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**Paper for the House Committee meeting
on 26 October 2001**

**Report of the Subcommittee on
Public Health (Animals and Birds) (Chemical Residues) Regulation
& Harmful Substances in Food (Amendment) Regulation 2001**

Purpose

This paper reports on the deliberations of the Subcommittee on Public Health (Animals and Birds) (Chemical Residues) Regulation & Harmful Substances in Food (Amendment) Regulation 2001.

The Regulations (Legal Notices 146 and 148 of 2001)

2. There is currently no specific legislation to regulate the feeding of chemicals to food animals. The Administration proposes to introduce the Public Health (Animals and Birds) (Chemical Residues) Regulation (the Regulation) under the Public Health (Animals and Birds) Ordinance (Cap.139) to regulate the feeding of chemicals to food animals (including livestock and poultry, but excluding fish) that are sold for human consumption. The Regulation prohibits the use of seven chemicals, including clenbuterol, by farmers and food animal traders to food animals. It also establishes "Maximum Residue Limits" (MRL) for 37 other agricultural and veterinary chemicals in meat, offal or milk with limits in line with international standards.

3. To ensure a consistent standard of chemical residues in the food chain, the Administration has proposed separate amendments to the Harmful Substances in Food Regulations made under section 55(1) of the Public Health and Municipal Services Ordinance (Cap. 132). The Harmful Substances in Food (Amendment) Regulation 2001 (the Amendment Regulation) prohibits the sale of food containing the same seven prohibited chemicals, and the same 37 agricultural and veterinary chemicals exceeding MRL as proposed under the Regulation.

The Subcommittee

4. At the House Committee meeting on 29 June 2001, Members agreed to form a Subcommittee to study the two Regulations. The membership list of the Subcommittee is in **Appendix I**.

5. Under the chairmanship of Dr Hon LO Wing-lok, the Subcommittee held six meetings with the Administration and met with representatives of eight organisations as listed in **Appendix II**.

Deliberations of the Subcommittee

Views of the trade

6. Members note from their meeting with representatives of food animal farmers, traders and fodder suppliers that the trade is generally in support of the introduction of tighter control over the use of chemicals in feeding food animals. They support the proposals as set out in the Regulation as long as the system is fair and they are given clear guidelines and necessary training.

Definition of food animal farmers

7. Members note that six categories of persons are included in the definition of "food animal farmer" in section 2 of the Regulation. The Administration explains that in Hong Kong, there is often blurring or overlapping of roles on livestock farms. For this reason, a broad definition of "food animal farmer" is created to cover all parties who are involved in the rearing of food animals on food animal premises to make sure that all types of situations that currently exist in Hong Kong are covered under the Regulation. For example, there are cases where the occupiers of food animal premises are involved in the rearing and trading of the food animals kept on the premises, but are not the holders of livestock keeping licences in respect of those premises.

Strict liability of food animal farmers and suppliers of prohibited chemical

8. Sections 3(1), 5(1), 6, 11(1) and (2), and 12(1) and (2) of the Regulation impose strict liability on food animal farmers and suppliers of prohibited chemicals. Legal action can be taken if the prosecution is able to prove one of the following -

- (a) a food animal kept by a food animal farmer contains any prohibited chemical;
- (b) the tissue of any food animal supplied by a food animal farmer contains any agricultural and veterinary chemical in excess of the

MRL;

- (c) the milk derived from food animals kept by a food animal farmer and supplied to or from or kept in any licensed dairies by him contains any agricultural and veterinary chemical in excess of the MRL;
- (d) a food animal farmer has in his possession or under his control any prohibited chemical or fodder containing or mixed with any prohibited chemicals; and
- (e) any person supplying to a food animal farmer or trader any prohibited chemical or fodder containing or mixed with any prohibited chemical.

