

**Bills Committee on
the Public Health and Municipal Services (Amendment) Bill 2008**

**Follow-up on Matters Arising from
the Bills Committee Meeting on 17 February 2009**

Purpose

This paper sets out our response to the issues raised by Members at the Bills Committee meeting on 17 February 2009.

Refund to Consumers during Food Recall

2. We note the information about the Trade Practices Act 1974 of Australia provided by the Consumer Council. As explained at the Bills Committee meeting on 17 February 2009, we have reservation about including a provision on mandatory refund to consumers in the Public Health and Municipal Services (Amendment) Bill 2008. Our considerations are –

- (a) The Trade Practices Act 1974 of Australia aims to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. It is a piece of legislation on general consumer protection and is not specifically related to food safety.
- (b) According to the Food Act of New South Wales and that of Victoria, which provide specifically for food recall and which we have made reference to, there is no provision for refund to consumers.
- (c) We consider that the provision of refund is a commercial issue between the seller and the buyer (in this case, the consumer). While the Consumer Council may be most concerned with the interest of the final consumers, we must bear in mind that there are indeed multiple parties in the whole food chain. There are the food manufacturers, food importers, food distributors/suppliers, food retailers of various sizes and scales, and the final consumers. Our Amendment Bill primarily aims to ensure the safety of food and to protect the public's health – its principal objective does not concern commercial considerations, such as transactions between sellers and buyers at any or all levels of the food chain.

- (d) We have looked into other local legislation which has similar provisions for product recall. These include the Toys and Children's Products Safety Ordinance (Cap 424), the Consumer Goods Safety Ordinance (Cap 456), the Public Health (Animals and Birds) (Chemical Residues) Regulation (Cap 139N) and the Electricity Ordinance (Cap. 406). None of these local legislation have provided for refund in the case of recall.
- (e) We note in the Trade Practices Act 1974 of Australia that the amount of a refund may be reduced by the supplier by an amount attributable to the use which a person has had of the goods. The inclusion of this provision is to cater for the situation where the goods concerned have been used (or partly used) by the consumers. In the case of food, the situation would be very complicated (e.g. the food has been partly consumed, the food has passed its expiry date/best-before date, etc), especially if a large volume of food products and buyers are involved. Actual implementation will be extremely difficult.
- (f) If we require all food retailers to provide refund to consumers in the Amendment Bill, it means that non-compliance will be an offence. If the refund arrangement is included in the section 78B order, non-compliance of the refund arrangement will be a non-compliance with the order – and the maximum penalty level would be level 6 (\$100,000) and 12 months of imprisonment. Such penalty is imposed for behaviour which endangers public health, and we do not think that the failure to provide refund is so serious that warrants such a high level of penalty.
- (g) There is also practical issue about enforcement. The Centre for Food Safety will be the enforcement department of the Amendment Bill. Its enforcement action should aim at protecting public health, meaning that it should deploy its limited staff resources to target at food businesses which continue to put on the market shelf problem food (which is the subject of a section 78B order). The Centre's staff resources should not be put to enforcing the proposed refund provision.

Activity in Relation to Any Food under Section 78B(1)(e)

3. We note Members' suggestion that we should explain in the Code of Practice how section 78B(1)(e), in relation to the prohibition of the carrying of an activity in relation to food, will be exercised.

4. To address Members' concern, we have elaborated Chapter 5 of the Code of Practice. The revised Chapter 5 is attached at the Annex for Members' reference.

Reason for Making a Section 78B Order

5. Section 78B(3) provides that a section 78B order must specify the reason for making the order. We note Members' suggestion that the person subject to the order should have access to the information that DFEH has taken into account when making the order.

6. Having considered Members' view, we propose to amend section 78B(3) such that the reason for making the order and the principal factors that led to the making of the order by DFEH should be specified in the order. We will introduce the following Committee Stage Amendment to section 78B(3)(c) –

“the reason for making the order and the principal factors that led to the making of the order;”

“作出該命令的原因，以及引致作出該命令的主要因素，”

Effective Date of Section 78B Order Published by Gazette

7. Section 78C(6) provides that a section 78B order addressed as referred to in section 78C(1)(b) or (c) takes effect at the beginning of the day on which it is published in the Gazette. Members raised concern that persons subject to the section 78B order might unknowingly contravene the order if the start of the required prohibition action specified in the order fell on the same day on which the order was published in the Gazette.

8. We note Members' concern. We have explored the option of stipulating that the section 78B order will take effect at the beginning of the following day on which it is published in the Gazette. This, however, is not preferred. There is already a time lag between preparation of the Gazette and actual publication during which the Government will publicise widely the food incident and the section 78B order to the public through various means. If we stipulate that the order will take effect on the following day, the time lag will be

unacceptably long and as pointed out by Members at the Bills Committee meeting, some unscrupulous traders might take the opportunity to sell the food.

