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Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

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14 November 2008

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Dear Mr Lam,

Public Health and Municipal Services (Amendment) Bill 2008

Thank you for your letter of 7 November 2008.

Our response to the questions raised is set out in the attached note.
Please feel free to let us know if you have further questions.

A handwritten signature in black ink, appearing to be 'Angelina Cheung'.

(Mrs Angelina Cheung)
for Secretary for Food and Health

**Response to Comments from Assistant Legal Adviser on the
Public Health and Municipal Services (Amendment) Bill 2008**

1. New section 78A

- (a) The definition of "supply" in the new section 78A is similar to the definition of "supply" in the Toys and Children's Products Safety Ordinance (Cap 424), the Consumer Goods Safety Ordinance (Cap 456) and the Energy Efficiency (Labelling of Products) Ordinance (Cap 598) except that the hiring out element is not provided in the Bill (because hiring out is not applicable to food). Whilst paragraph (a) "to sell the food" in the definition of "supply" should have covered most exchanges of food for money consideration, we consider it more comprehensive if the word "consideration" in paragraphs (c) and (d)(ii) is not restricted to "non-money consideration". We see no problem if a certain act is covered by both paragraphs (a) and (c) or by both paragraph d(i) and d(ii) in the definition.
- (b) We have considered your suggestion during the drafting of the Bill. If "supply" covers the giving away of food for non-commercial purposes, the scope of the Bill would be so wide that it also covers the situation when a person gives food as a gift (or for whatever reason) to a friend, a neighbour or a colleague in office. It is not the policy intent to cover such situations in our Bill. On the other hand, it may be difficult to define "charitable purpose" in the context of the giving away of food. We do not think that traders would "dump" the problem food to charitable organizations and neither do we think the latter would accept those food when the Administration has already widely publicized the making of an order to prohibit the supply of those food.

2. New section 78B(1)(c)

In drafting the Bill, we have made reference to a number of overseas legislation including the food safety legislation of New South Wales and Victoria of Australia. A copy of the relevant provisions is attached at Annex A. The power to prohibit the carrying on of an activity in relation to any food is provided in the Australian legislation which we consider useful in dealing with unforeseen food incidents.

For food in relation to which an activity is permitted to be carried on under an order made under the new section 78B(1)(e), so long as the activity is carried on in accordance with the conditions specified in the order, then there is no non-compliance. There may be, however, change in circumstances, e.g. the Director of Food and Environmental Hygiene (DFEH) has subsequently obtained additional information about the food. In such case, he may vary or revoke the original order under section 78B(4). If he has reasonable grounds under section 78B(2), he may vary the original order or make a new order to prohibit the supply of the food, prohibit the carrying on of the activity, direct that the food (if already supplied) be recalled or direct that food be impounded, isolated, destroyed or otherwise disposed of. We therefore do not consider there is the need to specifically extend the power to recall to food that is subject to an order made under section 78B(1)(e).

3. New section 78B(1)(e)

- (a) As mentioned in point 2 above, we consider section 78B(1)(e) useful in dealing with unforeseen food incidents. It is logical that section 78B(1)(e) is added to cover activities other than those covered by section 78B(1)(a) and (b). However, since "import" and "supply" are two main categories of the proposed section 78B orders, it is more reader-friendly if they are mentioned upfront. Section 78B(1) empowers DFEH to make an order to do one or more of the things described in section 78B(1)(a) to (e). Even if section 78B(1)(e) is wide enough to cover import and supply, it is in order as DFEH, on making an order, is to act within the scope of section 78B(1). We consider that the paragraphs under section 78B(1) need not be exclusive of one another.
- (b) A possible scenario under which section 78B(1)(e) will be invoked is as follow: An overseas food regulatory agency notifies that a certain batch of Product A (with detailed information on the batch number and expiry date) was found hazardous to health due to a non-systemic flaw in the manufacturing process; and various batches of Product A (including the unsafe batch) are found inside the same warehouse of an importer. We may make a section 78B order to permit the sale of the other batches subject to the condition that proof on the safety of those batches can be provided upon request.