9. The Administration proposes that strict liability be imposed on a food animal farmer under sections 3(1), 5(1), 6 and 11(1) and (2) because the farmer is the one who actually raises the animals on the farm and decides on how to feed the animals. It is highly unlikely that he has no knowledge about the feeding of the prohibited chemicals or the inappropriate feeding of other chemicals to food animals on his farm. A farmer should have the ultimate responsibility for the quality and conditions of the food animals he supplies to the slaughterhouse or market. Besides, a supplier of prohibited chemicals or fodder containing or mixed with these chemicals plays a significant role in assisting farmers to feed prohibited chemicals to their animals. Therefore, a supplier commits an offence under section 12(1) or (2) if he supplies prohibited chemicals or fodder containing or mixed with them. Under section 17(4) and (5), it shall be a defence for the food animal farmer and supplier to prove that he did not know and had no reason to suspect the existence of the circumstances giving rise to the contravention. The standard of proof is on a balance of probability.

10. Members note that the Administration's past experience shows that it is extremely difficult to gather sufficient evidence to prove that a farmer has purchased prohibited chemicals and has fed the chemicals to food animals on his farm. While farming and supplying of fodder are continuous activities, the act of mixing chemicals into fodder can be done very quickly and unnoticeably. This makes it impossible to catch the offending farmers or suppliers "red-handed". It is impossible for the prosecution or the enforcement agency to stay on a farm over a long period of time to gather evidence of improper feeding. Not only that such enforcement action is not practical or effective, it would also be very disturbing to the farmers. Thus unless the Administration creates strict liability offences, it will be close to impossible to secure a conviction against an unscrupulous farmer. The strict liability offence provisions are crucial to the overall effectiveness of controlling the problem of harmful or excessive chemical residues in food animals. Otherwise, the insurmountable enforcement problems would seriously undermine the deterrent

effect.

11. The legal adviser to the Subcommittee has pointed out that strict liability will not usually be imposed unless the matter in question is of social concern and the creation of strict liability will promote the objects of the legislation by encouraging greater vigilance. In this connection, public health has been characterised by the courts as an area of social concern.

12. The Administration has further pointed out that strict liability offences exist in current local food safety legislation as well as similar legislation in the United Kingdom, Canada and New Zealand. No injustice will be created as a responsible farmer would have little difficulty in making out his defence. Farmers accept that effective law enforcement will help ensure that the reputation of the trade will not be ruined by a few irresponsible and unscrupulous farmers.

13. Hon Tommy CHEUNG has expressed strong reservation about the strict liability provisions in the Regulation. He has indicated that he would consider moving amendments to the relevant sections to the effect that the person concerned would be liable only if the prosecution can prove that he knowingly or negligently commits the offence.

Liability of animal traders

14. Members note that animal traders are a step away from the actual rearing, especially the feeding, of food animals on the farm. However, there are traders who encourage farmers to use prohibited chemicals, such as clenbuterol to increase the proportion of lean meat in pork, through offering attractive price for livestock fed with such chemicals. These traders know that the animals they trade are contaminated and the Administration believes that they should be prosecuted. On the other hand, those traders who genuinely have no knowledge of the malpractice of farmers should not be held responsible. Therefore in the case of traders, the burden of proof for the act and mental element, i.e. the knowledge and wilfulness, rests with the prosecution.

Liability of body corporate

15. Section 21 of the Regulation provides that where an offence under the Regulation has been committed by a body corporate, any person who, at the time of commission of the offence, was a director or an officer concerned in the management of the body corporate shall also be guilty of such offence unless he proves that -

- (a) the offence was committed without his consent or connivance;
- and

- (b) he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.

16. Members note that a director who committed an offence can make the body corporate liable because his act and knowledge can be imputed to the company. If the company committed an offence under the Regulation, other directors and officers concerned in the management will not be guilty if the offence was committed without the director's or the officer's consent or connivance and he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.

17. Ng Fung Hong Limited, a major importer of food animals, has asked the Administration to consider amending the section to impose liability on those directors and other officers in the senior management responsible for the business of food animals. In response, the Administration has pointed out the proposed amendment would mean that the prosecution has to fully understand the internal operation of the body corporate concerned and to distinguish between the duties and responsibilities of its directors and senior management. It would be difficult for the prosecution to make an accurate judgment in this regard.

