

Explanatory Statement

Issued by the Authority of the Minister for Regional Services, Sport, Local Government and Decentralisation

Food Standards Australia New Zealand Act 1991

Food Standards Australia New Zealand Amendment (Charges) Regulations 2019

Food Standards Australia New Zealand (the Authority) is a body corporate continued in existence by section 12 of the *Food Standards Australia New Zealand Act 1991* (the FSANZ Act). The primary function of the Authority is to develop, vary and review food regulatory measures, being food standards and codes of practice for industry. Food regulatory measures are developed or varied by the Authority, either as a result of an application from a body or person, or as a result of a proposal prepared by the Authority on its own initiative.

Section 153 of the FSANZ Act provides that the Governor-General may make regulations, not inconsistent with the FSANZ Act, prescribing all matters required or permitted by the FSANZ Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the FSANZ Act.

Section 146 of the FSANZ Act provides that the *Food Standards Australia New Zealand Regulations 1994* (the Principal Regulations) may fix charges to be paid by a body or person for services and facilities the Authority provides to the body or person. A charge may be fixed in relation to an application if: the applicant has elected to have the consideration of the application expedited or to develop; or the application is to develop or vary a standard and the development or variation of the standard would confer an exclusive capturable commercial benefit on the applicant.

The mechanism for setting charge amounts is through the preparation of a cost recovery implementation statement (CRIS) that meets the requirements of the Australian Government Cost Recovery Guidelines. The Authority conducts regular reviews of its CRIS to ensure that cost recovery arrangements are adequate and that it can continue to effectively discharge its statutory functions.

The purpose of the *Food Standards Australia New Zealand Amendment (Charges) Regulations 2019* (the Regulations) is to implement the outcomes of the latest review of the Authority's CRIS and cost recovery arrangements. The review developed a new charging methodology to ensure that the charges imposed accurately reflect the cost to the Authority of assessing applications. The Regulations will:

- fix new charges with a fixed basic, variable and administrative component;
- require the Authority to estimate the hours of variable work when determining the charge for an application;
- change how certain applications may be classified for charging purposes in order to ensure that charges accurately reflect the costs of their assessment;
- provide that applications requiring minimal assessment are not subject to a charge;

- broaden the scope for applicants to pay charges by instalment;
- prescribe how refunds of charges must be calculated and made by the Authority;
- reduce the amount of the administrative charge payable by an applicant; and
- provide that these amendments apply to applications made on or after 1 July 2019.

The impact of the Regulations is to:

- amend the charges payable by applicants seeking the development or variation of a standard that will confer an exclusive capturable commercial benefit on them or who wish to expedite their application;
- align the charge payable by these applicants with the actual costs incurred by the Authority in undertaking the application consideration process; and
- increase the accuracy of estimates of the number of hours required to undertake an assessment of an application and, thereby, minimise the potential for excessive upfront payments by applicants and for large refunds to be made by the Authority.

Details of the Regulations are set out in [Attachment 1](#).

The FSANZ Act specifies no conditions that need to be met before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on 1 July 2019.

Consultation

In October 2016, the Authority commenced a review of its cost recovery arrangements in order to develop a new charging methodology. Public consultation took place in two rounds, over December 2016 to February 2017, and again from July 2018 to August 2018. The latter round involved the release for public comment of a revised draft CRIS detailing the alternate charging methodology. The Authority utilised its existing stakeholder engagement channels and consultative forums to ensure that information was available on the cost recovery review process. Approximately 7000 organisations and individuals registered on the Authority's contacts database were notified of the release of the draft CRIS and the public call for comment.

Three submissions were received during public consultation in 2018. The submissions were considered by the Authority and in the CRIS that was published in September 2018 post consultation. The submissions and the CRIS are publicly available on the Authority's website.

The Authority also consulted the Department of Finance in relation to the CRIS. The revised CRIS is consistent with the Australian Government Charging Framework. The CRIS has been approved by the Minister for Regional Services, Sport, Local Government and Decentralisation.

