

Decision-making factors in considering a food recall

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A potential food recall scenario is a high-pressure situation that requires the directors and food business management teams to make quick but critically important decisions. A food business can make its decision-making processes easier by improving its preparation and ensuring that critical information and data analysis is readily available to help inform the decision-making process from the earliest stage of an emerging event. This article considers factors in determining whether a recall is necessary.

It is important to recognise the desirability for external legal assistance such as is provided by FoodLegal, at the time when a problem is emerging and also in preparing systems that will mitigate problems before a real-case crisis ever emerges.

The importance of decision-making in a recall scenario

When dealing with a recall or similar crisis event, the consequences of poor decision-making can be significant. As a recall scenario often involves issues concerning product safety, failure to initiate a recall if it is required can result in:

- **Significant regulatory penalties** including fines for breach of the *Food Act* in the State or Territory where the business is based. For example, the sale of unsafe food can result in a fine of \$550,000 for a corporation under the NSW Food Act.
- **A mandatory food recall order.** If food regulators determine that a product must be recalled to protect public health, they are empowered to issue a mandatory order compelling the food business to recall the product.
- **Change in management being imposed as a condition of business continuity.** For food businesses that are required to hold a licence or registration with the relevant food authority, the authority may refuse to renew the licence for the current licence-holder. For example the Victorian meat regulator, PrimeSafe, may refuse to renew a meat processing licence in the name of the operator if the business has been involved in food safety incidents. PrimeSafe may require someone else to be the operator and licence-holder, and may require the licence-holder to undergo training.
- **Brand damage from negative publicity** with commercial customers and the public. This can impact an entire product category, even where the majority of suppliers are fully compliant.

However, part of the decision-making process involves assessing whether a recall is actually required. If a business approaches an issue too conservatively and elects to recall a product when

it is not required, this could also result in significant commercial consequences, including:

- Incurring unnecessary commercial costs associated with recalling stock, such as withdrawal and restocking fees (e.g. where the product is supplied through large national retailers) and resulting gaps in supply.
- Rejection of insurance claims where the insurer determines that a recall was not necessary (see below for further discussion of insurance).
- Attracting unnecessary negative publicity associated with the recall, since a food recall notification is a public process with advertising and considerable publicity through all media and online and in-store channels.

The decision whether to undertake a recall is a significant one; however, the decision-making process actually starts long before this point. Although some businesses have internal procedures to guide them through many of the big decisions, many ought to consider expert counsel external to the business reviewing the existing approach and systems. FoodLegal can also assist in preparing decision-making trees and undertaking mock exercises for different points of the supply chain.

The remainder of this article explores some of the key factors and issues to consider when making decisions to manage a recall scenario.

Have you identified the extent of the crisis?

A potential recall event is a crisis scenario, as it requires decisions to be made quickly and with the right expertise in order to minimise the potential for harm. This means being proactive rather than waiting to hear from a food regulator.

One issue that companies need to consider is whether lower management personnel are adequately trained to identify an emerging issue and its commercial ramifications for the business. For example, a QA manager dealing with a private label contract product may not be the right person to make decisions about a quality complaint that goes to the heart of the commercial relationship between the food company and a supermarket that is one of its major customers.

We explored some common crisis scenarios and steps that businesses can take to identify a potential crisis in our [November 2022 edition of FoodLegal Bulletin](#). Actions that a food business can take include:

- Monitoring consumer complaints and having a framework in place to escalate complaints that relate to a potential safety issue;
- Maintaining communication with commercial customers and trading partners to identify any potential issues with the product or an ingoing ingredient or component (e.g. packaging); and
- Having internal procedures in place (e.g. microbial testing regimes) to detect a potential safety issue as early as possible (ideally before stock is released for distribution) using frequent batching so that any problem is able to be quantified and quarantined immediately.

Having these procedures in place will give the business the data it needs to decide whether a situation is serious enough to contemplate recalling the product.

Is a recall required?

Not every crisis scenario will need to result in a recall.

Generally, a recall will be required where a product that is available for sale presents a risk to public health and safety. For example, if a product has a microbial contamination, does not include

all allergens on the label, or has packaging that is compromised, and thereby unsafe.