18. Members note that there are nine other ordinances providing the same defence as in section 21 of the Regulation. Hon Cyd HO and Hon Tommy CHEUNG oppose the provision and share the view that section 21 should be repealed. Members note that if section 21 is repealed, it may be possible for directors or other officers concerned in the management of the company to be guilty of the same offence as the company under section 101E of the Criminal Procedure Ordinance (Cap. 221) if it is proved that the offence was committed with their consent or connivance. However, the onus of proof will rest with the prosecution and the standard of proof is beyond reasonable doubt. Members also note that out of the 11 other regulations made under Cap.139, only one regulation contains a provision same as section 21. Under Cap.139 and its subsidiary legislation, no body corporate has been prosecuted. In the light of the above information, the Subcommittee has asked the Administration to review the need for section 21.

19. On review, the Administration has agreed to move an amendment to repeal section 21 and to rely on section 101E of the Criminal Procedure Ordinance (Cap.221) for imposing liability on directors and managing officers of offending corporations. The Administration will review the situation if there is a future court case proving that section 101E of Cap. 221 is not applicable in the case of this Regulation.

Proposal of adding "due diligence" to section 17(4) and (5)

20. Section 17(4) provides that in any proceedings for an offence against section 3(1), 5(1), 6 or 11(1) or (2), it shall be a defence for the defendant to prove that he did not know and had no reason to suspect the existence of the circumstances giving rise to the contravention. Section 17(5) makes similar provisions for an offence against section 12(1) or (2).

21. The legal adviser to the Subcommittee has pointed out that it is usual to provide a statutory defence for a person charged with a strict liability offence if he proves that -

- (a) he did not know and had no reason to suspect the existence of the circumstances giving rise to the contravention; and
- (b) he could not, by the exercise of reasonable supervision and reasonable diligence, have prevented those circumstances arising.

She has therefore asked the Administration to explain why it considers it inappropriate to include the second condition in section 17(4) or (5) .

22. The Administration has explained that it is not uncommon to find statutory provisions requiring the defendant to prove only the absence of knowledge. Section 17(4) or (5) provides the necessary defence for suspects committing offences of strict liability while striking a balance in ensuring the effectiveness of prosecution against the genuine offenders.

23. At the request of Hon Cyd HO, the Administration has provided for the Subcommittee's consideration an amended version of section 17(4) and (5) which replaces "had no reason to suspect" with "could not with reasonable diligence have known". Following discussion, members have come to the view that as the proposed amendment would impose a greater burden on the defendant, there should be no change to the original provisions.

MRL of agricultural and veterinary chemicals

24. Hon Michael MAK has questioned why the MRL listed under items 18, 19 and 25 of Schedule 1 of the Regulation is "0" and why these chemicals are not classified as prohibited chemicals. The Administration has pointed out that these chemicals have significant uses in livestock production, such as providing treatment for serious diseases, and therefore should be allowed to be used on livestock provided they are used in a careful and proper way. However, the existence of residues of these chemicals will do harm to human beings over a long period of time and since there is no safe level over long term, a strict MRL of "0" is necessary.

25. Members note that if farmers feed the agricultural and veterinary

chemicals at the recommended dose rates and withhold these chemicals from the animals for the specified period before slaughter, the concentration of these chemicals in the specified tissues and milk of food animals should be within the prescribed MRL.

Implementation plan

26. Members note that the Government Laboratory needs more time to develop or adapt the testing methods for the chemicals specified under the two Regulations and to purchase the required apparatus. For this reason, the Administration proposes to implement the Regulations in two phases having regard to the varying degrees of public health concerns over the various chemicals. The first phase will cover the seven prohibited chemicals and 10 of the 37 agricultural and veterinary chemicals while the second phase will cover the remaining chemicals.

27. Members share the view that control on these chemicals should take effect as soon as possible and have asked the Administration to give a timetable for the second phase implementation. In response to members' concern, the Administration has pointed out that while the seven prohibited chemicals have an acute toxic effect on health, a small quantity of the 37 agricultural and veterinary chemicals will not cause immediate harm to humans. The Administration expects that it will take approximately one year to proceed to the second phase of the implementation.

Laboratory testing facilities

28. Hon Fred LI has asked whether overseas experience could be drawn on the control and testing methods for these chemicals and whether laboratories in the private sector could provide testing services to expedite the process. The Administration has explained that it has made reference to overseas practices and most countries also have some degree of phasing in controls on different chemicals subject to the testing methods. As regards testing services in the private sector, no private laboratory in Hong Kong is able to carry out these types of tests at present. Moreover, the Administration has pointed out that it needs to rely on the testing work of the Government Laboratory as the Public Analyst for prosecution purposes.

