

Passed by both Houses



New South Wales

Fitness Services (Pre-paid Fees) Bill 2000

Contents

	Page	
Part 1	Preliminary	
1	Name of Act	2
2	Commencement	2
3	Definitions	2
4	When does a supplier commence to provide an agreed service?	3
5	Application of Act	4
6	Contracting out of Act prohibited	4
7	Act to bind Crown	4
Part 2	Pre-payment of fees	
8	Pre-payment of fees for period of more than 12 months	5
9	Pre-payment of fees where fitness centre leased	5
10	Pre-payment of fees where agreed service not provided within 3 months of payment	6
11	Pre-paid fees to be held in trust account where supplier has not commenced to provide agreed service	7

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Contents

	Page
Part 3	
Miscellaneous	
12 Search warrants	9
13 Application of certain enforcement provisions in Fair Trading Act 1987	9
14 Offences by corporations: liability of directors and managers	10
15 Proceedings for offences	10
16 Penalty notices	11
17 Civil consequences of contravention of Act	12
18 Regulations	13
19 Savings and transitional provisions	13
20 Amendment of other Acts	13
21 Review of Act	13
Schedules	
1 Savings and transitional provisions	15
2 Amendment of other Acts	16

I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2000*



New South Wales

Fitness Services (Pre-paid Fees) Bill 2000

Act No , 2000

An Act to regulate the pre-payment of fees for membership of fitness centres and for the provision of other fitness services; to amend consequentially the *Fair Trading Act 1987*, the *Fines Act 1996* and the *Search Warrants Act 1985*; and for other purposes.

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

Clause 1 Fitness Services (Pre-paid Fees) Bill 2000

Part 1 Preliminary

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Fitness Services (Pre-paid Fees) Act 2000*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

agreed service, in relation to a fitness service agreement, means the fitness service that the supplier agreed to provide to the consumer under the agreement.

consumer of a fitness service means a person who has agreed to pay for the service under a fitness service agreement (whether or not the person is provided with the service).

Director-General means the Director-General of the Department of Fair Trading.

exercise a function includes perform a duty.

fitness centre means premises at which, or in connection with which, the business of providing one or more fitness services to consumers under fitness service agreements is carried on (or proposed to be carried on), whether or not any other business is also carried on (or proposed to be carried on) at, or in connection with, the premises.

fitness service means the provision of any one or more of the following:

- (a) a fitness assessment,
- (b) an exercise program or other program for promoting fitness,
- (c) an exercise class,
- (d) the use of exercise equipment,
- (e) any other facility or service prescribed by the regulations,

- (f) membership rights in relation to the use of premises for anything referred to in paragraphs (a)–(e).

fitness service agreement means an agreement (whether oral or in writing) under which a person agrees to provide any fitness service to another person for a fee.

function includes a power, duty or authority.

investigator has the same meaning as it has in the *Fair Trading Act 1987*.

pre-paid fee, in relation to any fitness service, means a fee (or part of a fee) for the provision of the service that is paid or payable under a fitness service agreement before any or all of the agreed service is provided.

supplier of a fitness service means a person who has agreed to provide the service under a fitness service agreement (whether or not the person provides the service).

- (2) For the purposes of this Act, a supplier of a fitness service under a fitness service agreement is taken to have sought, accepted or received a fee if that fee is sought, accepted or received by another person on the supplier's behalf.
- (3) For the purposes of this Act, a supplier of a fitness service under a fitness service agreement who employs or otherwise engages another person to provide all (or part) of the service to the consumer of the service is taken not to have provided the service (or part of the service) if that other person does not provide the service (or part of the service) to the consumer.
- (4) Notes included in this Act do not form part of this Act.

4 When does a supplier commence to provide an agreed service?

For the purposes of this Act, a supplier of a fitness service commences to provide an agreed service to a consumer on the first day on which the supplier provides (or is able to provide) to the consumer all of the fitness service contemplated by the fitness service agreement.

5 Application of Act

This Act does not apply to the following:

- (a) the leasing of fitness equipment,
- (b) a fitness service provided by a medical practitioner in the practice of his or her profession,
- (c) a fitness service provided by or on behalf of:
 - (i) the New South Wales Institute of Sport constituted by the *Institute of Sport Act 1995*, or
 - (ii) the Australian Institute of Sport referred to in section 9 of the *Australian Sports Commission Act 1989* of the Commonwealth,
- (d) any other person or body belonging to a class of supplier of fitness services that is specified by the regulations in such circumstances as may be specified by the regulations,
- (e) any other fitness service, or fitness services, belonging to a class of fitness services that is specified by the regulations in such circumstances as may be specified by the regulations.

