

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

Circumstances under which a Section 78B Order would be Made

Purpose

This paper briefs Members on the circumstances under which the Director of Food and Environmental Hygiene (DFEH) will make an order under section 78B of the Public Health and Municipal Services (Amendment) Bill to prohibit the import and supply of food and order a food recall. This paper also explains why the Amendment Bill should apply to all food types, regardless of their shelf-lives.

Circumstances under which a section 78B order would be Made

2. The new section 78B in the Amendment Bill provides that 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 or 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. As explained by the Secretary for Food and Health when he introduced the Amendment Bill into the Legislative Council for first and second reading, DFEH will take into consideration the following factors in deciding whether there are reasonable grounds for him to make the order –
 - (a) information or document provided by the food traders, if any, on the safety of the food;
 - (b) results of food tests conducted by the Public Analyst, if available;
 - (c) results of food tests conducted by food safety authorities of other countries or places;

- (d) food alerts issued by food safety authorities of other countries or places;
- (e) time required for conducting the food test;
- (f) the exposure of the general public and/or particular vulnerable groups to the food;
- (g) consumption pattern relating to the food;
- (h) statutory standard of the concerned substances in the food, if any;
- (i) availability of information on the contamination of a particular batch or consignment of the food;
- (j) availability of information on the contamination of a particular food factory or the whole region; and
- (k) any other relevant considerations.

General Sampling Powers

4. DFEH is empowered under section 62 of the Public Health and Municipal Services Ordinance (Cap 132) to take samples of food for testing such as chemical analysis and bacteriological examination. Section 63 further provides for the detailed rules on taking samples for certain types of analysis, e.g. that the samples should be divided into three parts, with each part labelled, marked and sealed in the presence of a responsible person or owner/distributor, that the responsible person/owner/distributor should be informed of the purpose of analysis and allowed to select any one of the three parts for his custody and testing. Such rules are to ensure a fair and representative sample and to avoid any risk of contamination.

5. While testing for enforcement purpose is conducted by the Government, food tests conducted by private laboratories are recognized, provided that the laboratories have used valid methods to produce accurate testing results. Performance characteristics of the methods such as trueness, precision, sensitivity, matrix interference should be validated against internationally recognized guidelines. Moreover, third party assessment such as HOKLAS accreditation on the technical competence and quality management of the

laboratories is desirable. In this regard, Members may like to note that the Government has outsourced some testing under the regular food surveillance programme to private laboratories in order to free up resources in the Government Laboratory for the development of new and advanced testing methods for new food standards and to cater for the more extensive and complicated testing demands arising from the Administration's stepped-up food control regime.

Code of Practice

6. In order to provide practical guidance in respect of the provisions in the Amendment Bill, in particular the making of section 78B orders, we propose to include a new section in the Amendment Bill to empower DFEH to issue a set of code of practice on the matter. A failure on the part of any person to observe any provision of a code of practice does not of itself render the person liable to any civil or criminal proceedings. However, if in any legal proceedings the court is satisfied that a provision of a code of practice is relevant to determining a matter that is in issue in the proceedings, the code of practice is admissible in evidence in the proceedings and proof that the person contravened, or did not contravene, a relevant provision of the code of practice may be relied on by any party to the proceedings as tending to establish or negate that matter. We will introduce Committee Stage Amendments (CSAs) to that effect.

7. As explained in paragraph 3 above, DFEH will take into consideration a host of factors in deciding whether there are reasonable grounds for him to make a section 78B order. The considerations would be clearly set out in the relevant code of practice. Following trade consultation, we will submit the draft code of practice to the Bills Committee for comments in around January 2009.

Provisions in Similar Overseas Legislation

8. In formulating our policy, we have made reference to some overseas legislation, including Australia (New South Wales and Victoria), New Zealand, UK and Canada. We note that in the legislation of all these overseas jurisdictions, there is only a general empowering provision for the relevant authorities to make a similar order to prohibit the import or supply of food and/or order a food recall (see Table A below). The laws do not provide for the

different circumstances under which an order is to be made or not made. After all, the provisions are to deal with unforeseen food incidents to protect public health. We consider the proposed formulation of the new section 78B in the Amendment Bill, which is very similar to the Australian model, is appropriate.

Table A

<p>Australia (New South Wales) <i>New South Wales Food Act 2003</i></p>	<p>An order may be made by the Food Authority if the Food Authority has reasonable grounds to believe that the making of the order is necessary to prevent or reduce the possibility of a serious danger to public health or to mitigate the adverse consequences of a serious danger to public health.</p>
<p>Australia (Victoria) <i>Victoria Food Act 1984</i></p>	<p>If the Secretary has reasonable grounds to believe that the making of the order is necessary to prevent or reduce the possibility of a serious danger to public health or to mitigate the adverse consequences of a serious danger to public health.</p>
<p>New Zealand <i>Food Act 1981</i></p>	<p>The Minister may, for the purpose of protecting the public, issue to any importer, manufacturer, or seller of food, an order directing the recall of any food or appliance, or requiring the destruction or denaturing of any food that is unsound or unfit for human consumption or is damaged or deteriorated or perished or that is contaminated with any poisonous, deleterious, or injurious substance</p>
<p>UK <i>Food Safety Act 1990</i></p>	<p>If it appears to the Minister that the carrying out of commercial operations with respect to food, food sources or contact materials of</p>

	any class or description involves or may involve imminent risk of injury to health , he may, by an order, prohibit the carrying out of such operations with respect to food, food sources or contact materials of that class or description.
Canada <i>Canadian Food Inspection Agency Act</i> <i>Food and Drug Act</i>	Where the Minister believes on reasonable grounds that a product poses a risk to public, animal or plant health, the Minister may, by notice served on any person selling, marketing or distributing the product, order that the product be recalled or sent to a place designated by the Minister. The Minister may make an interim order if the Minister believes that immediate action is required to deal with a significant risk, direct or indirect, to health, safety, or the environment.

Arrangement for food with short shelf-lives

9. During discussion at the Bills Committee meeting on 18 November 2008, concern was raised on whether there should be different treatment for fresh food and processed food. As noted from all the above overseas legislation, the power to make orders is generally applicable to all food types, regardless of whether they are fresh food or processed food. In fact, there is no clear definition for the term “fresh food” as some food which are commonly known as “fresh food” also have a relatively long shelf-life, e.g. eggs and fruits while “processed food” may also have short shelf-life, e.g. bread and cakes. While it may be argued that the Chinese community consumes a lot of fresh food items, the shelf-lives of many Western food could also be very short. When DFEH considers there is health risk associated with any food, and has reasonable grounds to believe that the making of the order to prohibit the supply of the food is necessary to protect public health, as a responsible food authority, he will have to take timely and appropriate action to make such an order for a

specified period of time under section 78B of the Amendment Bill, irrespective of the shelf-life of the food concerned. That said, we note that the implications of a section 78B order would be more significant on traders of food with short shelf-life rather than long shelf-life. DFEH will therefore exercise extra care and due diligence before invoking the power on food with short shelf-life, taking into considerations all applicable factors set out in paragraph 3 above. Where necessary, the Government Laboratory will also give priority to the testing of such food. On the other hand, the cooperation of the food trade is of utmost importance particularly in respect of fresh food with short shelf-lives. It is to protect public health as well as to safeguard the interests of the traders as traders should only seek to import and supply food that complies with the safety requirements.

Food and Health Bureau
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