

# National Food Authority Regulations 1994 No. 286

## EXPLANATORY STATEMENT

### Statutory Rules 1994 No. 286

Issued by the authority of the Minister for Human Services and Health

*National Food Authority Act 1991*

National Food Authority Regulations

Section 70 of the *National Food Authority Act 1991* (the Act) provides that the Governor-General may make regulations for the purposes of the Act.

The National Food Authority (the Authority) is a statutory authority established by section 6 of the Act. Amongst its functions is the recommending of amendments to the Food Standards Code, either by proposing new food standards or proposing variations to existing food standards. Under a 1991 Commonwealth, State and Territory agreement in relation to the adoption of uniform food standards, food standards recommended by the Authority, and adopted by a Ministerial Council called the National Food Standards Council (NFSC), are to be adopted by reference and without amendment into State/Territory food legislation.

The Act provides for a number of matters to be prescribed in respect of the Authority's food standards work, and it is these matters with which the Regulations are concerned. The effect of these Regulations is to facilitate the operations of the Authority in undertaking its food standards functions. The Regulations expand the list of government agencies to which the Authority must send notices about food standards matters, prescribe specified Commonwealth and State/Territory organisations to which confidential commercial information may be disclosed on condition that the confidentiality of the information be maintained, and prescribe ways in which the standards process can be fasttracked in appropriate circumstances.

The Regulations commenced upon gazettal. Detailed notes on the content and effect of the Regulations are set out below.

#### Clause Notes

#### **Regulation 1**

Regulation 1 provides for the citation of the Regulations.

#### **Regulation 2**

Regulation 2 defines "application" and "proposal". The definitions correspond with those in the Act. Under the provisions of the Act, an "application" refers to a request for a variation to the Food Standards Code made to the Authority by a member of the public (including consumer organisations, industry and governmental agencies other than the Authority), while a "proposal" refers to a proposed variation to the Food Standards Code generated internally by the Authority.

Regulation 2 also defines "the Act" to mean the *National Food Authority Act 1991*.

#### **Regulation 3**

Regulation 3 extends the Act's definition of "appropriate government agency". An "appropriate government agency" is a government agency to which the Authority must send notices about

applications and proposals it is considering, and from which the Authority must invite comment on matters relevant to such applications and proposals.

Under subsection 3(1) of the Act, the definition of "appropriate government agency" in the Act provides that:

- the National Health and Medical Research Council (NHMRC);
- the Department of State of each State or Territory that is primarily responsible for public health in that State or Territory; and
- a Department of State of New Zealand nominated by the government of New Zealand;

are all to be appropriate government agencies. To this list, the Regulations add certain Departments of State of the Commonwealth (as permitted in paragraph (a) of the definition of "appropriate government agency" in the Act) and the South Australian Health Commission (as permitted in paragraph (d) of the definition of "appropriate government agency").

The Commonwealth Departments prescribed by subregulation 3(1) are:

- the Attorney-General's Department, in light of its responsibilities for consumer protection and fair trading;
- the Department of Foreign Affairs and Trade, in light of its responsibilities for international trade and commerce;
- the Department of Human Services and Health, in light of its responsibilities for public health;
- the Department of Industry, Science and Technology, in light of its responsibilities for the food manufacturing industry; and
- the Department of Primary Industries and Energy, in light of its responsibilities for primary food industries and for the Australian Quarantine and Inspection Service.

The South Australian Health Commission performs the same role in South Australia as the various Departments of Health do in other jurisdictions, but it is not constituted as a Department of State and so falls outside the Act's definition of "appropriate government agency". Prescribing the Commission to be an appropriate government agency in these Regulations means it can be treated on an equal footing to its counterparts.

### **Regulation 4 and Schedule 1**

Section 36 of the Act provides that if the Authority is satisfied that an application or proposal raises issues of minor significance or complexity only, and that to omit to do one or more of the matters that the Authority is required to do under Part 3 of the Act in relation to that application or proposal will not adversely affect the interests of any person or body, the Authority may omit to do that matter or those matters.