Regulatory Impact

The Authority has received a Regulatory Impact exemption from the Office of Best Practice Regulation (OBPR) for the review of the Authority's cost recovery arrangements. The OBPR reference is ID 13717.

Statement of Compatibility with Human Rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker of a legislative instrument to which section 42 (disallowance) of the *Legislation Act 2003* applies to cause a statement of compatibility to be prepared in respect of that legislative instrument. A Statement of Compatibility with Human Rights has been prepared to meet that requirement and is set out at [Attachment 2](#).

Authority: Section 153 of the *Food Standards Australia New Zealand Act 1991*

DETAILS OF THE PROPOSED *FOOD STANDARDS AUSTRALIA NEW ZEALAND AMENDMENT (CHARGES) REGULATIONS 2019*

Section 1 – Name of Regulation

This section provides that the title of the Regulations is the *Food Standards Australia New Zealand Amendment (Charges) Regulations 2019*.

Section 2 – Commencement

This section provides that the Regulations commence on 1 July 2019.

Section 3 – Authority

This Section provides that the *Food Standards Australia New Zealand Amendment (Charges) Regulations 2019* is made under the *Food Standards Australia New Zealand Act 1991* (the FSANZ Act).

Section 4 – Schedules

This item provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1 – before Regulation 1

This item inserts the heading ‘Part 1 – Preliminary’ before existing regulation 1.

Item 2 – Regulation 2

This item repeals the definition of *administration charges*.

Item 3 – Regulation 2

This item establishes and defines the following new terms: *administrative costs*, *Authority personnel*, *Authority personnel variable work cost*, *general procedure level 5 application* and *high level health claims procedure level 5 application*.

The term *administrative costs* is defined to mean the total of those charges that are payable by the Authority for a thing required by a law of the Commonwealth to be done in connection with an application (other than amounts payable for services of Authority personnel) and, if the application is for a high level health claims variation, the establishment of a High Level Health Claims Committee (section 4 of the FSANZ Act).

The definition of the term **Authority personnel** identifies who are Authority personnel for the purposes of cost recovery and the calculation of charges. Paragraph (a) and subparagraph (b)(i) of the definition cover both substantive holders of the offices and positions mentioned and persons acting in those offices and positions: see section 20 of the *Acts Interpretation Act 1901* (applying because of subsection 13(1) of the *Legislation Act 2003*). A person covered by subparagraph (b)(ii) may be a consultant engaged under section 136 of the FSANZ Act or a person whose services are made available to the Authority under an arrangement under section 137 of the Act.

The term **Authority personnel variable work cost** provides the method for calculating, for the purposes of subregulation 8(2), the cost of **variable work** undertaken by **Authority personnel** on certain types of applications. The table to the definition of **Authority personnel variable work cost** lists personnel of the Authority by position, office or classification and prescribe an hourly rate in a dollar amount for each different position, office or classification. The definition provides that the cost of **variable work** for an application is the number of hours spent by Authority personnel on **variable work** for that application multiplied by the relevant prescribed hourly rates.

The terms **general procedure level 5 application** and **high level health claims procedure level 5 application** are required to account for changes that the Regulations make to the classification of applications for cost recovery purposes. For cost recovery purposes, the Principal Regulations classify applications by reference to one of the four statutory procedures for assessment of applications established by the *Food Standards Australia New Zealand Act 1991*. These are: the general procedure; the minor procedure; the major procedure; and the high level health claim variation procedure. The Principal Regulations provide four different classifications for applications subject to the general procedure or the high level health claim variation procedure, and a single classification for applications subject to the minor procedure or the major procedure. The Principal Regulations fix a different charge for each classification. These Regulations increase from four to five the number of classifications for applications subject to the general procedure or the high level health claim variation procedure. See Item 8 and Regulation 7 below.

Item 4 – Regulation 2

This item repeals the definition of the term **minor procedure application**. This definition is no longer required as these Regulations provide that applications assessed under the minor procedure are not subject to a charge (see subregulation 7(3)).