29. The Chairman considers that private laboratories should be encouraged to install facilities to conduct these tests so that farmers or traders who disagree with the testing results of the Government Laboratory would be able to obtain a second opinion.

Enforcement of the Regulations

30. Members note that after the Regulations have come into force, the Government will exercise regulatory control throughout the entire food chain,

from the farm of origin to the retailer. At present, a voluntary system to collect urine samples of local and imported live food animals is already in place at slaughterhouses. Such screening tests will continue and be enhanced with the introduction of the Regulations. If the screening test results show that chemicals are used improperly or prohibited chemicals are used in feeding food animals, the farm of origin can be identified through the tracing system and the animal identification system so that the fodder in the farm in question can also be examined. Under the Regulation, a fodder supplier has an obligation to furnish information on the content and use of the fodder if it contains any agricultural and veterinary chemicals so as to enable farmers to use it in a proper way. The Government will also step up the existing regular and irregular inspections of retailers to check whether the meat contains any prohibited chemical or any of the 37 agricultural and veterinary chemicals exceeding the MRL.

31. The Administration has assured members that it will work closely with farmers to address their problems and help them improve the quality of their products. Farmers have been made well aware of the implications of using these chemicals on food animals and the Government will strictly enforce the Regulation against the use of the prohibited chemicals and the improper use of the agricultural and veterinary chemicals.

Training for food animal farmers

32. Members note that training for farmers on the proper use of animal feed and chemicals has already commenced. The Agriculture, Fisheries and Conservation Department (AFCD) would continue to work closely with farmers and provide them with proper guidance on the feeding of chemicals to food animals. Information on the recommended dose rates and the requisite withholding periods for different types of chemicals will also be provided to farmers.

Guidelines for the various parties concerned

33. In response to the Subcommittee's request, the Administration has prepared information sheets setting out suggested actions for the reference of the following parties in the supply chain of food animals to help them avoid any contravention of the Regulation -

- (a) Food animal farmers;
- (b) Food animal wholesalers and importers;
- (c) Retailers of food animals and related products;
- (d) Food animal transporters; and
- (e) Fodder suppliers.

Imported food animals

34. Members note that the certification requirements on chemical residues in imported animals as set out in section 8 of the Regulation are within the ambit of the World Trade Organisation's Sanitary and Phytosanitary Services Agreement. Therefore countries engaging in export trade of food animals should have no problem in complying with the requirements. At present, Hong Kong's largest supplier of live food animals is the Mainland. The State General Administration for Quality Supervision and Inspection and Quarantine, which is the relevant competent authority, is well informed of the requirements and does not have any problem with the required certification.

Regulation of imported chilled meat

35. Both Hon TAM Yiu-chung and Hon WONG Yung-kan have voiced concern that the control on local live food animals seems to be more stringent than that for imported meat. The Administration has explained that local live food animals and imported meat will be subject to the same control under the Regulation and the Amendment Regulation respectively.

36. The Administration has also pointed out that similar legislation to control the use of chemicals on food animals has been put in place in many other countries including Thailand. Before Thailand was allowed to export pork to Hong Kong, the Hong Kong Government had sent officials to examine their testing facilities and inspection procedures at slaughterhouses. Furthermore, only pork from several registered slaughterhouses may be exported to Hong Kong and these slaughterhouses have been requested to conduct the same type of ante-mortem urine tests on live pigs as that in Hong Kong. In addition, the pork to be imported to Hong Kong has to be accompanied by a health certificate issued by the relevant health authority of Thailand certifying that the pork has passed the requisite tests and is fit for human consumption. Sample tests on imported meat will also be conducted locally.

Issues for follow-up by the Panel on Food Safety and Environmental Hygiene

37. The following issues/proposals have also been raised during the course of discussions and the Subcommittee recommends that they should be followed up by the Panel on Food Safety and Environmental Hygiene -

- (a) extension of control under the Regulation to fish;
- (b) enhanced monitoring of sale of chilled meat;
- (c) legislative amendment to separate control of drugs for humans and animals in order that drugs for food animals could be regulated under one ordinance (Cap. 139) and one department

(AFCD); and

- (d) establishment of a designated zone for food animal farming.

