



New South Wales

Fitness Services (Pre-paid Fees) Regulation 2001

under the

Fitness Services (Pre-paid Fees) Act 2000

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Fitness Services (Pre-paid Fees) Act 2000*.

JOHN WATKINS, M.P.,
Minister for Fair Trading

Explanatory note

The objects of this Regulation are as follows:

- (a) to prescribe additional requirements relating to the administration of trust accounts under section 11 of the Act,
- (b) to prescribe certain offences under the Act and the Regulation as offences in respect of which penalty notices may be issued and to provide for the penalties for such offences,
- (c) to prescribe certain classes of physiotherapists and occupational therapists as classes of suppliers of fitness services to which the Act will not apply.

This Regulation is made under the *Fitness Services (Pre-paid Fees) Act 2000*, including sections 5 (d), 11, 16 and 18 (the general regulation-making power).

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Clause 1 Fitness Services (Pre-paid Fees) Regulation 2001

Part 1 Preliminary

Fitness Services (Pre-paid Fees) Regulation 2001

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Fitness Services (Pre-paid Fees) Regulation 2001*.

2 Commencement

This Regulation commences on 1 July 2001.

3 Definitions

In this Regulation:

Infringement Processing Bureau means the Infringement Processing Bureau within the Police Service.

IPB Code, in relation to an offence, means the code allocated to the offence by the Infringement Processing Bureau.

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

trust account of a trustee supplier means a general trust account of the kind referred to section 11 (2) of the Act.

trust money means money received by a trustee supplier as a pre-paid fee for a fitness service that the supplier is required to hold exclusively for the consumer of the service under section 11 (1) of the Act.

trust record means a record required to be kept under Part 2.

trustee supplier—see clause 5.

visible form means any record of information by means of which the information can be produced on demand in permanent legible form in the English language.

4 Notes

The explanatory note, table of contents and notes in the text of this Regulation do not form part of this Regulation.

Part 2 Administration of trust accounts

Division 1 General

5 Application of Part

This Part applies to a supplier of a fitness service (a *trustee supplier*) to whom section 11 (1) of the Act applies.

Note. Section 11 (1) of the Act provides that 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 section 11 and the regulations under that section are complied with in relation to the money.

Section 11 (7) of the Act makes it an offence for a supplier of a fitness service to contravene a provision of section 11 or the regulations under the section.

Division 2 Provisions relating to keeping of trust accounts and records

6 Banking trust account money

A trustee supplier who receives trust money must pay it into the supplier's trust account within 3 banking days after its receipt.

Note. Section 11 (2) of the Act requires a trustee supplier to pay trust money to the credit of a general trust account at a branch of an authorised deposit-taking institution in New South Wales.

7 Records to be kept by trustee suppliers

- (1) Every trustee supplier must keep the following records:
 - (a) a trust receipt book containing the duplicates of all receipts issued for all amounts received and required to be paid into the supplier's trust account (the duplicates being machine-numbered consecutively to correspond with the machine-numbered receipts),
 - (b) a deposit book of an authorised deposit-taking institution showing all deposits made by the trustee supplier into the trust account or some other written or electronic record showing those deposits,

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- (c) a trust account cash book or some other written or electronic record of all receipts of amounts required to be paid into, and of all payments made from, the trust account.
- (2) A trustee supplier is not required to keep duplicates of receipts in a trust receipt book if the particulars entered on the receipts when they were prepared were entered simultaneously in the trust account cash book and the supplier keeps a printed record in that cash book containing those particulars recorded sequentially to correspond with the receipts issued.

8 Computer records

- (1) If a trustee supplier maintains trust records by means of a computer system, the supplier must comply with this clause in relation to the records.
- (2) The supplier must maintain a record, compiled in chronological sequence, of all changes (by creation, amendment or deletion) to any of the following information:
 - (a) the name of the consumer of the fitness service concerned,
 - (b) the consumer's address,
 - (c) the authorised deposit-taking institution's account number for the trust account,disclosing the details of the information before and after the change.
- (3) The supplier must ensure, in respect of any journal:
 - (a) that entries balance before entries are made in the ledger, and
 - (b) that any journal reference numbers are allocated in sequence under program control.
- (4) The supplier must ensure in respect of any ledger that no program is capable of accepting the entry of a transaction resulting in a debit balance to an account unless a contemporaneous record of the transaction is made in such a manner as to enable the production in permanent legible form, on demand, of a separate chronological report of all such occurrences.
- (5) The supplier must ensure in respect of any ledger that no program enables the deletion of an account unless:
 - (a) the balance of the account is zero, and
 - (b) the account, when deleted, is retained in visible form.