Item 5 – Regulation 2

This item establishes and defines the new term **variable work**. The term is defined to mean work for the Authority on an application that is undertaken for the purposes of complying with sections 29, 33(1)(b), 33(2), 33(3), 45, 52(1)(b) or 52(2) of the FSANZ Act. This work includes, for example, assessing the application and preparing a report in response to public submissions.

Item 6 – Before Regulation 6

This item inserts the heading ‘Part 2 – Commercial confidential information’ before existing regulation 6.

Item 7 – Before Regulation 6A

This item inserts the heading ‘Part 3 – Nomination for Board members’ before existing regulation 6A.

Item 8 – Regulations 6B, 7, 8, 8A, 8B and 9

This item repeals existing regulations 7 to 9 of the Principal Regulations and replaces them with a new Part comprising regulations 6B, 7, 8, 8A, 8B and 9.

The heading of this new Part is ‘Part 4 – Charges’.

Regulation 6B provides that Part 4 applies to an application if: the applicant has elected to have assessment of the application expedited; or the application is to develop or vary a standard and the development or variation of that standard would confer an exclusive capturable commercial benefit on the applicant. Section 8 of the FSANZ Act explains what is an exclusive capturable commercial benefit.

Regulation 7 requires applications to be classified by the Authority into one of eleven classifications listed in the table to that regulation. The classification of an application affects the charge payable for considering it and whether the charge may be paid in instalments. Regulation 8 sets the charge payable for each classification.

Regulation 7 requires the Authority to determine an application’s classification by reference to: the statutory assessment procedure established by the FSANZ Act that applies to the application; and then the Authority’s estimate of the number of person-hours of *variable work* that the application requires. Regulation 7 further provides an exception for applications assessed under the major procedure established by the FSANZ Act. This is because section 42 of that Act determines which applications will be subject to that procedure, and assessment under that procedure, can involve any number of person-hours.

Regulation 7 also provides five different classifications for applications subject to the general procedure or the high level health claim variation procedure. The Principal Regulations only provided four classifications for these types of applications. The additional classification that is provided by Regulation 7, and the separate charge that is provided by Regulation 8 for that additional classification, will enable greater accuracy in charging. This in turn will reduce the potential for excessive upfront payments by applicants and the amounts that the Authority may have to refund to applicants.

Subregulation 7(2) requires the Authority to provide an applicant with written notice of the classification of the application. If the application is classified by the Authority as a general procedure level 5 application, a major procedure application or a high level health claims procedure level 5 application, the Authority must also provide the applicant with written notice of the amount of the charge that is payable. This requirement reflects that the dollar amount of that charge is not specified by the Regulations. Instead, that amount is calculated by the Authority having regard to the estimated number of person-hours of variable work required.

Subregulation 7(3) provides that Regulation 7 does not apply to applications that are subject to the statutory assessment procedure (or minor procedure) described in Subdivision E of Division 1 of Part 3 of the FSANZ Act. This means that these applications are not subject to a charge.

Regulation 8 fixes the charges to be paid by the applicant for the Authority's services relating to assessment of its application.

Subregulation 8(2) fixes a different charge for each classification listed in the table to Regulation 7. Regulation 7 requires the Authority to have classified an application as falling within one of the listed eleven classifications. Subregulation 8(2) then provides that the amount of the charge payable for that application is the sum of \$19,470 and the amounts set for that classification in columns 2 and 3 of the table to that subregulation.

The fixed component of \$19,470 covers the cost of activities common to and consistent for all applications. The amount of the variable component set by column 2 of the table covers the costs of Authority personnel undertaking the *variable work* required by the application. That is, the work that is required by or under sections 29, 33(1)(b), 33(2), 33(3), 45, 52(1)(b) or 52(2) of the FSANZ Act. The amount of the administrative component set by column 3 covers the amounts payable by the Authority in processing the application, such as gazettal costs or convening a statutory advisory committee. The higher administrative component for applications classified as high level health claims variation applications reflects the additional costs that are incurred due to the statutory requirement for these applications to be considered by the High Level Health Claims Expert Committee established under the FSANZ Act.

