proposed opening day for a fitness centre that has not yet opened;
- that the client is entitled to terminate the agreement because of the client's permanent sickness or physical incapacity;
- the circumstances under which the client is entitled to terminate the agreement before the membership period ends other than during the cooling-off period or because of the client's permanent sickness or physical incapacity;
- how the client terminates the agreement; and
- the circumstances under which the supplier may terminate the agreement.

Clause 18 provides that a supplier must take reasonable steps to ensure a service offered under a membership agreement with a client is available to the client.

Division 4—Types of membership agreements

Clause 19(1) provides that clause 19 applies if a supplier enters into a membership agreement with a client for a term of more than 1 year.

Clause 19(2) provides that a supplier must not accept prepayment from the client of fees for more than 1 year of the term.

Clause 20(1) provides that a supplier who enters into an on-going agreement with a client must ensure there is a condition in the membership agreement stating that the membership agreement is an on-going agreement, that the client initials and dates the condition at the time the client signs the membership agreement and the supplier, at least two months before the end of the initial term of the agreement gives the client written notice stating when the initial term ends and that the agreement continues after the end of the initial term and ends only if and when the client terminates the agreement.

Clause 20(2) defines the term "on-going agreement" for the purposes of clause 20 to mean a membership agreement that has an initial term and that agreement continues after the end of the initial term and ends only if and when the client terminates the membership agreement.

Division 5—Entering into membership agreements before fitness centre opens

Clause 21 provides that a membership agreement may be entered before a fitness centre opens.

Clause 22 provides that no fee is payable by a client or collectable by the supplier until the centre opens.

Clause 23(1) provides that a supplier before entering into a membership agreement with a client, must advise the client of the proposed opening day and that the client may inspect the centre during the cooling-off period.

Clause 23(2) provides that if a different opening day is made, the supplier must advise the client of this day and that the supplier must allow the client to inspect the centre during the cooling-off period.

Clause 23(3) requires a supplier to permit a client to inspect the centre during the cooling-off period.

Division 6—Terminating membership agreements

Clause 24 provides for the termination of a membership agreement during the cooling-off period.

Clause 24(1) provides that a client may terminate a membership agreement with a supplier during the cooling-off period.

Clause 24(2) provides that the client terminates the agreement by giving the supplier a written notice of termination and evidence of the agreement.

Clause 24(3) provides that the supplier must refund to the client the fees paid by the client to the supplier, less the fee for a service if the supplier has supplied a fitness service to the client and the client has not paid for the service, and less the supplier's administration fee.

Clause 24(4) provides that the supplier may only deduct from the refund the unpaid fee if the supplier has disclosed the fee in the written statement given to the client before the client entered the agreement.

Clause 24(5) provides that the maximum administration fee a supplier can charge is the lesser of either $75 or 10% of the membership fee.

Clause 24(6) provides that the supplier must pay the refund to the client within 21 days of the client terminating the agreement.

Clause 25 provides for the termination of a membership agreement due to sickness or incapacity. For the purposes of the Code, the phrase "permanent sickness or physical incapacity" is defined in the dictionary to mean the greater of the remainder of the term of the membership agreement or 5 years.

Clause 25(1) provides a client may terminate a membership agreement with a supplier at any time if the client cannot use a fitness service supplied under the agreement because of the client's permanent sickness or physical incapacity.

Clause 25(2) provides that the client terminates the agreement by giving the supplier a written notice of the termination and a medical certificate stating that the client cannot use the fitness service because of the client's permanent sickness or physical incapacity.

Clause 25(3) provides that the supplier must refund to the client a proportion of the fees paid by the client to the supplier representing the unused part of the agreement less the fee for the service if the supplier has supplied a fitness service to the client and the client has not paid for the service and the supplier's administration fee.

Clause 25(4) provides that the supplier may only deduct from the refund the unpaid fee if the supplier has disclosed the fee in the written statement given to the client before the client entered the agreement.

Clause 25(5) provides that the maximum administration fee a supplier can charge is the lesser of $75 or 10% of the membership fee.

Clause 25(6) provides that the supplier must pay the refund to the client within 21 days of the client terminating the agreement.

Clause 26 provides for the termination of membership agreements other than those for agreements terminated during the cooling-off period (clause 24) or because of permanent sickness or physical incapacity (clause 25).

Clause 26(1) provides that a client may terminate a membership agreement with a supplier other than under clauses 24 or 25.

Clause 26(2) provides that the client terminates the agreement by giving the supplier written notice of the termination.

Clause 26(3) provides that the maximum termination fee the supplier can charge the client is the termination fee stated in the agreement.

Clause 26(4) provides that the supplier must make every reasonable effort to respond quickly and fairly to the client's termination of the agreement.

PART 5—COMPLAINTS HANDLING PROCEDURES

Clause 27 provides that a supplier must make every reasonable effort to resolve quickly and fairly a complaint made by a client about the supply of a service offered under a membership agreement with the supplier.

Clause 28(1) provides that a supplier supplying a fitness service to a client under a membership agreement must make available to the client a complaints handling procedure either in the supplier's business or by an industry organisation.

Clause 28(2) provides that the complaints handling procedure must be simple and easy to use and comply with Australian Standard Number: AS 4269-1995 (Complaints handling).

SCHEDULE

The Schedule to the Code contains the dictionary which defines words and phrases for the purposes of the Code.

DICTIONARY

"Administration fee" is defined by reference to clause 15(2)(e).

"Casual client" is defined to mean a person who has not entered into membership agreement with a supplier and pays the supplier for a fitness service at a fitness centre each time the service is used.

"Client" is defined to mean a person who is not a casual client and either is supplied with a fitness service by a supplier or enters into a membership agreement with a supplier or makes enquiries with a supplier or employee of a supplier at a fitness centre about entering into a membership agreement with the supplier.

"Cooling-off period" is defined by reference to clause 14.

"Fitness centre" is defined to mean an indoor facility owned, leased or used by a supplier at which the supplier provides fitness equipment and primarily conducts the business of supplying fitness services.

“Fitness equipment” is defined to mean apparatus used in the supply of fitness services, including, for example, free weights and rowing machines.

“Fitness service” is defined by reference to clause 4.

“Membership agreement” is defined to mean an agreement between a supplier and a client for the supply of fitness services by the supplier to the client at a fitness centre.

“Membership fee” is defined by reference to clause 15(2)(b).

“New opening day” is defined to mean the day a fitness centre opens if that day is different from the proposed opening day.

“Opens” means when the fitness centres starts operating.

“Permanent sickness or physical incapacity” of a client is defined to mean the client is sick or physically incapacitated for the greater of the remainder of the term of the membership agreement or 5 years.

“Proposed opening day” means the day advised by a supplier to a client before the fitness centre opens as the day the centre would open.

“Supplier” is defined as a person who is in the business of supplying fitness services. A note advises that pursuant to section 36 of the Acts Interpretation Act 1954, a “person” is defined to include an individual and a corporation. To assist with interpretation the definition includes examples of a supplier and persons who are not suppliers.

“Termination fee” is defined by reference to clause 15(2)(f).

ENDNOTES

1. Laid before the Legislative Assembly on . . .
2. The administering agency is the Department of Tourism, Racing and Fair Trading.

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