- (6) The supplier must ensure that any entry in a record produced in visible form appears in chronological sequence.
- (7) The supplier must ensure that a report, or each page of or entry in a report, is numbered sequentially under program control in a manner that enables the completeness of the records required to be kept by this Regulation to be conveniently verified.
- (8) The supplier must ensure that no amendment to the particulars of a transaction already recorded can be made otherwise than by a separate transaction effecting the amendment.
- (9) The supplier must ensure that each program requires input in each field of a data entry screen intended to receive information required by this Regulation to be included in trust records.
- (10) The supplier must ensure:
 - (a) that a back-up copy of all records to which this clause refers is made on a computer disk or magnetic tape or by other electronic means not less frequently than once each month, and
 - (b) that the most recent back-up copy is kept in such a place that any incident (such as a power or disk failure) that could adversely affect the records would not also affect the back-up copy.

9 Issue of receipts

- (1) A trustee supplier must cause a receipt to be prepared immediately after the supplier receives trust money for or on behalf of any consumer.
- (2) When a receipt is being prepared by a supplier for issue:
 - (a) from the trust receipt book, a copy of the entries made on the receipt must be made simultaneously on the machine-numbered duplicate form provided in the book, or
 - (b) otherwise than from a trust receipt book, a copy of the entries made on the receipt must be made simultaneously in the trust cash book.

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Part 2 Administration of trust accounts

Division 2 Provisions relating to keeping of trust accounts and records

- (3) The following particulars must be shown on each receipt issued by a supplier:
- (a) the date of issue,
 - (b) the number of the receipt in numerical sequence,
 - (c) the name of the supplier and the words "Trust Account",
 - (d) the name of the consumer of the fitness service concerned,
 - (e) particulars of the transaction in respect of which the money was paid,
 - (f) the sum of money received and whether (or the extent to which) it was paid in cash or by cheque, by electronic funds transfer or otherwise.

10 Payment of trust money

- (1) Trust money must not be drawn from a trustee supplier's trust account otherwise than by a cheque or electronic funds transfer.
- (2) Each cheque must:
- (a) be machine-numbered in series, and
 - (b) be marked "not negotiable", and
 - (c) not be payable to cash, and
 - (d) contain the name of the supplier or (if appropriate) of the supplier's firm and the words "Trust Account", and
 - (e) be signed by the supplier or another person authorised by or under clause 14 to sign the cheque.
- (3) The trustee supplier must ensure that, for each cheque, a record is kept of:
- (a) the date of issue, the payee and the amount of the cheque, and
 - (b) details identifying the ledger account to be debited and the name of the person on whose behalf the cheque was drawn, and
 - (c) sufficient particulars to identify the cheque and the reason for drawing it.

- (4) If the supplier maintains an accounting system which (at the same time as that at which, and in the same operation as that in which, a cheque is drawn) causes the particulars required by subclause (3) to be entered directly in the cash book required to be kept, the entry of the particulars in the cash book is sufficient compliance with subclause (3).
- (5) The supplier must ensure that, for each electronic funds transfer, a record is kept of:
 - (a) the date of the transfer, the payee and the amount transferred to or from each ledger account, and
 - (b) details identifying the ledger accounts to be debited and the name and code reference number of each consumer on whose behalf the transfer was made, and
 - (c) sufficient particulars to identify the transfer and the reason for it.

