

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

Response to Comments from Hon Wong Ting-kwong

“Supply”

1. Paragraph (b) (i.e. “to offer, keep or exhibit the food for sale”) in the definition of “supply” in the new section 78A generally covers the display of food on the market shelf, display of food in food fair or exhibitions, etc. It does not cover the situation where the food is advertised for sale via, say TV, publications or other media channels. This definition 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). We consider there is no need to amend the definition of “supply” to specifically exclude advertisements.
2. As explained above, the definition of “supply” in the new section 78A is similar to the definition of “supply” in Cap 424, Cap 456 and Cap 598. Paragraph (e) of the definition (i.e. “for commercial purposes, to give the food as a prize or to make a gift of the food”) only covers the situation where the food is given away. That said, the new section 78B(1)(d) provides that the Director of Food and Environmental Hygiene (DFEH) may direct that any food be impounded, isolated, destroyed or disposed of in specified manner within a specified period. If DFEH has reasonable grounds under section 78B(2), he may make an order to direct that any food be disposed of in a specified manner (e.g. depending on the actual circumstances and the risk level, we may permit the export of problem food back to its country/place of origin where the food manufacturer will further process the food to make it fit for human consumption or for other purposes).

Order to Prohibit the Supply of Food, etc

3. The food trade has the responsibility to ensure that the food they supply is safe and fit for human consumption. They also have the responsibility to

stop supplying problem food to the market and recall food that has already been supplied to protect the health of consumers. They should not wait for DFEH's order to take action if they suspect that the food they are supplying may not be fit for human consumption. Section 78B(1) provides that DFEH may make orders to, amongst others, prohibit the supply of food or direct that any food supplied be recalled, depending on the actual circumstances of each case. Depending on the circumstances, DFEH may make an order to do one or more of the things stated in the new section 78B(1)(a) to (e) to deal with a food incident. Generally speaking, DFEH will make a prohibition of supply order if the problem food still remains in the distribution chain and a recall order if the food has been widely distributed to consumers. It should be emphasized that even if no recall order is made, the food traders should still exercise their discretion and judgment to take appropriate action in a timely manner to protect public health. If necessary, DFEH may, in the order issued, exclude food that is returned by customers to retailers or by retailers to wholesalers, etc, or on the other hand, since DFEH may order under section 78(1)(e), permit the carrying on of an activity in relation to any food in accordance with specified condition, DFEH may in parallel exercise his power to permit the return of food by customers to retailers or by retailers to wholesalers for consideration.

4. The term "food" is clearly defined in section 2 of the Public Health and Municipal Services Ordinance (Cap. 132) and it is extended to include live poultry, live reptiles and live fish in the new Part VA. To protect public health, DFEH's power under the new section 78B should cover "any food". DFEH will only make an order if he has reasonable grounds to do so and the order, if made, will only apply to the problem food in question. As required under section 78B(3)(b), a section 78B order must specify the particulars of the food that is the subject of the order and would not apply to all food.
5. In formulating the legislative proposal, we have made reference to some overseas legislation. Section 78B(2) is very similar to the food safety legislation of New South Wales and Victoria of Australia. The first limb of the provision is for preventing or reducing a possibility of danger to public health. DFEH will only make the orders when he has reasonable grounds to do so. We consider there is no need to specify the level of possibility in

this provision. The proposed amendment “likely to reduce a danger to public health” will inevitably reduce the flexibility of the authority to deal with food incident in a rapid and effective manner.

Serving of Orders and Publication of Orders

6. Section 134 of Cap. 132 provides that any order required to be served may be served either (a) by delivering it to the person on whom it is to be served; (b) by sending it by registered post addressed to the last known place of business or residence of the person to be served; (c) by leaving it with an adult occupier of the premises or place to which the notice relates or by posting it upon a conspicuous part of such premises or place. Section 134 of Cap. 132 applies to the service of orders under the new section 78C, which is under the new Part VA of Cap. 132.
7. Section 134 requires that any order or notice (if served by post), has to be sent by registered post addressed to the last known place of business or residence of the person to be served. In interpreting the serving of orders by registered post, reference should be made to section 8 of the Interpretation and General Clauses Ordinance (Cap. 1), which provides that unless the contrary is proved, the service shall be deemed to have been effected at the time at which the document or notice would be delivered in ordinary course of post.
8. For a section 78B order which is made to a class of persons or all persons, the new section 78C(3) requires that such order must be published in the Gazette. This is a formal legal requirement. The Government will, in addition to publication in the Gazette, widely publicise the making of the orders through various media channels, including press releases, to make known to the public of the orders and the related health advice.

“Employee” and “Employer”

9. The terms “employer” and “employee” are unambiguous and have their general meaning. We do not see the need for including specific definitions for them in the Amendment Bill. We also note that there is no definition for the two terms in legislation which have similar provision for employer and employee liability. These include section 59(5) of the Unsolicited

Electronic Messages Ordinance (Cap. 593) and section 5(4) and (5) of Cap. 598. Whether a person working part-time or temporarily or otherwise is an “employee” is a matter of fact.