4. New section 78B(2)

Section 78B(2) is also modelled on the food safety legislation of New South Wales and Victoria of Australia. While the first limb of the provision is for preventing or reducing a possibility of danger to public health, the second limb takes into account situation where the adverse consequence of a danger to public health may or may not have emerged. For example, when there are locally reported cases of food poisoning by consumption of certain oysters due to the presence of norovirus, it may be necessary to make an order to prohibit the supply of the relevant oysters to avoid further poisoning cases, in other words mitigating the adverse consequences.

5. New section 78C(3)

Since a section 78B order is not subsidiary legislation, we consider that a Gazette notice of the order is also not subsidiary legislation. However, on further consideration of the provision, we agree to introduce Committee Stage Amendments (CSAs) to the new section 78C(3) and (6), for the avoidance of doubt, to provide for the publication of the order (instead of the publication of a notice). We will draft the amendments in due course.

6. New section 78D(3)(b)

Whether an employee exercised managerial functions at the relevant time is a matter of fact in relevant criminal proceedings. In preparation of the Bill, the Administration took note of the concerns that it would be unfair if junior front-line staff would commit an offence by simply following instructions from their employers. We have therefore provided for a defence in section 78D(3) for employees who do not exercise managerial functions. This is similar to section 5(4) and (5) of Cap 598. That said, we note your concern on the expression "managerial functions". We will consider your view, together with Members' view at the Bills Committee and see if it would be more appropriate to make the defence available to employees who were not in a position to make or influence a decision in relation to the relevant act or omission. This is similar to section 59(5) of the Unsolicited Electronic Messages Ordinance (Cap 593).

7. New section 78H

- (a) 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 such as the value of the business of supplying the food. This approach is consistent with that under various existing statutory compensation provisions such as 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.
- (b) We consider that the word "loss" is appropriate. The loss should be any monetary loss reasonably attributed to the section 78B order in question or the exercise of a power under the new section 78I in relation to the order. Hence, to qualify for compensation, the loss must not be too remote. Whether there will be any loss within the scope of the new section 78H(1)(b)(ii) would depend on the actual circumstances of a particular case. For example, if a section 78B order prohibiting supply is in effect for three days, a trader may suffer loss for perishable food but may possibly suffer no loss if the food is not perishable and has a shelf life of a few years. The scope of the loss suffered by a person under section 78H(b)(ii) is distinct from the maximum amount of compensation payable under the new section 78H(1) which is discussed in paragraph 7(a) above.

(c) A section 78B order is directed at those who are bound by it, and so are the powers exercisable under the new section 78I. Hence, it would be fair to protect only those who are bound by a section 78B order, but not other persons. In the example quoted in the letter, if a tenancy agreement is ended prematurely because of a section 78B order made in relation to food sold at the premises or any other reasons, the landlord may seek redress in accordance with the provisions under the tenancy agreement. Further, were it the policy to compensate those who are indirectly affected by a section 78B order, it would be difficult to draw the line between those who should be compensated and those who should not. For example, there is the question of whether employees and suppliers of goods and services of a person bound by a section 78B order should also be entitled to compensation.

(d) Please see the note attached at **Annex B**.

(e) We have made reference to a number of overseas legislation in drafting the 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. 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.

8. New section 78J

We will consider your proposal to provide for the liability of principal/agent.

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Annex A

New South Wales Food Act 2003 (Extract)

Part 3 – Emergency powers

30 Making of order

An order may be made under this Part 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.

