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

Purpose

This paper reports on the deliberations of the Bills Committee on Public Health and Municipal Services (Amendment) Bill 2008 (the Bill).

Background

2. The existing control of food safety is provided mainly in Part V of the Public Health and Municipal Services Ordinance (Cap. 132). Under section 52 of Cap. 132, no person shall sell to the prejudice of a purchaser any food which is not of the nature, or not of the substance, or not of the quality of the food demanded by the purchaser. Under section 54 of Cap. 132, no person shall sell any food which is intended for but unfit for human consumption.

3. Food incidents in the past years have revealed inadequacies in Cap. 132 in the control of food safety. In this regard, the Administration has been working on a Food Safety Bill to introduce new food safety control tools, such as the introduction of a mandatory registration scheme for food importers and distributors, requiring food traders to maintain proper records on the movement of food so as to enhance traceability, and empowering the Director of Food and Environmental Hygiene (DFEH) to make administrative orders to prohibit the import and supply of problem food and order a recall of the problem food, for the better protection of public health.

4. Given the immense public concern on food safety, the Administration has decided to expedite work in respect of administrative orders to prohibit the import and supply of problem food and order a recall of the problem food in an Amendment Bill, ahead of the introduction of the full Food Safety Bill.

The Bill

5. The Bill seeks to add a new Part VA to Cap. 132 to -

(a) empower DFEH to make orders in relation to food for the

protection of public health; and

- (b) provide for incidental and connected matters.

The Bills Committee

6. At the House Committee meeting held on 7 November 2008, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon Fred LI Wah-ming, the Bills Committee has held 10 meetings. The membership list of the Bills Committee is in **Appendix I**. The Bills Committee has also invited views from the trade and other interested parties, a list of which is in **Appendix II**.

Deliberations of the Bills Committee

New section 78B - Additional powers in relation to food

7. New section 78B provides that DFEH may make an order (section 78B order) if he has reasonable grounds at the time of making the order to believe that the making of the order is necessary to prevent or reduce a possibility of danger to public health or to mitigate any adverse consequence of a danger to public health. A section 78B order may prohibit the import or supply of any food, direct that any food supplied be recalled, direct that any food be impounded, isolated, destroyed, or otherwise disposed of, or prohibit or permit the carrying on of any activity in relation to any food.

8. In determining whether there are reasonable grounds for DFEH to make a section 78B order, he may, in so far as is practicable and reasonable, take into account all factors relevant to the circumstances of the case that he considers appropriate, including but not limited to the following -

- (a) information obtained from any importer or supplier of the food;
- (b) information, reports or testing results obtained from a public analyst;
- (c) information (including reports, alerts, warnings and advisories) obtained from any international food or health authority or the food or health authority of any place;
- (d) the time required for obtaining reports or testing results from a public analyst;
- (e) characteristics of any hazard in the food, the level of the hazard in the food, consumption pattern of the food and the exposure of the

general public and vulnerable groups to the food;

- (f) any statutory requirement relating to the food;
- (g) information on the source and extent of the hazard, in particular on whether the hazard exists throughout or in any part of the manufacture or supply chain or is limited to a particular batch of food.

The considerations will be clearly set out in the code of practice to provide practical guidance in respect of new Part VA.

9. DFEH will, under most circumstances and where it is practicable, alert the food trade as far as possible prior to the making of the section 78B order. DFEH may not need to make a section 78B order if the voluntary course of action to withdraw the food concerned from the shelves or recall the food concerned from the market has been carried out. The Administration remains of the view that food safety could only be ensured through goodwill and cooperation/collaboration between the Government, the trade and the public.

10. Hon WONG Kwok-hing considers that, in view of the wide range of factors that DFEH may take into consideration in making section 78B orders, an independent committee to monitor the exercise of powers by DFEH under new section 78B and to provide a forum for the public to voice their views/concerns on the decisions taken by DFEH in this regard should be set up by the Administration.

11. The Administration has pointed out that to create another tier in making section 78B orders would be against the legislative intent of the Bill to empower DFEH with the necessary powers to take timely and swift action to protect public health, not to mention that it would be difficult for any committee to meet quickly at all times to make the orders. The Administration has further pointed out that persons bound by section 78B orders may appeal to the Municipal Services Appeals Board (MSAB) under new section 78G.

12. The Administration has also advised that the Centre for Food Safety (CFS) under the Food and Environmental Hygiene Department (FEHD) regularly conducts trade consultation forums as well as public forums to listen to the views of the stakeholders and the general public on food safety issues. To further strengthen the consultative framework on food safety issues, the Expert Committee on Food Safety has been set up to advise DFEH on food safety measures, food safety standards in light of international practices, trends and developments, as well as risk communication strategies. The Expert Committee comprises academics, professionals, food experts, members of the trade and consumer group, and other experts.