The methodology used to calculate the amounts listed in subregulation 8(2) is detailed in the [Cost Recovery Implementation Statement 2018-2019](#).

Subregulation 8(3) provides the Authority with the option of imposing an extra charge if the *administrative costs* of the Authority in processing an application exceed the amount listed in column 3 of the table to subregulation 8(2). In these circumstances, the applicant must pay the amount of the excess if the Authority chooses to notify the applicant of the excess and its amount.

Regulation 8A provides that the charge payable for the applications listed in that Regulation may be paid by instalments. A charge imposed for applications classified under Regulation 7 as one of the following would not be able to be paid by instalments: a general procedure level 1 application; a general procedure level 2 application; a high level health claims procedure level 1 application; or a high level health claims procedure level 2 application. This reflects that the charge imposed for these applications is relatively small.

Subregulation 8A(2) provides that the amount of first instalment of the charge is 75% of the charge or, if for a major procedure, 25% of the charge. Subregulation 8A(3) provides that the amount of the second instalment is the balance of the charge.

Subregulation 8A(4) provides that the second instalment is payable on the occurrence of one of the specific events listed in that subregulation.

Subregulation 8A(5) provides that, if and when the Authority thinks it is appropriate for the second instalment to be paid, the Authority must give the applicant written notice that the applicant must pay the second instalment.

Regulation 8B provides for payment of a second instalment for an application that is withdrawn before the Authority's final determination on that application or for an application that is rejected by the Authority. Regulation 8B provides that the amount of the second instalment is the amount by which the *Authority personnel variable work cost* for the application exceeds the amount of the first instalment paid by the applicant. Subregulation 8B(3) provides that the Authority must provide the applicant with written notice of the amount of the second instalment. The second instalment is due and payable 20 business days after the day the notice was given to the applicant.

Regulation 9 provides for the Authority to make refunds to applicants. The Regulation provides that the Authority is to make a refund where the amount of the variable component of an imposed charge exceeds the *Authority personnel variable work cost* for the application and where the amount of the administrative component of an imposed charge exceeds the *administrative costs* of the Authority for the application. The amount of the refund to be made by the Authority is the amount of the excess.

Item 8 inserts after regulation 9 the heading 'Part 5 – Time for considering applications'

Item 9 – Before regulation 12

This item inserts the heading 'Part 6 – Application and transition provisions' before regulation 12.

Item 10 – At the end of the instrument

This item inserts new Regulation 13 into the Principal Regulations. Regulation 13 provides that applications made before 1 July 2019 would continue to be dealt with under the Principal Regulations as in force before 1 July 2019.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Food Standards Australia New Zealand Amendment (Charges) Regulations 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Amending Instrument

The *Food Standards Australia New Zealand Amendment (Charges) Regulations 2019* amend the *Food Standards Australia New Zealand Regulations 1994* to:

- amend the charges payable by a person who applies to Food Standards Australia New Zealand (the Authority) for the development or variation of a food standard that will confer an exclusive capturable commercial benefit on them or who wish to expedite their application;
- align the charge payable by these applicants with the actual costs incurred by the Authority in undertaking the application consideration process; and
- increase the accuracy of the Authority's estimate of the number of hours required to undertake an assessment of an application and, thereby, minimise the potential for excessive upfront payments by applicants and for large refunds to be made by the Authority.

The Regulations will:

- fix new charges with a fixed basic, variable and administrative component;
- require the Authority to estimate the hours of variable work when determining the charge for an application;
- change how certain applications may be classified for charging purposes in order to ensure that charges accurately reflect the costs of their assessment;
- provide that applications requiring minimal assessment are not subject to a charge;
- broaden the scope for applicants to pay charges by instalment;
- prescribe how refunds of charges must be calculated and made by the Authority;
- reduce the amount of the administrative charge payable by an applicant; and
- provide that these amendments apply to applications made on or after 1 July 2019.

Human rights implications

This Legislative Instrument does not engage any of the applicable human rights and freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.