



New South Wales

Fitness Services (Pre-paid Fees) Regulation 2006

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*.

DIANE BEAMER, M.P.,
Minister for Fair Trading

Explanatory note

This Regulation remakes, with some recasting but only minor changes of substance (including the omission of superseded matter), the *Fitness Services (Pre-paid Fees) Regulation 2001*, which is repealed on 1 September 2006 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation prescribes the following:

- (a) additional requirements relating to the administration of trust accounts under section 11 of the *Fitness Services (Pre-paid Fees) Act 2000 (the Act)*,
- (b) the offences under the Act that are offences in respect of which penalty notices may be issued,
- (c) the penalties for those offences when dealt with by way of a penalty notice,
- (d) the classes of physiotherapists and occupational therapists that are classes of suppliers of fitness services to which the Act does 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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Fitness Services (Pre-paid Fees) Regulation 2006

under the

Fitness Services (Pre-paid Fees) Act 2000

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Fitness Services (Pre-paid Fees) Regulation 2006*.

2 Commencement

This Regulation commences on 1 September 2006.

Note. This Regulation replaces the *Fitness Services (Pre-paid Fees) Regulation 2001* which is repealed on 1 September 2006 by section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definitions

(1) In this Regulation:

cash book of a trustee supplier means the written record required to be kept under clause 6 (1) (c).

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 in 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 4.

(2) Notes included in this Regulation do not form part of this Regulation.

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Division 1 General

4 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 that section.

Division 2 Provisions relating to keeping of trust accounts and records

5 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.

6 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,
 - (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.

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- (2) However, despite subclause (1) (a), 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 cash book and the supplier keeps a printed record in that cash book containing those particulars recorded sequentially to correspond with the receipts issued.

7 Computer records

- (1) A trustee supplier who maintains trust records by means of a computer system must comply with this clause.
- (2) The trustee supplier must maintain a record, compiled in chronological sequence, of all changes (by creation, amendment or deletion) to any of the following information, showing the details of the information before and after the change:
- (a) the name of a consumer of the fitness service concerned,
 - (b) a consumer's address,
 - (c) the account number for the trust account of the fitness service at the relevant authorised deposit-taking institution.
- (3) The trustee supplier must ensure that computer programs relating to ledgers:
- (a) are not 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 viewable form of a separate chronological report of all such occurrences, and
 - (b) are not capable of amending the particulars of a transaction already recorded otherwise than by a separate transaction effecting the amendment, and
 - (c) are not capable of deleting an account unless:
 - (i) the balance of the account is zero, and
 - (ii) when the account is deleted, a record of the account will be retained in viewable form.
- (4) The trustee supplier must also ensure the following:
- (a) that each computer program requires input in each field of a data entry screen intended to receive information that this Regulation requires to be included in trust records,
 - (b) that entries in the ledger of a journal balance before further entries are made,
 - (c) that journal reference numbers are allocated in sequence by the computer program,

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- (d) that entries in a record retained in viewable form appear in chronological sequence,
 - (e) that a report, or each page of or entry in a report, is numbered in sequence by the computer program in a manner that enables easy verification of the completeness of the records that this Regulation requires to be kept,
 - (f) that a back-up copy of all records that this Regulation requires to be kept that are kept by means of a computer system is made on a computer disk or magnetic tape, or by other electronic means, at least once in every four weeks,
 - (g) 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.
- (5) In this clause, **viewable form**, in relation to a report or record, means a form that enables the production of the report or record, on demand, in a permanent legible form in the English language.

8 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) The following particulars must be shown on each receipt:
 - (a) the date of issue,
 - (b) the number of the receipt in numerical sequence,
 - (c) the name of the trustee supplier and the words "Trust Account",
 - (d) the name of the consumer,
 - (e) particulars of the transaction in respect of which the money was paid,
 - (f) the amount of money received and the extent to which it was paid in cash or by cheque, by electronic funds transfer or otherwise.
- (3) A copy of the particulars shown on the receipt must be made simultaneously:
 - (a) on the machine-numbered duplicate form provided in the trust receipt book (if the receipt is issued from that book), or
 - (b) in the cash book (if the receipt is issued otherwise than from the trust receipt book).