13. Whilst recognising the need to provide DFEH with wide power to make section 78B orders to deal with food incidents, Hon Audrey EU considers it necessary to ensure that DFEH will exercise such power in a prudent manner having regard to the high threshold to claim compensation from the Government for loss suffered as a result of the orders. Although it is not practical to spell out all the factors that DFEH will take into consideration in making section 78B orders, consideration should be given to at least spelling out certain important factors, such as credible information, on which DFEH must base in making a section 78B order. Hon Alan LEONG has also suggested providing guiding principles for making section 78B orders in the Bill.

14. Having considered members' views, the Administration has agreed to propose Committee Stage amendments (CSAs) -

- (a) to add new sections 78K and 78L in new Part VA to empower DFEH to issue any code of practice that in his opinion is suitable for the purpose of providing practical guidance in respect of new Part VA of Cap. 132. A failure on the part of any person to observe any provision of a code of practice does not of itself render the person liable to any civil or criminal proceedings. However, if in any legal proceedings the court is satisfied that a provision of a code of practice is relevant to determining a matter that is in issue in the proceedings, the code of practice is admissible in evidence in the proceedings and proof that the person contravened, or did not contravene, the provision of the code of practice may be relied on by any party to the proceedings as tending to establish or negate that matter. The implementation of the code of practice on section 78B orders will dovetail with that of the Bill; and
- (b) to add a new subsection (2A) in section 78B to set out the factors that DFEH may take into account in determining whether there are reasonable grounds under section 78B(2) (including the factors referred to in paragraph 8 above).

15. Members note that the Administration intends to propose CSAs to add a definition of "hazard" (危害) under new section 78A (which is referred to in the new proposed section 78B(2A)(e)). To improve accuracy and consistency, the term "danger" in new section 78B(2) is rendered as “危險” in the Chinese version of the Bill.

New section 78B(1)(e)

16. New section 78B(1)(e) provides that the Authority may make a section 78B order to prohibit the carrying on of an activity in relation to any food, or

permit the carrying on of such activity in accordance with conditions specified in the order, for the period specified in the order.

17. The Administration has clarified that section 78B(1)(e) is a catch-all provision to cover situations other than those covered by section 78B(1)(a) to (d). Section 78B(1)(e) also empowers DFEH to impose conditions in the order. Some possible examples are -

- (a) section 78B(1)(b) empowers DFEH to make an order to prohibit the supply of any food. The definition of “supply” in section 78A does not cover the giving away of food for non-commercial purpose, such as when a person gives food as a gift (or for whatever reason) to a friend, a neighbour or a colleague in office. That said, where the situation warrants, DFEH may need to make an order to prohibit a particular activity in relation to problem food, e.g. the manufacture of a particular food, etc. Section 78B(1)(e) would be invoked in this case. As required by section 78B(3), the particulars of the food that is the subject of the order and the prohibition/action required, as the case may be, and conditions (if any) would be clearly specified in the order;
- (b) there had been past cases of raw fish/oysters which were not intended for consumption at raw state but were supplied for the purpose of raw consumption. A section 78B order under section 78B(1)(e) may be made to prohibit the supply of raw fish/oysters unless a warning label (e.g. that the food is not intended for consumption at raw state) is properly attached to the product;
- (c) certain common raw material of a particular brand is found to contain highly toxic matter, and a section 78B order (under section 78B(1)(e)) may be made to prohibit all local manufacturers from using that raw material in their production of food; and
- (d) after a section 78B order is made to prohibit the supply of a particular food product, the Authority notices that there is an advertisement in the media (newspaper, TV, radio, etc) targeted at promoting the sales of the food product (that is the subject of a section 78B order) which has the effect of confusing or misleading the public. Under such circumstances, the Authority may consider issuing an order under section 78B(1)(e) to prohibit the continued publishing of that advertisement for a certain period of time.

New section 78B(3)(c)

18. Section 78B(3)(c) provides that a section 78B order must specify the reason for making the order. Hon Cyd HO and Hon Alan LEONG have suggested that a person bound by a section 78B order should have access to the

information that DFEH has taken into account when making the order.

19. The Administration has explained that there would be practical difficulty in attaching all relevant information to a section 78B order, having regard to the voluminousness of the information that may be entailed and the large number of persons bound by the order that may be involved. The Administration has, however, pointed out that under the Code on Access to Information, the Government must make available information to the public upon request unless there are valid reasons to withhold the information. The Administration has further pointed out that MSAB is empowered to order the respondent to give evidence and produce documents, should the Board consider that the information provided by the appellant is not adequate for the Board to hear the appeal. Nevertheless, the Administration has agreed to propose CSAs to section 78B(3)(c) such that the principal factors that led to the making of the order by DFEH should also be specified in the order.

20. Dr Hon LEUNG Ka-lau has asked whether, and if so, what responsibility would be held by the Government and FEHD if, say, 50% of the section 78B orders turned out to be not necessary, i.e. the food concerned turned out to be not problematic one year after the implementation of the Bill.