11 Record of trust account transactions

- (1) A trustee supplier must keep a trust account cash book or other written record in which are entered as soon as is practicable particulars of receipts and payments of money required to be paid into, or paid out of, the supplier's trust account.
- (2) The pages of the book or other record must be consecutively numbered and on the respective pages the consecutive numbers of receipts issued and cheques drawn or electronic funds transfer payments made must be shown.
- (3) When money required to be paid into the trust account is received, the licensee must enter the following particulars in the book or other record:
 - (a) the date of receipt and the receipt number,
 - (b) the amount of money received and the form in which it was received,
 - (c) the name or code reference of the consumer of the fitness service concerned on whose behalf the money was received,
 - (d) details identifying the ledger account to be credited,
 - (e) sufficient particulars to identify the purpose for which the money was received.

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Clause 11 Fitness Services (Pre-paid Fees) Regulation 2001

Part 2 Administration of trust accounts

Division 2 Provisions relating to keeping of trust accounts and records

- (4) When money is paid out of the trust account, the trustee supplier must enter the following particulars in the book or other record:
 - (a) the date of issue of the cheque, the cheque number, its amount and the payee or the date of the electronic funds transfer payment, the amount transferred and the payee,
 - (b) details identifying the ledger account to be debited and the name of the consumer of the fitness service concerned on whose behalf the cheque was drawn or the electronic funds transfer payment was made,
 - (c) particulars sufficient to identify the purpose for which the cheque was drawn or the electronic funds transfer payment was made.
- (5) At the end of each month, the trustee supplier must balance the cash book or other record and either:
 - (a) carry forward the balance to the commencement of the next month, or
 - (b) carry forward the balance to a ledger account provided for the purpose.
- (6) The trustee supplier must, at the end of each month, prepare a statement reconciling the balance of the trust account at an authorised deposit-taking institution with the balance of the related cash book or other record.

12 Trust account ledger

- (1) A trustee supplier must maintain a separate ledger account for trust money received or paid to each consumer of a fitness service in relation to whom section 11 (1) of the Act applies.
- (2) The ledger account must include the name of the consumer, a reference number or other identification and particulars of each transaction affecting trust money.

- (3) Those particulars must include the following:
- (a) the date of the transaction,
 - (b) a description of the transaction,
 - (c) particulars sufficient to identify the trust record originating the transaction,
 - (d) the amount of the transaction,
 - (e) the resulting current balance of account arising from the transaction.

13 Trust account ledger trial balance

- (1) A trustee supplier must, within 21 days after the end of each month, prepare a trial balance statement of all ledger accounts current as at the end of that month.
- (2) The trial balance statement must:
- (a) specify the month to which it refers and the date of its preparation, and
 - (b) list each ledger account that does not have a zero balance at the end of that month by stating the name of the consumer, the reference number or other identification and the balance of the account at the end of the month, and
 - (c) show the total of the ledger account balances at the end of that month, and
 - (d) show a comparison between that total and the balance in the cash book reconciled with the balance in the trust account at an authorised deposit-taking institution as required by clause 11 (6).

14 Signing of trust account cheques

- (1) The following persons are authorised to sign a cheque drawn on a trust account (a *trust cheque*):
- (a) if the trustee supplier is a corporation, a director of the corporation, or
 - (b) if the trustee supplier is a sole proprietor, the sole proprietor, or
 - (c) a partner of a trustee supplier.

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Clause 14 Fitness Services (Pre-paid Fees) Regulation 2001

Part 2 Administration of trust accounts

Division 2 Provisions relating to keeping of trust accounts and records

- (2) A person who has authority to sign trust cheques otherwise than as a delegate may delegate the authority to sign those cheques to any other person or persons.
- (3) The delegation must be in writing and signed by the delegator and the delegate and may be revoked by the delegator by giving written notice of revocation to the delegate.
- (4) This clause does not remove any additional prohibition or restriction on the signing of cheques made by the constitution or the terms of the partnership agreement of any company or partnership concerned.
- (5) A person who has authority to sign a trust cheque must not purport to delegate his or her authority to sign the cheque otherwise than in accordance with this clause.
- (6) A person must not sign a trust cheque purporting to do so as the delegate of the trustee supplier if that person has not been authorised to do so in accordance with this clause.

Maximum penalty (subclause (6)): 40 penalty units in the case of a corporation or 20 penalty units in any other case.

15 Period that trust records must be kept

- (1) A trustee supplier must keep any trust record for a period of 3 years after the date of creation of the record.