A decision of the Authority under section 36 must be in writing and published in the Gazette and in a newspaper circulating in each State and Territory. Also, subject to the *Administrative Appeals Tribunal Act 1975*, an appeal may be made to the Administrative Appeals Tribunal against a decision of the Authority under section 36.

The intent of section 36 is that the full extensive and resource-intensive public consultation mechanism set down in Part 3 of the Act might not be necessary where an application or

proposal raises only minor issues. By way of example, section 36 could be used to efficiently progress minor amendments to the Food Standards Code to correct drafting errors and other such matters of no great import.

However, the statutory procedure set down in Part 3 is very detailed, and is written in terms which assume that no steps have been omitted. This creates a potential difficulty where the Authority may have decided to omit a step. Recognising this, Parliament provided in subsection 36(2) that, for the purpose of facilitating a decision made by the Authority under section 36 in relation to an application or proposal, the regulations may provide for the application of the provisions, or of specified provisions, of Part 3, subject to such modifications and adaptations as are prescribed, in relation to that application or proposal.

Regulation 4 specifies how the statutory procedure in Part 3 is to apply in cases where the Authority decides, under section 36, to omit to do certain steps. The detailed modifications and adaptations to the provisions of Part 3 are set out in Schedule 1 of the Regulations with respect to decisions of the Authority to omit:

- to invite submissions after it accepts an application (as would otherwise be required by section 14);
- to give notice that it will hold an inquiry to consider a draft standard, or draft variation of a standard, prepared in relation to an application (as would otherwise be required by section 16);
- to invite submissions after it prepares a proposal (as would otherwise be required by section 22);
- to give notice that it will hold an inquiry to consider a draft standard, or draft variation of a standard, prepared in relation to a proposal (as would otherwise be required by section 24).

## **Regulation 5 and Schedule 2**

Section 37 of the Act provides that where the Authority considers that a recommendation in relation to an application or proposal should be made to the National Food Standards Council as a matter of urgency in order to avoid compromising the objectives set out in section 10 of the Act (protecting public health and safety, providing consumers with adequate information to make informed choices, promoting fair trading, promoting trade and commerce and promoting consistency with international food standards providing the latter does not lower the Australian standard), the Authority may decide to omit to do certain steps which would otherwise be required by Part 3 of the Act to be done in relation to the application or proposal.

Section 37, like section 36, provides a fast-track mechanism for the timely consideration of applications or proposals where there is some pressing urgency. Subsection 37(2), like subsection 36(2), provides that the regulations may specify how the provisions of Part 3, subject to specified modifications and adaptations, are to apply in such cases.

Sections 36 and 37 raise identical issues for the purpose of these Regulations, hence the similarity of form and content between regulations 4 and 5 and Schedules 1 and 2.

Schedules 1 and 2 are identical. While this may seem repetitious, it is better to have the two Schedules in place just in case, at some future time, a modification is needed in respect of a section 36 decision that is not needed in respect of a section 37 decision or vice versa. It is easier to set out the two Schedules from the outset than to have to introduce a second Schedule if, and when, the need arises.

## **Regulation 6**

Section 39 of the Act imposes upon the Authority, its staff and committee members and its consultants a duty not to disclose any confidential commercial information in respect of food that has been acquired by a person because of his or her work with the Authority. Confidential commercial information is defined as either a trade secret relating to food, or other information relating to food that has a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

Subsection 39(4) of the Act provides that despite this duty of confidentiality, the Chairperson of the Authority may disclose confidential commercial information to a prescribed authority or person.

Regulation 6 prescribes the authorities to which the Chairperson may disclose confidential commercial information. The list of agencies prescribed is almost identical to the list of "appropriate government agencies", with the exception of the NHMRC and the Department nominated by New Zealand. This mechanism ensures that governmental agencies from which comment is sought in relation to applications and proposals can be provided with all information (including confidential commercial information) available to the Authority to assist in that process.

Subsection 39(6) imposes upon persons to whom the Chairperson has disclosed confidential commercial information a duty of confidentiality equivalent to that imposed upon the Authority and its staff.