6 Contracting out of Act prohibited

A provision of an agreement or other instrument (whether in writing or not and whether entered into before or after the commencement of this section) by which a person seeks to avoid, modify or restrict the operation of this Act is void.

7 Act to bind Crown

- (1) This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.
- (2) However, nothing in this Act renders the Crown liable to prosecution for an offence.

Part 2 Pre-payment of fees

8 Pre-payment of fees for period of more than 12 months

- (1) A supplier who agrees to provide any fitness service under a fitness service agreement must not seek or accept a pre-paid fee for the provision of the service for a period that exceeds 12 months.

Maximum penalty: 1,000 penalty units.

- (2) For the purposes of subsection (1), it does not matter whether the period during which the fitness service is to be (or might be) provided under a fitness service agreement is to be ascertained by reference to:
- (a) consecutive days, weeks or months, or
 - (b) days, weeks or months in total.
- (3) Nothing in subsection (1) prevents a supplier of a fitness service from seeking or accepting a pre-paid fee for a fitness service to be provided under a fitness service agreement for a period that exceeds 12 months (the *extended period*) if:
- (a) the fee is an instalment payable under the agreement, and
 - (b) the amount of the fee, together with the total amount of any other fee instalments payable under the agreement during the 12 month period immediately following the date the fee is sought or accepted, bears the same proportion to the total fees payable for the extended period under the agreement as the period of 12 months bears to the extended period.

Note. Assume that a supplier agrees to provide a fitness service under a fitness service agreement for a period of 3 years for \$3000 payable by instalments. As the period of 12 months represents a third of the period of 3 years, subsection (3) would preclude the supplier from seeking or accepting fee instalments in any 12 month period during the term of that agreement for an amount greater than a third of \$3000 (namely, \$1000).

9 Pre-payment of fees where fitness centre leased

- (1) A supplier who agrees to provide any fitness service at, or in connection with, a fitness centre that is leased must not seek or accept a pre-paid fee for the service under a fitness service agreement for a period that exceeds the unexpired term of the lease unless:
- (a) the supplier has first notified the consumer of the service in writing of the date on which the lease is to expire, and

- (b) the consumer of the service has acknowledged in writing that the consumer has been so notified.

Maximum penalty: 1,000 penalty units.

- (2) In this section, *lease* includes a licence to enter and use premises granted to a person for a limited period specified by agreement (whether oral or in writing).

10 Pre-payment of fees where agreed service not provided within 3 months of payment

- (1) A supplier must not seek or accept a pre-paid fee for any fitness service to be provided under a fitness service agreement at, or in connection with, a fitness centre if:
 - (a) the supplier intends at the time the fee is sought or accepted not to commence to provide the agreed service within 3 months after the date on which the fee is sought or accepted, or
 - (b) there are reasonable grounds, of which the supplier is aware, or ought reasonably to be aware, at the time the fee is sought or accepted for believing that the supplier will not be able to provide the agreed service within 3 months after the date on which the fee is sought or accepted.

Maximum penalty: 1,000 penalty units.

- (2) A supplier who accepts a pre-paid fee for any fitness service to be provided under a fitness service agreement at, or in connection with, a fitness centre must refund that fee to the consumer of the service within the prescribed period if the supplier does not commence to provide the agreed service within 3 months after the date on which payment is accepted.

Maximum penalty: 1,000 penalty units.

- (3) A fitness service agreement under which a fitness service is to be provided at, or in connection with, a fitness centre is, by operation of this subsection, terminated on and from the day that the period of 3 months expires after the day on which the agreement was entered if the supplier does not commence to provide the agreed service to the consumer of that service within that period.
- (4) A supplier cannot be convicted of an offence under both subsection (1) and section 53 of the *Fair Trading Act 1987* in respect of seeking or accepting a pre-paid fee on the same occasion.

-
- (5) In this section, *prescribed period* means:
- (a) the period of 7 days immediately after the expiry of 3 months after the date on which payment is accepted, or
 - (b) such other period as may be prescribed by the regulations immediately after the expiry of 3 months after the date on which payment is accepted.

