

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

Compensation

Purpose

This paper briefs Members on the compensation mechanism provided under the Public Health and Municipal Services (Amendment) Bill 2008.

Background

2. The new section 78B in the Amendment Bill provides that the Director of Food and Environmental Hygiene (DFEH) may make an order (section 78B order) if he has reasonable grounds at the time of making the order to believe that the making of the order is necessary to prevent or reduce a possibility of danger to public health or to mitigate any adverse consequence of a danger to public health. A section 78B order may prohibit the import and supply of any food, direct that any food supplied be recalled, direct that any food be impounded, isolated, destroyed, or otherwise disposed of, or prohibit or permit the carrying on of any activity in relation to any food.

3. The new section 78G of the Amendment Bill provides that a person bound by a section 78B order may, within 14 days from becoming bound by it, appeal to the Municipal Services Appeals Board. The new section 78H further provides that a person bound by a section 78B order who has suffered loss as a result of the order may apply to the court for an amount of compensation that is just and equitable in all the circumstances of the case and not exceeding the market value of the food at the time of making the order if an appeal has been made to the Municipal Services Appeals Board and the Board has varied or set aside DFEH's order and the person proves that DFEH did not have reasonable grounds to make the order at the time of making the order.

Compensation Capped at Market Value of the Food

4. A section 78B order regulates the food concerned, and so are the powers exercisable under the new section 78I. It would therefore be fair that the amount of compensation shall be measured against, and capped at, the market

value of the affected food, but not other matters. This approach is consistent with the existing statutory compensation provision under section 59 of the Public Health and Municipal Services Ordinance (Cap. 132). This section provides that any authorized public officer may affix to any food a mark, seal or other designation or destroy or otherwise dispose of such food if it appears to the public officer that the food is unfit for human consumption. If any person considers himself aggrieved, he may, within 72 hours complain to the court and the court may confirm or disallow the act, either wholly or in part, and shall, in the case of any act disallowed, or disallowed in part, order the removal of such mark, seal or other designation or the restoration of the food seized and removed, either as to the whole or as to such part in respect of which the act was disallowed, or, if the food in question, or any part thereof, has been destroyed or otherwise disposed of, or is no longer fit for human consumption, or is depreciated in value at the time of making such order by reason of such act, order the Authority, to pay by way of compensation such sum of money, *not exceeding the market value of such food* at the time of the doing of such act, as the court may, having regard to the circumstances of the case, consider just.

Compensation Mechanism in Local Legislation

5. The power to prohibit import and supply of products and order a recall of such products is not novel in local legislation. There are similar powers in legislation which are aimed at protecting public health and public safety. Examples include –

Legislation	Power of authorities
Public Health (Animals and Birds) (Chemical Residues) Regulation (Cap. 139N) [sections 9, 10, 14 and 15] Authority : Director of Agriculture, Fisheries and Conservation	Power to make a suspension order requiring food animal farmers/traders to suspend the supply of food animals and withdraw immediately and retrieve food animals that have already been supplied. Power to make a suspension order requiring any person who supplies fodder to suspend the supply of fodder and withdraw immediately

	and retrieve those fodder already supplied.
<p>Toys and Children's Products Safety Ordinance (Cap. 424) [sections 11 and 12]</p> <p>Authority : Commissioner for Customs and Excise</p>	<p>Power to serve a prohibition notice prohibiting the supply of toy or children's products and power to serve a notice requiring the immediate withdraw of toy or children's products from being supplied and the retrieval of those items already supplied.</p>
<p>Consumer Goods Safety Ordinance (Cap. 456) [sections 8 and 9]</p> <p>Authority : Commissioner of Customs and Excise</p>	<p>Power to serve a prohibition notice prohibiting the supply of consumer goods and power to serve a notice requiring the immediate withdraw of consumer goods from being supplied and the retrieval of those items already supplied.</p>
<p>Electricity Ordinance (Cap. 406) [sections 25 and 29]</p> <p>Authority : Director of Electrical and Mechanical Services</p>	<p>Power to prohibit the use or supply of electrical products by notice in the Gazette.</p>