Proposed amendments

38. In addition to the amendment to repeal section 21 of the Regulation, the Administration will move the following proposed amendments at the Council meeting on 31 October 2001 -

- (a) amendment to item (a) for pigs in Schedule 4 of the Regulation to revise the tattoo mark requirement from comprising "5 separate alphanumeric characters" to "at least 5 separate alphanumeric characters" to allow more flexibility and cater for future changes; and
- (b) amendments to section 4 of the Amendment Regulation - the current amended Regulation 3A of the Harmful Substances in Food Regulations prohibits the sale of fish, meat and milk containing any prohibited substance. The proposed amendments, made in response to the Chairman's suggestion, seek to also prohibit the import of such fish, meat and milk.

39. The proposed amendments to be moved by the Administration are in **Appendix III**. The Subcommittee supports the proposed amendments.

Recommendation

40. The Subcommittee recommends that the Regulations be supported.

Advice sought

41. The Subcommittee invites the House Committee to note its deliberations. Two verbal reports were made by Dr Hon LO Wing-lok, Chairman of the Subcommittee, at the House Committee meetings on 5 and 12 October 2001.

Council Business Division 2
Legislative Council Secretariat
24 October 2001

**Subcommittee on
Public Health (Animals and Birds) (Chemical Residues) Regulation
& Harmful Substances in Food (Amendment) Regulation 2001**

Membership List

| | |
|----------------------|-----------------------------|
| Chairman | Dr Hon LO Wing-lok |
| Members | Hon Cyd HO Sau-lan |
| | Hon Fred LI Wah-ming, JP |
| | Hon WONG Yung-kan |
| | Hon TAM Yiu-chung, GBS, JP |
| | Hon Tommy CHEUNG Yu-yan, JP |
| | Hon Michael MAK Kwok-fung |
| | (Total : 7 Members) |
| Clerk | Ms Doris CHAN |
| Legal Adviser | Ms Bernice WONG |
| Date | 24 October 2001 |

Appendix II

**Subcommittee on
Public Health (Animals and Birds) (Chemical Residues) Regulation
& Harmful Substances in Food (Amendment) Regulation 2001**

**Organisations represented at the
Subcommittee meeting on 11 October 2001**

Ng Fung Hong Limited

Woodley Agri Service Co. Ltd.

Advance Feed Co., Ltd.

Hong Kong Pigfarm Association

Hong Kong Livestock Industry Association

The N.T. Chicken Breeders Association Ltd.

Guang Nan (Holdings) Ltd.

Hong Kong N.T. Poultry - Culture (Geese Ducks) Mutual Association

INTERPRETATION AND GENERAL CLAUSES ORDINANCE

RESOLUTION

(Under section 34 of the Interpretation and
General Clauses Ordinance (Cap. 1))

PUBLIC HEALTH (ANIMALS AND BIRDS) (CHEMICAL RESIDUES) REGULATION

RESOLVED that the Public Health (Animals and Birds) (Chemical Residues) Regulation, published in the Gazette as Legal Notice No. 146 of 2001 and laid on the table of the Legislative Council on 27 June 2001, be amended -

- (a) by repealing section 21;
- (b) in Schedule 4, in the entry in column (2) opposite to the entry of "Pig" in column (1), in paragraph (a), by repealing "5" and substituting "at least 5".

INTERPRETATION AND GENERAL CLAUSES ORDINANCE

RESOLUTION

(Under section 34 of the Interpretation and
General Clauses Ordinance (Cap. 1))

HARMFUL SUBSTANCES IN FOOD (AMENDMENT) REGULATION 2001

RESOLVED that the Harmful Substances in Food (Amendment) Regulation 2001, published in the Gazette as Legal Notice No. 148 of 2001 and laid on the table of the Legislative Council on 27 June 2001, be amended by repealing section 4 and substituting -

"4. Regulation substituted

Regulation 3A is repealed and the following substituted -

**"3A. Prohibition of import and sale of
fish, meat or milk containing
prohibited substances**

No person shall import, sell or consign or deliver for sale for human consumption, any fish, meat or milk which contains any substance specified in the Second Schedule."."