11 Pre-paid fees to be held in trust account where supplier has not commenced to provide agreed service

- (1) If a supplier receives money for any pre-paid fee for any fitness service to be provided under a fitness service agreement at, or in connection with, a fitness centre, the supplier must:
- (a) hold the money exclusively for the consumer of the service until the supplier commences to provide the agreed service, and
 - (b) ensure that the requirements of this section and the regulations under this section are complied with in relation to the money.
- (2) Money received on behalf of a consumer of a fitness service by the supplier of the service must be paid to the credit of a general trust account at a branch of an authorised deposit-taking institution in New South Wales and be kept in accordance with the regulations.
- Note.** Section 21 (1) of the *Interpretation Act 1987* defines **deposit-taking institution** to mean an authorised deposit-taking institution within the meaning of the *Banking Act 1959* of the Commonwealth.
- (3) A trust account under this section must be kept exclusively for the purpose of money received on behalf of all consumers of fitness services to be provided by the supplier in respect of whom subsection (1) applies.
- (4) A supplier in respect of whom subsection (1) applies must keep accounting records in respect of money received on behalf of a consumer of a fitness service.
- (5) Such accounting records must:
- (a) disclose at all times the true position concerning the money received, and
 - (b) be kept at the principal place of business of the supplier in New South Wales, and
 - (c) be otherwise kept in accordance with the regulations.

Clause 11 Fitness Services (Pre-paid Fees) Bill 2000

Part 2 Pre-payment of fees

- (6) The regulations may make provision for the administration of trust accounts under this section and, in particular, the keeping of documents and records by suppliers of fitness services.
- (7) A supplier of a fitness service must not contravene a provision of this section or the regulations under this section.
Maximum penalty (subsection (7)): 1,000 penalty units.

Part 3 Miscellaneous

12 Search warrants

- (1) An investigator may apply to an authorised justice for a search warrant if the investigator has reasonable grounds for believing that a provision of this Act or the regulations has been or is being or is about to be contravened in or about any premises.
- (2) An authorised justice to whom an application is made under this section may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising the investigator named in the warrant to enter the premises and to search the premises for evidence of a contravention of this Act or the regulations.
- (3) Part 3 of the *Search Warrants Act 1985* applies to a search warrant issued under this section.
- (4) A person must not, without reasonable excuse, obstruct or hinder a person executing a search warrant issued to an investigator.
Maximum penalty: 1,000 penalty units.
- (5) In this section:
authorised justice has the same meaning as it has in the *Search Warrants Act 1985*.
premises has the same meaning as it has in the *Search Warrants Act 1985*.

13 Application of certain enforcement provisions in Fair Trading Act 1987

- (1) A reference in Division 3 (Investigators) of Part 2 of the *Fair Trading Act 1987* to any other legislation administered by the Minister is taken to include this Act and the regulations made under this Act.
Note. Investigation powers are provided by Division 3 of Part 2 of the *Fair Trading Act 1987*. That Division provides for the appointment of investigators and their powers of entry and inspection in relation to the administration of that Act and any other legislation administered by the Minister for Fair Trading.
- (2) Section 73A (Enforcement of undertakings) of the *Fair Trading Act 1987* applies in connection with a matter in relation to which the Director-General has a function under this Act as if the function were a function under the *Fair Trading Act 1987*.

- (3) Section 86A (Public warning statements) of the *Fair Trading Act 1987* extends to the provision of fitness services and to suppliers of such services.

14 Offences by corporations: liability of directors and managers

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.
- (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or has been convicted under the provision.
- (3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation under this Act or the regulations.

15 Proceedings for offences

- (1) Proceedings for an offence under this Act or the regulations may be taken and prosecuted only by the Director-General or, in the name of the Director-General, by a person acting with the authority of the Director-General.
- (2) Proceedings for an offence under this Act or the regulations may be dealt with:
- (a) summarily before a Local Court constituted by a Magistrate sitting alone, or
 - (b) summarily before the Supreme Court in its summary jurisdiction.
- (3) In proceedings for an offence under this Act or the regulations, an authority to prosecute purporting to have been signed by the Director-General is evidence of that authority without proof of the signature of the Director-General.
- (4) If proceedings are brought in a Local Court, the maximum monetary penalty that the Local Court may impose for an offence is 100 penalty units (or such other amount as may be prescribed by the regulations), despite any higher maximum monetary penalty provided in respect of the offence.

- (5) Proceedings for an offence under this Act or the regulations may be commenced within 3 years after the alleged commission of the offence.