6. Members may like to note that in none of the above legislation is there a statutory compensation mechanism provided in direct relation to the orders of the authorities. Where a compensation mechanism is included, it is only provided for the situation where the authorities have seized or detained the products concerned. For example, in the Toys and Children's Products Safety Ordinance (Cap. 424) and the Consumer Goods Safety Ordinance (Cap. 456), the authorities concerned are empowered to seize or detain any goods if there are reasonable grounds to suspect that an offence under the relevant legislation has been committed. These two Ordinances provide for a compensation mechanism in relation to the seizure or detention of the goods. No compensation is provided for in relation to the power of the authorities to

prohibit the supply and order a recall of the products concerned.

7. Similarly, the Electricity Ordinance (Cap. 406) does not provide for compensation in relation to a prohibition notice issued by the relevant authority. Only where the relevant electrical product is seized by the relevant authority would there be a chance for compensation under the Ordinance. The aggrieved person will have to make an appeal first to the relevant appeal board and no proceedings shall be maintainable in respect of a claim for such compensation unless the appeal board has not confirmed the action of the authority to seize the product.

8. In all the above situations, all claims for compensation would have to be made to the court of relevant jurisdiction. In the Amendment Bill, in order to simplify the procedures, we have provided that an application for claims may be made to the Small Claims Tribunal, for claims up to the maximum jurisdiction of the Tribunal, and to the District Court, irrespective of the amount claimed.

Compensation Mechanism in Overseas Legislation

9. We have made reference to a number of overseas legislation in drafting the Amendment Bill. These include Australia, New Zealand, EC, UK, Singapore, Canada and the US. Among all these overseas legislation, only in the Australian legislation could we find provisions relating to compensation. No compensation provision is provided in relation to the orders made by the authorities in the other jurisdictions.

10. In the legislation of the New South Wales and Victoria of Australia, a person bound by an order made under the legislation who suffers loss may apply to the Authority for compensation if he considers that there were insufficient grounds for the making of the order. The Authority is to pay such compensation to the applicant as is just and equitable. If the Authority has not determined an application for compensation within 28 days of receiving the application, he is taken to have refused to pay any compensation. An applicant who is dissatisfied with a determination by the Authority as to the refusal to pay compensation or as to the amount of compensation may apply to the tribunal/court for a review of the determination.

Proposed Committee Stage Amendments

11. Having considered Members' views on the current proposal under the new section 78H of the Amendment Bill, we agree that the amount of compensation should, in addition to covering only the market value of the food at the time of making the order, also cover other loss actually suffered by the person bound by the section 78B order arising as a direct result of compliance with the order. We therefore propose to amend section 78H to the effect that if the criteria set out in section 78H are met and the court agreed to award compensation, the compensation recoverable should be just and equitable in all the circumstances of the case and should cover –

- (a) the total or partial loss of the food which arise as a direct result of compliance with the order made by DFEH and that the food (i) has been destroyed or otherwise disposed of; (ii) is no longer fit for human consumption; or (iii) is depreciated in value and the compensation in relation to such situation should not exceed the market value of the food at the time of making the order; and
- (b) loss of any other kind (excluding, for the avoidance of doubt, any indirect loss) which arise as a direct result of compliance with the order made by DFEH and the compensation in relation to such situation should not exceed the actual amount of the loss suffered.

12. Furthermore, having considered Members' view that more time should be allowed for an aggrieved person to make an appeal, we propose to amend the proposed section 78G(1) under the Amendment Bill such that a person bound by a section 78B order may, within 28 days (instead of the original 14 days) from becoming bound by it, appeal to the Municipal Services Appeals Board.

Advice Sought

13. Members are invited to comment on the proposals set out in paragraphs 11 and 12.

Food and Health Bureau
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