Once the food business has identified an issue, it must conduct an assessment as to whether it presents a safety risk. A business can use internal metrics or thresholds that it can test against (e.g. allergen testing thresholds) to guide this decision. Businesses can also engage external expertise to assist. For example, if a business has identified a foreign contaminant, this will require an assessment to identify the source of the contaminant, the level in the product, and whether the level presents a risk to public health, taking into account any relevant scientific literature and regulatory legal guidance to assess the level of risk.

There are some products for which a business can take steps to mitigate and manage some of the added risks that may be known to occur in some circumstances, or which require frequent ingredient testing for inherent contaminants or residues. Another situation is where using an uncommon ingredient, there should be a research dossier compiled to establish all the circumstances in relation to risks attributable to certain ingredients in changing circumstances. This dossier might then be relied on by the food company or if there are queries about whether the ingredient ought to have been prohibited as a novel food.

Another example would be a situation where a business decision must be made as to whether the product complaint relates to product quality rather than product safety. A quality issue can be harmful but it might be possible to address a product withdrawal issue through managing a particular customer or a specific distribution channel by separately identifying those affected and communicating directly through those relationships.

The question of amendments to labelling can raise a whole raft of other issues, including whether existing inventory stocks of particular packaging artwork can be salvaged. Sometimes a label can continue to be used, or used in a modified way, and in some circumstances the timing of a print run for a new label might be a matter of negotiation with relevant parties. It is important that public safety cannot be compromised and therefore this must always be capable of being demonstrated to the relevant regulators and other parties affected.

Role of insurance

In making a decision whether to recall, a food business should consider its insurance coverage. Some policies cover product recalls; however, it will be necessary to assess what circumstances will be covered. Some policies might only cover a mandatory recall that is ordered by a regulator. Formal official mandatory recalls are not common because, as mentioned below, there are laws by which a food regulator can become liable to compensate a food business for having made a mandatory food recall in circumstances that were not warranted.

The wording of insurance policies and their coverage and exclusions and the level of the Excess should all be carefully reviewed at senior management level. Some insurance policies do not cover voluntary recalls even though the 'voluntary-ness' might be far more imperative than the word 'voluntary' might suggest.

Insurers should also be notified in accordance with the terms of the relevant insurance policies, given that the insurer can also exercise a power of 'subrogation' which may authorise the insurer to control the processes for compromise with the affected party having recourse against the food company. The directors of the food company need to be aware of this possible limitation on their powers to reach commercial compromises if there is a relevant insurer that might need to be consulted.

Has a regulator become involved?

If a food business first becomes aware of a potential issue through being contacted by a food regulator, it should conduct an assessment to verify the facts and quantify whether the issue

presents a safety risk. Even though a regulator may have an opinion about whether the issue is likely to present a breach, the business should form its own conclusions and there is usually an opportunity to engage in a discussions with the concerned regulator. External legal advice should be sought and can be provided by FoodLegal

When dealing with a food regulator, a food business ought to obtain tailored advice on its approach. Often, when a regulator is involved the stakes will be higher and it will be important to respond to any questions quickly.

When a regulator believes that a product presents a safety risk, they will likely place pressure on the food business to conduct a voluntary recall. It is very rare that the regulator will order a mandatory recall, as each State and Territory *Food Act* has a provision requiring compensation to be paid to the food business if the regulator did not have proper grounds for ordering the recall.

Decision-making after the fact: Change in business procedures

After a business has made a decision whether or not to conduct a recall, it is an important step to consider any learnings and potential changes arising from the experience. Even where the business has decided that a recall is not necessary as the issue is only a quality issue, there may be opportunities to increase efficiencies or reduce the likelihood of the issue arising in future.

Potential changes could include staff training, changes or upgrades to equipment, labelling changes, use of alternative ingredients, or changes to manufacturing processes.

If you have any questions on the contents of this article, please feel free to [contact us](#).

This is general information rather than legal advice and is current as of 8 Apr 2024. We therefore recommend you seek legal advice for your particular circumstances if you want to rely on advice or information to be a basis for any commercial decision-making by you or your business.