9. A modified option is to stipulate that the section 78B order will take effect at a specific time, say 12 noon on the day on which it is published in the Gazette. As Gazette would normally be published in the morning, we consider that specifying 12 noon of the day as the effective time of the section 78B order would solve the problem in most circumstances. Subject to Members' view, we will introduce the following Committee Stage Amendment to section 78C(6) –

“A section 78 order addressed as referred to in subsection (1)(b) or (c) takes effect at ~~the beginning~~ noon of the day on which it is published under subsection (3).”

“如第(1)(b)或(c)款所提述般致予某類別人士或所有人的第78B條命令，
於該命令根據第(3)款刊登當日開始之時正午生效。”

That said, Members should note that this option would cause the same problem if the Gazette is published in the evening of the day.

10. Another option for Members' consideration would be to keep section 78C(6) as proposed under the Amendment Bill. We would work with the Government Printer to publish the Gazette by uploading it onto the Government's website of Gazette notice¹ at the earliest possible time. We assure Members that we will stipulate clearly in the section 78B order the period for the order (as required under section 78B(3)(e)), including the start time for the order, to ensure that the section 78B order will take effect at a prospective time either at or after the actual publication time of the Gazette. As explained above, public announcements through the media and electronic means will be made immediately to notify the public and the trade of the section 78B order before it is formally published in the Gazette.

Penalty Level

11. The penalty level of the various provisions under the Amendment Bill is

¹ www.gld.gov.hk/egazette/

set out below –

Provision	Offence	Maximum Penalty
Section 78D(1)	Non-compliance with a section 78B order	Level 6 (\$100,000) and imprisonment for 12 months
Section 78E(3)	Failure to comply with notice requiring the person to inform DFEH the actions taken in relation to a section 78B order and provide to DFEH samples of the food for testing	Level 3 (\$10,000) and imprisonment for 3 months
Section 78F(2)	Failure to comply with notice requiring the person to provide the information specified in the notice to DFEH	Level 3 (\$10,000) and imprisonment for 3 months
Section 78I(3)	Removal, alteration or obliteration of any mark, seal or designation affixed to any food with the intent to deceive any other person	Level 5 (\$50,000) and imprisonment for 6 months

Advice Sought

12. Members are invited to note the above.

Food and Health Bureau
February 2009

**Extract from Draft Code of Practice on Section 78B Orders under Part VA
of Public Health and Municipal Services Ordinance (Cap. 132)**

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CHAPTER 5: FORMS OF ORDER

Prohibition of import

5.1 Given the large amount of food imported into Hong Kong, a section 78B order to prohibit import is a highly effective and direct measure for stopping problem food from entering the Hong Kong market. If only the food products produced by a particular overseas plant or only the food products of a particular batch to be imported from overseas are problematic, a prohibition of import is likely to apply to that particular plant or that particular batch of food, instead of all of the relevant food products from the whole exporting country/place.

Prohibition of supply

5.2 If the problematic food has already entered Hong Kong or the food is locally produced or manufactured, the Authority will consider making a section 78B order to prohibit supply. Food traders will no longer be allowed to put the food concerned on the market for the period specified in the order.

Recall

5.3 If the problematic food has already left the control of the food manufacturers, importers or distributors, it may be necessary for the Authority to make a section 78B order directing the parties concerned to take action to recall the food. A recall means the recovery of the food from all points in the food chain, including the final consumers. The order will direct that any food supplied be recalled in the manner specified in the order. For example, the order may require the food traders to arrange a public recall announcement and immediately notify all known consumers of the recall and the related arrangements.

Impounding, etc. or activity in relation to food

5.4 Depending on the circumstances, the Authority may also make a section 78B order to require the food traders to impound, isolate, destroy or otherwise dispose of the problem food concerned in the manner specified in the order, or to prohibit the carrying on of an activity in relation to any food, or to permit the carrying on of such activity in accordance with specified conditions.

Prohibit or permit the carrying on of an activity in relation to food

5.5 Where situation warrants, the Authority may need to make an order to prohibit a particular activity in relation to problem food, or permit the carrying on of such activity in accordance with specified condition. Some examples may include –

- (a) raw fish/ oysters which were not intended for consumption at raw state but were supplied for the purpose of raw consumption, the Authority may make a section 78B order under section 78B(1)(e) to prohibit the supply of raw fish/ oysters unless a warning label (e.g. that the food is not intended for consumption at raw state) is properly attached to the product;
- (b) certain common raw material of a particular brand is found to contain highly toxic matter, and a section 78B order may be made under section 78B(1)(e) to prohibit all local manufacturers from using that raw material in their production of food.

Points to note

5.6 It must be emphasized that the making of a section 78B order is not an impediment to the taking of any other legal action that may be available to the Government under any law. Also, it is not a defence for a person who has contravened a section 78B order to show that the food concerned is the subject of a licence, permit or any other form of authorization issued or granted under any Ordinance.

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