Note. Section 11 (5) (b) of the Act requires a trustee supplier to keep accounting records at the supplier's principal place of business in New South Wales.

- (2) In the case of a record kept by means of a computer system, it is sufficient compliance with subclause (1) if the trustee supplier makes available to an investigator any of the following at the request of the investigator:
 - (a) a computer terminal by means of which the investigator can view the information contained in the record,
 - (b) a computer print-out of the information contained in the record.

Note. The term *investigator* is defined by section 3 (1) of the Act to have the same meaning as that term has in the *Fair Trading Act 1987*. Section 13 (1) of the Act makes clear that the investigation powers conferred on such investigators by Division 3 of Part 2 of the *Fair Trading Act 1987* extend to the administration of the *Fitness Services (Pre-paid Fees) Act 2000* and the regulations made under that Act. Also, section 12 of the Act authorises such investigators to obtain search warrants from an authorised justice if the investigator has reasonable grounds for believing that a provision of the Act or the regulations has been, is being or is about to be contravened in or about any premises.

Part 3 Penalty notices

16 Penalty notice offences

- (1) For the purposes of section 16 of the Act:
 - (a) each offence created by a provision specified in Column 1 of Schedule 1 is a prescribed offence, and
 - (b) the prescribed penalty for such an offence is the amount specified in Column 4 of Schedule 1.
- (2) If the reference to a provision in Column 1 of Schedule 1 is qualified by words that restrict its operation to specified kinds of offences or to offences committed in specified circumstances, an offence created by the provision is a prescribed offence only if it is an offence of a kind so specified or is committed in the circumstances so specified.

17 Short descriptions

- (1) For the purposes of section 145B of the *Justices Act 1902*, the prescribed expression for an offence created by a provision specified in Column 1 of Schedule 1 consists of the IPB Code set out in relation to the offence in Column 2 of Schedule 1 together with:
 - (a) the expression specified in Column 3 of that Schedule, or
 - (b) if a choice of words is indicated in that expression, the words remaining after the omission of the words irrelevant to the offence.
- (2) For the purposes of any proceedings for an offence created by a provision specified in Column 1 of Schedule 1, the prescribed expression for the offence is taken to relate to the offence created by the provision, as the provision was in force when the offence is alleged to have been committed.
- (3) The amendment or repeal of a prescribed expression does not affect the validity of any information, complaint, summons, warrant, notice, order or other document in which the expression is used, and any such document continues to have effect as if that expression had not been amended or repealed.

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Clause 17 Fitness Services (Pre-paid Fees) Regulation 2001

Part 3 Penalty notices

- (4) Subclause (3) applies to any information, complaint, summons, warrant, notice, order or other document (whether issued, given or made before or after the amendment or repeal) that relates to an offence alleged to have been committed before the amendment or repeal.

Part 4 Miscellaneous

18 Classes of suppliers to which Act does not to apply

For the purposes of section 5 (d) of the Act, the following classes of supplier of fitness services are prescribed:

- (a) a physiotherapist registered under the *Physiotherapists Registration Act 1945* while providing a fitness service in the course of his or her practice as a physiotherapist,
- (b) an occupational therapist accredited by the Australian Association of Occupational Therapists—NSW while providing a fitness service in the course of his or her practice as an occupational therapist.

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Schedule 1 Penalty notice offences

Schedule 1 Penalty notice offences

(Clauses 16 and 17)

Offences under the Act

Column 1	Column 2	Column 3	Column 4
Offence	IPB code	Short description	Penalty
Section 10 (2)—fail to refund pre-paid fee within the prescribed period	8670	fail to refund fee within prescribed period	\$1,100
Section 11 (7)—contravene a provision of section 11	8672	contravene a provision of section 11	\$440
Section 11 (7)—contravene a provision of the regulations under section 11	8673	contravene a provision of regulations under section 11	\$440

Offences under this Regulation

Column 1	Column 2	Column 3	Column 4
Offence	IPB code	Short description	Penalty
Clause 14 (6)—sign a trust account cheque as delegate of trustee supplier when not a delegate	8674	sign cheque as delegate without authority	\$440

BY AUTHORITY