31 Nature of order

An order under this Part may do any one or more of the following:

- (a) require the publication of warnings, in a form approved by the Food Authority, that a particular food or type of food is unsafe,
- (b) prohibit the cultivation, taking, harvesting or obtaining, from a specified area, of a particular food or type of food,
- (c) prohibit a particular food or type of food from being advertised or sold,
- (d) direct that a particular food or type of food consigned or distributed for sale or sold be recalled and specify the manner in which, and the period within which, the recall is to be conducted,
- (e) direct that a particular food or type of food be impounded, isolated, destroyed or otherwise disposed of and specify the manner in which the impounding, isolation, destruction or disposal is to be conducted,
- (f) prohibit absolutely the carrying on of an activity in relation to a particular food or type of food, or permit the carrying on of the activity in accordance with conditions specified in the order,
- (g) without limiting the generality of paragraph (f), impose conditions relating to the taking and analysis of samples of the food or of water or soil or any other thing that is part of the environment in which that activity is carried on in relation to the food,

(h) specify methods of analysis (not inconsistent with any methods prescribed by the Food Standards Code) of any samples required to be taken in accordance with the order.

32 Special provisions relating to recall orders

(1) A recall order may require the person, or the persons of a class, that is bound by the order to disclose to the public or to a class of persons specified in the order, in a manner so specified, any one or more of the following:

- (a) the particular food or type of food to be recalled or disposed of,
- (b) the reasons why the food is considered to be unsafe,
- (c) the circumstances in which the consumption of the food is unsafe,
- (d) procedures for disposing of the food.

(2) A person who is required by a recall order to conduct a recall of any food must give written notice to the Food Authority of the completion of the recall as soon as practicable after that completion.

(3) A person who is bound by a recall order is liable for any cost incurred by or on behalf of the Food Authority in connection with the recall order and any such cost is taken to be a debt due to the Food Authority from that person.

(4) In any proceedings for the recovery of the debt, a certificate signed by the Food Authority stating the amount of any costs and the manner in which they were incurred is evidence of the matters certified.

33 Manner of making orders

(1) An order under this Part:

(a) may be made in writing addressed to the person or persons intended to be bound by it, and served on that person or each of those persons, as the case requires, or

(b) may be addressed to several persons, to a class of persons, or to all persons.

(2) Notice of an order addressed as referred to in subsection (1) (b) setting out the terms of the order and the persons to be bound by the order must, as

soon as practicable after the order is made, be published in a newspaper that, in the opinion of the Food Authority, will be most likely to bring the order to the attention of the persons bound by it.

(3) An order under this Part, when it takes effect, is binding on the person or persons to whom it is addressed.

(4) An order that is served on a person takes effect when it is served.

(5) An order, notice of which is published under subsection (2), takes effect at the beginning of the first day on which the notice was published.

(6) An order ceases to have effect at the expiration of 90 days after the day on which it takes effect unless it is sooner revoked.

(7) Subsection (6) does not prevent a further order being made in the same terms as an order that has expired.

(8) An order under this Part may be varied or revoked by the Food Authority in the same manner as the order was made.

34 Compensation

(1) A person bound by an order under this Part who suffers loss as a result of the making of the order may apply to the Food Authority for compensation if the person considers that there were insufficient grounds for the making of the order.

(2) If there were insufficient grounds for the making of the order, the Food Authority is to pay such compensation to the applicant as is just and reasonable.

(3) The Food Authority is to send written notification of its determination as to the payment of compensation under this section to each applicant for the payment of such compensation.

(4) If the Food Authority has not determined an application for compensation under this section within 28 days of receiving the application, the Food Authority is taken to have refused to pay any compensation.

(5) An applicant for the payment of compensation under this section who is dissatisfied with a determination by the Food Authority as to the refusal to pay compensation or as to the amount of compensation may apply to the Administrative Decisions Tribunal for a review of the determination:

(a) within 28 days after the day on which notification of the determination was received, or

(b) in a case to which subsection (4) applies, within 28 days after the expiration of the 28-day period referred to in that subsection.

35 Failure to comply with emergency order

A person must not, without reasonable excuse:

(a) carry on an activity in contravention of any prohibition imposed on the person by an order under this Part, or

(b) neglect or refuse to comply with a direction given by such an order, or

(c) fail to comply with a condition specified in such an order.

Maximum penalty: 500 penalty units in the case of an individual or 2,500 penalty units in the case of a corporation.