Actions Taken in Relation to Section 78B Orders

10. The new section 78E(1)(a) provides that DFEH may serve on a person bound by a section 78B order a notice requiring him to inform DFEH of the actions taken by the person in relation to the order. The purpose of this section is to enable DFEH to monitor closely the progress of compliance with the orders. If a person has reported to DFEH on the actions taken by him in relation to the orders within the specified time and would like to provide supplementary information afterwards, he would not contravene the law. However, in accordance with section 78E(3)(b), if the person, in purported compliance with the notice, provides information to DFEH that he knows is false in a material particular; or recklessly provides information that is false in a material particular, the person commits an offence.

Power to Obtain Information or Copies of Documents

11. The new section 78B(2) empowers DFEH to make a 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. In considering whether he has reasonable grounds under section 78B(2), DFEH will consider a host of factors (as set out in the Brief for Legislative Council) and make reference to documents or information available to him. It is therefore necessary to empower DFEH under section 78F to obtain information or document from any person whom he has reasonable ground to believe to possess information or document that may assist him in deciding whether to make, vary or revoke a section 78B order. DFEH must act reasonably in a prudent manner when exercising the powers under the new section 78F. Similar power is also provided under section 58 of Cap 132 which states that the authority may by order require any person who carries on a business which includes the production, importation, or use of substances of any class specified in the order to furnish to such public officer as shall be specified in the order, within such time as may be so specified, such particulars as may be so specified of the composition and use of any such substances sold in the course of that

business for use in the preparation of food for sale for human consumption.

Appeals to Municipal Services Appeals Board

12. Section 71(1)(a) of Cap. 1 provides that in computing time, a period of days from the happening of any event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done. In calculating the 14 days stipulated in section 78G(1) of the Amendment Bill within which a person may appeal to the Municipal Services Appeals Board, it should not include the first day when the person is bound by a section 78B order. It should be noted that taking into account views of the Members of the Bills Committee, we have extended the 14-day appeal period to 28 days.
13. If a person bound by a section 78B order is a limited company, it would mean the company itself, rather than the shareholders. It must, however, be noted that under section 137 of Cap. 132, where an offence has been committed by a corporation is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the corporation, or of any person who was purporting to act in any such capacity, he, as well as the corporation, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
14. Section 11 of the Municipal Services Appeals Board Ordinance (Cap. 220) provides that the parties to an appeal may be present at the hearing of the appeal and make representations either in person or by counsel or solicitor or, with the consent of the Board hearing the appeal, by some other person. There is no provision about awarding of costs to the parties to an appeal under Cap 220.
15. In accordance with section 9 of Cap 220, the respondent (in this case, DFEH) shall, within 28 days after receiving notice of an appeal to the Board, serve on the appellant and any other person who is bound by the administrative decision, and lodge with the Board, a statement relating to the administrative decision that, among other things, sets out the findings on material questions of fact, refers to the evidence or other material on which those findings were based and sets out the policy, if any, relied upon by the

respondent when the administrative decision was made. In case the appellant subsequently finds that there are no valid grounds of appeal, he may abandon his appeal. Section 12 of Cap 220 further provides that the Municipal Services Appeals Board hearing an appeal may receive and consider any material, whether by way of oral evidence, written statements, documents or otherwise, require any person to attend before it at any hearing and to give evidence and produce documents, etc.

Seizure, Marking or Destruction of Food

16. Unless it appears to an authorized public officer that a food trader refuses to comply with a section 78B order or has contravened any term in a section 78B order, the authorized public officer will not (and could not) exercise the power under section 78I to seize, mark or destroy the relevant food. An authorized public officer must act reasonably in exercising the power under section 78I(1). Only in the case where, for example, a food product that has been prohibited for supply by DFEH was seen on a market shelf in a supermarket will an authorized public officer consider invoking the power under section 78I. We will include practical guidelines in the code of practice to be issued by DFEH on section 78B orders and the related matters. The same term “if it appears to a public officer” is also used in section 59(2) of Cap. 132 which provides that if it appears to any authorized public officer that any food, whether seized or not, is unfit for human consumption, or that any regulations made under section 55 or 56 of Cap. 132 have been contravened in respect of any food, he may affix to such food a mark, seal or other designation; or destroy or otherwise dispose of such food or cause the same to be destroyed or otherwise disposed of.
17. The new section 78I stipulates that an authorized public officer may (a) seize and remove from the person any such food; (b) affix to any such food a mark, seal or other designation; or (c) destroy or otherwise dispose of any such food or cause it to be destroyed or otherwise disposed of. If the owner of the food concerned could not be identified, we will consider whether the food should be seized or affixed with a mark or seal, etc and the best arrangement for maintaining the integrity and quality of the food. Section 78I(4) provides that if the food has to be destroyed or otherwise disposed of, the public officer must record a description and other details that are sufficient to identify the food and DFEH must keep the record for a period of not less than 12 months.

Liability of Employers

18. The defence for “exercising all due diligence” is a very common defence among legislation, including Cap. 132 (e.g. section 70 of Cap. 132). Under section 78J(3), whether an employer has exercised all due diligence to prevent an employee from doing the relevant act or making the relevant omission would have to be determined by the court having regard to the actual circumstances on a case-by-case basis. In determining whether due diligence has been exercised, various factors may be taken into account, e.g. whether clear instructions have been given by the employers to the employees to remove the particular food from shelf, whether such actions as may be necessary has been taken to ensure that his staff will remove that particular batch of product from the shelf, and whether the employers have conducted checking or taken any measures to ensure that the employees have followed the instructions, etc.