9 Payment of trust money

- (1) Trust money must not be drawn from a trustee supplier's trust account otherwise than by a cheque or an electronic funds transfer.

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- (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 trustee supplier or (if appropriate) of the trustee supplier’s firm and the words “Trust Account”, and
 - (e) be signed by the trustee supplier or another person authorised by or under clause 13 to sign the cheque.
- (3) The trustee supplier must ensure that a record of the following is kept in relation to each cheque:
- (a) the date of issue, the payee and the amount of the cheque,
 - (b) details identifying the ledger account to be debited and the name of the person on whose behalf the cheque was drawn,
 - (c) sufficient particulars to identify the cheque and the reason for drawing it.
- (4) The trustee supplier must ensure that a record of the following is kept in relation to each electronic funds transfer:
- (a) the date of the transfer, the payee and the amount transferred to or from each ledger account,
 - (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,
 - (c) sufficient particulars to identify the transfer and the reason for it.

10 Cash book record of trust account transactions

- (1) The pages of the cash book must be consecutively numbered.
- (2) The cash book must show the following:
- (a) the consecutive numbers of the receipts issued,
 - (b) the consecutive numbers of the cheques drawn,
 - (c) a chronological list of electronic funds transfer payments made.
- (3) The particulars of payments of money into and out of a trustee supplier’s trust account that are required by this clause must be entered in the cash book as soon as is practicable after the receipt or payment of the money concerned.
- (4) When money required to be paid into the trust account is received, the trustee supplier must enter the following particulars in the cash book:
- (a) the date of receipt and the receipt number,

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- (b) the amount of money received and the form in which it was received,
 - (c) the name or code reference of the consumer 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.
- (5) When money is paid out of the trust account, the trustee supplier must enter the following particulars in the cash book:
- (a) the date of issue of the cheque, the cheque number, the amount of the cheque and the payee or (as the case may require) 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 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.
- (6) At the end of each month, the trustee supplier must:
- (a) balance the cash book and either:
 - (i) carry forward the balance to the commencement of the next month, or
 - (ii) carry forward the balance to a ledger account provided for the purpose, and
 - (b) prepare a statement reconciling the balance of the trust account at an authorised deposit-taking institution with the balance of the cash book.

11 Trust account ledger

- (1) A trustee supplier must maintain a separate ledger account for trust money received from or paid to each consumer of the fitness service concerned.
- (2) The ledger account must include the name of the consumer, a reference number or other identification and particulars of each transaction.
- (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,

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- (d) the amount of the transaction,
 - (e) the balance of the account after the transaction.

12 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 10 (6) (b).

13 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,
 - (b) if the trustee supplier is a sole proprietor—the sole proprietor,
 - (c) if the trustee supplier is a partnership—a partner of the partnership.
- (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 affect any other prohibition or restriction on the signing of cheques made by the constitution or the terms of the partnership agreement of any corporation or partnership concerned.

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- (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 is not authorised to do so in accordance with this clause.
Maximum penalty (subclause (6)): 20 penalty units.

14 Period that trust records must be kept

- (1) A trustee supplier must keep trust records for a period of 3 years after the date of creation of the record concerned.
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 taken to be evidence of compliance with subclause (1) if the trustee supplier makes either of the following available to an investigator at each request of the investigator that is made within the relevant period:
 - (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 *Fitness Services (Pre-paid Fees) Act 2000* makes it 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 *Fitness Services (Pre-paid Fees) Act 2000* authorises such an investigator to obtain search warrants from an authorised officer if the investigator has reasonable grounds for believing that a provision of that Act or the regulations has been, is being or is about to be contravened in or about any premises.

Part 3 Miscellaneous

15 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 2 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.

16 Classes of suppliers to which Act does not apply

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

- (a) a registered physiotherapist 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—New South Wales while providing a fitness service in the course of his or her practice as an occupational therapist.

17 Saving

Any act, matter or thing that had effect under the *Fitness Services (Pre-paid Fees) Regulation 2001* immediately before the repeal of that Regulation is taken to have effect under this Regulation.

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Schedule 1 Penalty notice offences

Schedule 1 Penalty notice offences

(Clause 15)

Offences under the Act

Column 1	Column 2
Offence	Penalty
Section 10 (2)	\$1,100
Section 11 (7)	\$440

BY AUTHORITY