36 Limitation on stay of operation of emergency orders

In any proceedings for judicial review or in any other proceedings, a court or tribunal is not authorised to make an interlocutory order that has the effect of staying the operation of an order under this Part.

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Victoria

Food Act 1984 (Extract)

Part VII—Emergency Powers

44 Making of order

An order may be made under this Part by the Secretary 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.

44A Nature of order

- (1) An order under this Part may do any one or more of the following—
- (a) require the publication of warnings, in a form approved by the Secretary, that a particular food or type of food is unsafe;
 - (b) prohibit the cultivation, taking, harvesting or obtaining, from a specified area, of a particular food or type of food or other primary produce intended to be used for human consumption;
 - (c) prohibit a particular food or type of food from being advertised or sold;
 - (d) direct that a particular food or type of food consigned or distributed for sale or sold be recalled and specify the manner in which, and the period within which, the recall is to be conducted;
 - (e) direct that a particular food or type of food or other primary produce intended to be used for human consumption be impounded, isolated, destroyed or otherwise disposed of and specify the manner in which the impounding, isolation, destruction or disposal is to be conducted;
 - (f) prohibit absolutely the carrying on of an activity in relation to a particular food or type of food, or permit the carrying on of the activity in accordance with conditions specified in the order;
 - (g) without limiting the generality of paragraph (f), impose conditions for or with respect to requiring the taking and analysis of samples of the food or of water or soil or any other thing that is part of the

environment in which that activity is carried on in relation to the food;

- (h) specify methods of analysis (not inconsistent with any methods prescribed by the Food Standards Code) of any samples required to be taken in accordance with the order.
- (2) An order under this Part may be varied or revoked by the Secretary in the same manner as the order was made.

44B Special provisions relating to recall orders

- (1) A recall order may require the person, or the persons of a class, that is bound by the order to disclose to the public or to a class of persons specified in the order, in a manner so specified, any one or more of the following—
- (a) the particular food or type of food to be recalled or disposed of;
 - (b) the reasons why the food is considered to be unsafe;
 - (c) the circumstances in which the consumption of the food is unsafe;
 - (d) procedures for disposing of the food.
- (2) A person who is required by a recall order to conduct a recall of any food must give written notice to the Secretary of the completion of the recall as soon as practicable after that completion.
- (3) A person who is bound by a recall order is liable for any reasonable costs incurred by or on behalf of the Secretary in connection with the recall order and any such costs are taken to be a debt due to the Secretary from that person.
- (4) In any proceedings for the recovery of the debt, a certificate signed by the Secretary stating the amount of any costs and the manner in which they were incurred is evidence of the matters certified.

44C Manner of making orders

- (1) An order under this Part—
- (a) may be made in writing addressed to the person or persons intended to be bound by it, and served on that person or each of those persons, as the case requires; or
 - (b) may be addressed to several persons, to a class of persons, or to all persons.
- (2) Notice of an order addressed as referred to in subsection (1)(b) setting out the terms of the order and the persons to be bound by the order must, as soon as practicable after the order is made, be published in a

newspaper that, in the opinion of the Secretary, will be most likely to bring the order to the attention of the persons bound by it.

- (3) An order under this Part, when it takes effect, is binding on the person or persons to whom it is addressed and on all the persons of any class to which it is addressed.
- (4) An order that is served on a person takes effect when it is served.
- (5) An order, notice of which is published under subsection (2), takes effect at the beginning of the first day on which the notice was published.
- (6) A order ceases to have effect at the expiration of 90 days after the day on which it takes effect unless it is sooner revoked.
- (7) Subsection (6) does not prevent a further order being made in the same terms as an order that has expired.

