

[Act 2000 No 95]



New South Wales

Fitness Services (Pre-paid Fees) Bill 2000

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to regulate the pre-payment of fees for membership of fitness centres and for the provision of other fitness services.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 provides that a supplier of a fitness service under a fitness service agreement 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.

Clause 5 provides that the proposed Act does not apply to certain suppliers of fitness services and certain classes of fitness services.

Clause 6 provides that a provision of an agreement or other instrument by which a person seeks to avoid, modify or restrict the operation of the proposed Act is void.

Clause 7 provides that the proposed Act binds the Crown. However, nothing in the proposed Act will render the Crown liable to prosecution for an offence.

Part 2 Pre-payment of fees

Clause 8 makes it an offence for a supplier to seek or accept a pre-paid fee for a fitness service to be provided by the supplier under a fitness service agreement for a period that exceeds 12 months (whether or not that period is to be, or might be, consecutive or cumulative). The maximum penalty for the offence will be 1,000 penalty units (currently \$110,000).

Clause 9 makes it an offence for a supplier who is to provide any fitness service under a fitness service agreement at, or in connection with, a fitness centre that is leased to seek or accept a pre-paid fee for the service 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 has acknowledged in writing that the consumer has been so notified.

The maximum penalty for the offence will be 1,000 penalty units (currently \$110,000).

Clause 10 makes it an offence for a supplier to 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.

The proposed section also makes it an offence for 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 not to refund that fee to the consumer within a specified period if the supplier does not commence to provide the agreed service to the consumer under the agreement within 3 months after the date on which payment is accepted.

The maximum penalty for either offence will be 1,000 penalty units (currently \$110,000).

The proposed section will also terminate any such fitness service agreement if the supplier does not commence to provide the agreed service within 3 months after the date on which payment is accepted.

Clause 11 requires a supplier who 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:

- (a) to hold the money exclusively for the consumer of the service until the supplier commences to provide the agreed service under the agreement to the consumer, and
- (b) to ensure that the requirements of the proposed section and the regulations under the proposed section are complied with in relation to the money.

It will be an offence for a supplier of fitness services to contravene a provision of the proposed section. The maximum penalty for the offence will be 1,000 penalty units (currently \$110,000).

Part 3 Miscellaneous

Clause 12 provides for the issue of search warrants to investigators appointed under the *Fair Trading Act 1987* for the purpose of enabling such investigators to investigate whether the proposed Act or the regulations have been contravened.

The proposed section also makes it an offence for a person, without reasonable excuse, to obstruct or hinder a person executing a search warrant issued to an investigator. The maximum penalty for either offence will be 1,000 penalty units (currently \$110,000).

Clause 13 makes it clear that certain enforcement provisions of the *Fair Trading Act 1987* will apply to the proposed Act.

The proposed section provides that 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 the proposed Act and the regulations made under the proposed Act. Division 3 of Part 2 of the *Fair Trading Act 1987* 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.

The proposed section also provides that section 73A of the *Fair Trading Act 1987* will apply in connection with a matter in relation to which the Director-General of the Department of Fair Trading (the *Director-General*) has a function under the proposed Act as if the function were a function under the *Fair Trading Act 1987*. Section 73A enables the Director-General to accept a written undertaking by a person in connection with a matter in relation to which the Director-General has a function and to enforce such an undertaking in the Supreme Court.

Finally, the proposed section makes it clear that section 86A of the *Fair Trading Act 1987* extends to the provision of fitness services and to suppliers of such services. Section 86A enables the Minister for Fair Trading and the Director-General to issue public warnings and give information concerning the supply of goods and services.

Clause 14 provides for the circumstances in which directors and managers of corporations will be taken to be liable for offences against the proposed Act or the regulations committed by corporations.

Clause 15 provides that proceedings for an offence against the proposed Act or the regulations are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone or by the Supreme Court. However, proceedings for an offence 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.

Clause 16 provides for penalty notices to be issued by certain authorised officers in respect of offences under the proposed Act (or regulations made under the proposed Act) that are prescribed by the regulations.

Clause 17 provides that any pre-paid fee for a fitness service that was accepted or received either under a fitness service agreement that is terminated by operation of proposed section 10 (3) or 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.

The proposed section provides that the debt 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 proposed section 10 (3) giving rise to the right of recovery under the proposed section, or
 - (ii) a contravention of Part 2 giving rise to the right of recovery under the proposed section.

Clause 18 sets out the general regulation-making power under the proposed Act. The regulations may create an offence and may impose a penalty not exceeding 40 penalty units.

Clause 19 gives effect to Schedule 1, which contains provisions of a savings and transitional nature.

Clause 20 gives effect to Schedule 2, which makes amendments to the *Fair Trading Act 1987*, the *Fines Act 1996* and the *Search Warrants Act 1985*.

Clause 21 provides for Ministerial review of the proposed Act.

Schedule 1 Savings and transitional provisions

This Schedule contains savings and transitional provisions, including a power to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act. In particular, it provides that a provision of the proposed 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

Schedule 2.1 amends section 8 of the *Fair Trading Act 1987* to enable the Director-General to delegate the exercise of functions conferred on the Director-General by the proposed Act. It also amends section 66 of that Act to enable the Director-General (with the consent of the Minister) to seek an injunction from the Supreme Court in respect of a person who has engaged, or proposes to engage, in conduct that constitutes or would constitute a contravention of the proposed Act.

Schedule 2.2 amends Schedule 1 to the *Fines Act 1996* to enable enforcement proceedings to be undertaken under that Act in respect of penalty notices issued under the proposed Act.

Schedule 2.3 makes an amendment to the definition of *search warrant* in section 10 of the *Search Warrants Act 1985* that is consequential on the enactment of proposed section 12 of the proposed Act.