16 Penalty notices

- (1) An authorised officer may serve a penalty notice on a person if:
- (a) it appears to the officer that the person has committed an offence under this Act or the regulations, and
 - (b) the regulations prescribe the offence as being one for which a penalty notice may be issued.
- (2) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person may pay, within the time and to the person specified in the notice, the penalty prescribed by the regulations for the offence if dealt with under this section.
- (3) A penalty notice may be served personally or by post.
- (4) If the amount of the penalty prescribed for an alleged offence is paid under this section, no person is liable to any further proceedings for the alleged offence.
- (5) Payment under this section is not an admission of liability for the purposes of, and does not affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.
- (6) The regulations may:
- (a) prescribe an offence for the purposes of this section by specifying the offence or by referring to the provision creating the offence, and
 - (b) prescribe the amount of penalty for an offence if dealt with under this section, and
 - (c) prescribe different amounts of penalty for different offences or classes of offences.
- (7) The amount of penalty prescribed under this section for an offence may not exceed:
- (a) an amount equivalent in value to 40 penalty units, or

- (b) the maximum amount of penalty that could be imposed for the offence by a court,

whichever is the lesser.

Note. Section 17 of the *Crimes (Sentencing Procedure) Act 1999* provides that a reference to a number of penalty units (whether fractional or whole) in an Act or statutory rule is taken to be a reference to an amount of money equal to the amount obtained by multiplying \$110 by that number of penalty units.

- (8) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (9) In this section:
authorised officer means:
- (a) the Director-General, or
 - (b) a person authorised in writing by the Director-General as an authorised officer for the purposes of this section, or
 - (c) an investigator.

17 Civil consequences of contravention of Act

- (1) Any pre-paid fee for a fitness service that was accepted or received:
- (a) under a fitness service agreement that is terminated by operation of section 10 (3), or
 - (b) in contravention of a provision of Part 2,
- is a debt due to the consumer of the service on and from the date of termination or contravention (as the case may be) and is recoverable in a court of competent jurisdiction.
- (2) Any pre-paid fee for a fitness service that is recoverable by the consumer of the service under subsection (1) may be recovered from any of the following:
- (a) the supplier of the service,
 - (b) if the supplier is a corporation—any person who is a director of the corporation or who is concerned in the management of the corporation where that person knowingly authorised or permitted:

- (i) the failure to commence to provide the agreed service leading to the termination of a fitness service agreement by operation of section 10 (3) giving rise to the right of recovery under subsection (1), or
 - (ii) a contravention of Part 2 giving rise to the right of recovery under subsection (1).
- (3) However, nothing in subsection (2) entitles a consumer of a fitness service to recover more than the amount of the pre-paid fee paid by the consumer (together with any appropriate award of interest).
- (4) Nothing in subsection (1) or (2) affects or limits:
 - (a) any other right to recover a pre-paid fee for a fitness service that the consumer may have, or
 - (b) any right to contribution, or claim by way of set off, counterclaim or cross-action, that a person may have (whether at law or in equity) in respect of a debt recoverable under this section from that person.

18 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) A regulation may create an offence punishable by a penalty not exceeding 40 penalty units.

19 Savings and transitional provisions

Schedule 1 has effect.

20 Amendment of other Acts

The Acts specified in Schedule 2 are amended as set out in that Schedule.

21 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

Clause 21 Fitness Services (Pre-paid Fees) Bill 2000

Part 3 Miscellaneous

- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Schedule 1 Savings and transitional provisions

(Section 19)

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of this Act

2 Act does not affect pre-existing fitness agreements

A provision of this Act does not apply to the any thing done, or omitted to be done, under or in relation to a fitness service agreement entered into before the commencement of the provision.

Schedule 2 Amendment of other Acts

(Section 20)

2.1 Fair Trading Act 1987 No 68

[1] Section 8 Delegation by Director-General

Insert after section 8 (1) (b):

(b1) *Fitness Services (Pre-paid Fees) Act 2000,*

[2] Section 66 Other injunctions

Insert after section 66 (1) (a) (i):

(ia) a provision of the *Fitness Services (Pre-paid Fees) Act 2000,*

2.2 Fines Act 1996 No 99

Schedule 1 Statutory provisions under which penalty notices issued

Insert in alphabetical order:

Fitness Services (Pre-paid Fees) Act 2000, section 16

2.3 Search Warrants Act 1985 No 37

Section 10 Definitions

Insert in alphabetical order of Acts in the definition of *search warrant*:

section 12 of the *Fitness Services (Pre-paid Fees) Act 2000,*