44D Compensation

- (1) A person bound by an order under this Part who suffers loss as a result of the making of the order may apply to the Secretary for compensation if the person considers that there were insufficient grounds for the making of the order.
- (2) If there were insufficient grounds for the making of the order, the Secretary is to pay just and reasonable compensation to the applicant.
- (3) The Secretary is to send written notification of the Secretary's determination as to the payment of compensation under this section to each applicant for the payment of compensation.
- (4) If the Secretary has not determined an application for compensation under this section within 28 days of receiving the application, the Secretary is taken to have refused to pay any compensation.
- (5) An applicant for the payment of compensation under this section who is dissatisfied with a determination by the Secretary as to the refusal to pay compensation or as to the amount of compensation may apply to the Magistrates' Court for a review of the determination—
 - (a) within 28 days after the day on which notification of the determination was received; or
 - (b) in a case to which subsection (4) applies, within 28 days after the 28-day period referred to in that subsection.
- (6) If the amount of compensation sought exceeds the jurisdictional limit of the Magistrates' Court, the application under subsection (5) is to be made to the Supreme Court.

44E Failure to comply with emergency order

A person must not, without reasonable excuse—

- (a) carry on an activity in contravention of any prohibition imposed on the person by an order under this Part; or
- (b) neglect or refuse to comply with a direction given by such an order; or
- (c) fail to comply with a condition specified in such an order.

Penalty: \$40 000 in the case of an individual or \$200 000 in the case of a corporation.

44F Person has no right to be heard before order made

In making an order under this Part, it is not necessary for the Secretary to give any person who may be affected by the order a chance to be heard before the order is made.

44G Secretary may obtain enforcement order

The Secretary may apply to the Supreme Court for an order against any person who is required to comply with an order made under this Part requiring the person to comply with the order.



Annex B

**Constitutionality of the Compensation Provision
in the New Section 78H**

This paper discusses the question of whether the compensation provision in the new section 78H (as provided for in clause 2 of the Public Health and Municipal Services) Amendment Bill 2008) is consistent with Articles 6 and 105 of the Basic Law (BL 6 and BL 105).

Compensation provision

2. The new section 78H provides for compensation to a person bound by a section 78B order if (among other requirements) the person proves that the Authority did not have reasonable grounds to make the order at the time of making the order, and the person has suffered loss as a result of the order or as a result of the exercise of a power under the new section 78I in relation to the order.¹ The compensation shall be of such an amount that is just and equitable in all the circumstances of the case provided that it does not exceed the market value of the food at the time of making the order.

BL 6 and BL 105

3. BL 6 provides that the HKSAR shall protect the right of private ownership in accordance with law. BL 105 provides, inter alia, that the HKSAR shall in accordance with law protect the right of individuals and legal persons to compensation for lawful deprivation (“徵用”) of their property.

Meaning of “deprivation” under BL 105

4. In *Weson Investment Ltd v Commissioner of Inland Revenue* [2007] 2 HKLRD 567, Tang VP held, at paragraph 79, that the word “deprivation” in BL 105 was used in the sense of “expropriation” which was the expression used in its original Chinese text (namely, “徵用”).² In his opinion, BL 105 concerned essentially a taking, as under eminent domain. Genuine action taken to assess and enforce payment of tax or recovery of a penalty or fine by action, even if

¹ A section 78B order may (a) prohibit the import or supply of any food, (b) direct that any food be recalled, impounded, isolated, destroyed or otherwise disposed of, or (c) prohibit the carrying on of an activity in relation to any food or permit the carrying on of such activity in accordance with conditions. The new section 78I provides for the seizure, marking or destruction of food that is the subject of a section 78B order if a term of the order has been contravened.

² The decision of the Standing Committee of the National People's Congress adopted on 28 June 1990 provides: “... the English translation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China which has been finalized upon examination under the auspices of the Law Committee of the National People's Congress shall be the official English text and shall be used in parallel with the Chinese text. In case of discrepancy between the two texts in the implication of any words used, the Chinese text shall prevail.”

subsequently found to be wrong, did not come within the scope of lawful expropriation of property under BL 105.

5. The above approach of interpreting the meaning of “deprivation” was followed by the Court of First Instance in *Harvest Good Development Ltd v Secretary for Justice & Ors* [2007] 4 HKC 1 and *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd (No.5)* [2007] 5 HKC 122, as well as by the Court of Appeal in *巫振漢 對 漁農自然護理署* CACV 143/2007. In the last-mentioned case, the applicant challenged, inter alia, the forfeiture of certain birds by the Agriculture, Fisheries and Conservation Department pursuant to section 8 of the Public Health (Animals and Birds) Ordinance (Cap 139). That section provides that the senior veterinary officer, or any person acting under his direction, may seize any animal, bird or thing dealt with in contravention of Cap 139 or of any regulation thereunder, and may order the forfeiture of such animal, bird or thing, and the same shall thereupon be destroyed, sold or otherwise disposed of as the senior veterinary officer may direct. Referring to Tang VP’s construction of “deprivation” in *Weson*, the Court of Appeal held that section 8 was consistent with BL 105 and dismissed the challenge.

6. In *Harvest Good Development Limited*, Hartmann J (as he then was), after noting Tang VP’s approach in *Weson* of interpreting “deprivation” under BL 105 as meaning “expropriation”, said the following at paragraph 134:

“134. As to the definition of the term ‘expropriation’, in his text, *Constitutional Property Clauses* (1999, Juta & Co. Ltd) Professor AJ van der Walt, at p. 18, wrote:

‘The term expropriation ... does not apply to or adequately explain the position in all jurisdictions. When referring to the acquisition of property in terms of the power of eminent domain, most constitutions in the Anglo tradition refer to compulsory acquisitions, whereas most jurisdictions in the Germanic tradition refer to expropriations, with the two terms having roughly the same meaning. *The fairly widely accepted interpretation is that these terms require the state to actually acquire property or derive a benefit from the expropriation or acquisition in some way, thereby excluding state actions that destroy or take away property without any benefit for the state.*’ (emphasis added by Hartmann J)

7. In the present case, a section 78B order is for the purpose of protecting public health: the new section 78B(2) provides that the Authority may only make a section 78B order if the Authority has reasonable grounds 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. It would not authorize the Government to actually acquire property or derive a benefit from the expropriation or acquisition in some way. Hence, on the basis of the authorities mentioned in paragraphs 4 – 6 above, it will not result in any “deprivation” or “徵用” for the purpose of BL 105.

8. As regards the new section 78I, it provides for the seizure, marking or destruction of food that is the subject of a section 78 order if a term of the order has been contravened. Under the new section 78D, it is an offence to contravene a section 78B order. Given this context and in view of the Court of Appeal’s judgment in 巫振漢 mentioned in paragraph 5 above, it is unlikely that an exercise of the powers under the new section 78I would give rise to any “deprivation” or “徵用” within the meaning of these terms in BL 105.

De facto deprivation

9. In *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553, the Court of Appeal dealt with the issue of *de facto* deprivation. It held that an action adversely affecting use of property, despite falling short of formal expropriation, might in certain circumstances nonetheless properly be described as deprivation, in which case there was a right to compensation. Such *de facto* deprivation could occur where the interference with use of the property was so substantial that the owner was deprived of any meaningful use of the property or, in other words, all economically viable use. The foregoing was to be ascertained as a matter of substance rather than the form. Absent a formal expropriation, the question whether there had been a *de facto* deprivation of property was perforce case specific, a question of fact and degree. In this regard, the Court of Appeal noted that in the jurisprudence developed in the United States in relation to the Fifth Amendment to the US Constitution (which provides, inter alia, that no private property shall be taken for public use without just compensation), whether there had been a taking required “essentially ad hoc, factual inquiries”. Further, as decided by the US Supreme Court in *Penn Central Transportation Co v City of New York* 438 US 104 (1978), a number of factors were particularly significant in the above inquiries:

“...the Court’s...decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course

relevant considerations. ... So, too, is the character of the governmental action.”

10. In his review of the ways in which the US Supreme Court has interpreted the various parts of the *Penn Central* test, Professor Joseph William Singer of the Harvard Law School has made the following observations:³

- (a) character of the government action: a regulation is more likely to be a legitimate exercise of the police power not requiring compensation if the government action can be characterized as a limitation on property use designed to protect the community from harm, or to respond to the externalities caused by the property owner’s use of the property rather than extraction of a benefit to the community for which the owner should receive compensation;⁴
- (b) economic impact of the regulation: a regulation is less likely to be held a taking if the diminution in value is substantial but the regulation prohibits a property use that never was part of the owner’s rights in the first place or is justified by a sufficiently strong public interest in preserving human life or in protecting the public from harm;⁵
- (c) interference with reasonable investment-backed expectations: a regulation is less likely to be held a taking if the change in the law is one that could or should have been anticipated such that the owner’s reliance on the continuation of prior law was unreasonable.⁶

11. In the light of the above US jurisprudence, a section 78 order is unlikely to involve any *de facto* deprivation for the purpose of BL 105. Firstly, such an order only seeks to prevent owners from committing public harms. Secondly, such an order is justified by a sufficiently strong public interest in the protection of public health. Thirdly, the sale and importation of food have long been subject to regulation. The additional powers provided for in the new section 78B are in line with the existing regulatory powers in relation to food, and do

³ Joseph William Singer, *Introduction to Property* (2nd ed, Aspen Publishers, 2005), section 14.4.

⁴ *Ibid*, p 724.

⁵ *Ibid*, p 729.

⁶ *Ibid*, p 730.

not appear to interfere with reasonable investment-backed expectations regarding the food regulatory scheme.

12. Nor would the above principle of *de facto* deprivation have any application to an exercise of the law enforcement powers under the new section 78I. In view of the direct authority of the Court of Appeal's decision in 巫振漢 which was decided some months after the Court of Appeal's decision in *Fine Tower*, such powers are unlikely to give rise to any "deprivation" or "徵用" within the meaning of these terms in BL 105.

13. Given that the acts required under a section 78B order or an exercise of the powers under the new section 78I would not result in any "deprivation" or "徵用" for the purpose of BL 105, there is no constitutional requirement to pay in respect of such acts or exercise of the powers real value compensation provided for in that Article.

"Fair balance test"

14. For cases of interference with property rights falling short of deprivation, it is arguable that a "fair balance test" developed under the European jurisprudence would apply as an implicit requirement under BL 6 and BL 105. Under this test, any interference with property rights would need to strike a fair balance between the demands of the general interest of the society (which any interference with property rights must aim to serve) and the requirements of the protection of the individual's rights. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In the European jurisprudence,⁷ there is no inherent right to compensation for controls of use, nor, by extrapolation, for interferences with peaceful enjoyment that do not amount to "deprivations". However, when assessing the proportionality of the regulation in question, it will be of relevance whether compensation is available and to what extent a concrete economic loss was caused by the legislation: see Jessica Simor and Ben Emmerson QC, *Human Rights Practice*, paragraph 15.060.

15. Parenthetically, it may be noted that the Court of Appeal in *Fine Tower* held (at paragraph 33) that mere restriction on use, falling short of *de facto* deprivation, is not compensable: if it were otherwise the financial consequences would be such as "to cripple the legislature's freedom to introduce ... socially

⁷ Such jurisprudence is on Article 1 of Protocol No. 1 of the European Convention of Human Rights, which protects property rights.

beneficial legislation”.

16. The Administration is of the view that the regulatory powers provided for in the new sections 78B and 78I would meet the above “fair balance test”:

- (a) there is clear public interest in providing the Authority or the relevant public officers with the powers (see the discussion in paragraph 4 of the Legislative Council Brief on the present Bill under the reference FH CR 1/3231/07);
- (b) under the new section 78(2), the Authority may only make a section 78B order if the Authority has reasonable grounds 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; and for the powers under the new section 78I, they are to be exercised if a term of the order has been contravened;
- (c) under the new section 78G, a person bound by a section 78B order who is aggrieved by the order may, within 14 days from becoming bound by it, appeal to the Municipal Services Appeals Board;
- (d) compensation is provided to a person bound by a section 78B order subject to the conditions mentioned in the new section 78H.

17. On the basis of the discussion above, the compensation provision in the new section 78H is consistent with BL 6 and BL 105.

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