21. The Administration considers it not appropriate to assess the justification of making section 78B orders according to whether the food concerned turned out to be problematic or otherwise. In deciding whether to make a section 78B order, DFEH may take into account the host of factors under the proposed new section 78B(2A). DFEH would, however, review the whole process after the conclusion of the making of a section 78B order to identify room for improvement, if any.

New section 78K - Codes of practice

New section 78L - Use of codes of practice in legal proceedings

22. In order to provide practical guidance in respect of the provisions in the new Part VA, the Administration has agreed to propose CSAs to add new sections relating to the issuance of codes of practice.

23. The Administration has met with the trade on 19 December 2008 to seek their views on the draft code of practice on section 78B orders. The trade was generally supportive of the draft code of practice.

24. Members have suggested that how new section 78B(1)(e), in relation to the prohibition of the carrying of an activity in relation to food, will be exercised, should be spelt out in the code of practice on section 78B orders. To address members' concern, the Administration will provide elaboration in Chapter 5 of the code of practice. The draft code of practice is in **Appendix III**.

25. Some members are concerned that codes of practice are usually issued to provide practical guidance to the general public or persons to be regulated by an Ordinance in complying with the statutory requirements. The Administration has pointed out that it is also possible for a code of practice to be issued to provide practical guidance to other persons concerned, including the authorities and public officers, e.g. the codes of practice issued under section 42 of the Energy Efficiency (Labelling of Products) Ordinance (Cap. 598) and section 63 of the Interception of Communications and Surveillance Ordinance (Cap. 589). In the present case, the Administration considers that it is appropriate to issue a code of practice to provide practical guidance to the public authority who is empowered to make a section 78B order in order to prevent or reduce a possibility of danger to public health or to mitigate any adverse consequence of such a danger. Such a code will also indicate to the public and the relevant trade the circumstances under which the power to make a section 78B order will be exercised.

26. Hon Andrew CHENG has suggested that the use of the word "may" in new section 78K, giving DFEH the discretion to issue codes of practice on section 78B orders, should be replaced with "shall".

27. The Administration has advised that it is very common among legislation to use the word "may" to give an authority or a public officer the discretion to issue codes of practice. These include, amongst others, section 42(1) of Cap. 598 and section 56(5) of Cap. 132. New Part VA of Cap. 132 should be consistent with other similar provisions in the same Ordinance. The Administration therefore intends to retain the word "may" in new section 78K. That said, it is every intention of the Administration to issue a code of practice to provide practical guidance to members of the trade.

28. Hon Tommy CHEUNG considers that the Administration should either narrow down the power conferred on DFEH by new section 78B or incorporate the code of practice in the Bill so that the code of practice can be subject to scrutiny by the Legislative Council.

29. The Administration has pointed out that it is rare, if at all, for a code of practice to be made part of a legislation as codes of practice are to provide practical guidance only.

30. Hon Tommy CHEUNG has requested that the Administration should, apart from consulting the trade, also consult the views of the Panel on Food Safety and Environmental Hygiene of the Legislative Council (FSEH Panel), before revising the whole or any part of the code of practice or revoking the code of practice.

31. The Administration has responded that as some revisions to the code of practice may only be technical and/or minor in nature, it would not be

necessary for the Administration to first consult the views of stakeholders and the FSEH Panel every time before revising the code of practice. The Administration has, however, agreed to inform the FSEH Panel in advance of making any revision to the code of practice and publication in the Gazette. Should the FSEH Panel wish to discuss such revision at a meeting, the Administration would be happy to oblige.

New section 78C - Manner of making section 78B orders, service and publication

32. New section 78C provides for the service of section 78B orders addressed to particular persons and publication in the Gazette of notices of section 78B orders addressed to a class of persons or to all persons. For the avoidance of doubt, the Administration has agreed to propose CSAs to new section 78C(3) and (6) to provide for the publication of a section 78B order, instead of the publication of a notice of a section 78B order.

33. Hon WONG Ting-kwong is of the view that the Administration should only publicise the service of a section 78B order on a food supplier after the food concerned is tested to be problematic, having regard to the irreparable damage to the goodwill of the food supplier if the food concerned turned out to be not problematic in the end.

34. The Administration has pointed out that it is incumbent upon FEHD to protect public health by notifying the public that certain food might be problematic. The Administration has, however, pointed out that FEHD will inform the public in the first instance if subsequent food testing revealed that the food concerned was not problematic.

35. New section 78C(6) provides that a section 78B order addressed as referred to in section 78C(1)(b) (referred to a class of persons) or (c) (referred to all persons) takes effect at the beginning of the day on which it is published in the Gazette (i.e. 00:00). Members have expressed concern that persons bound by a section 78B order may unknowingly contravene the order if the start time of the period of a prohibition/action specified in the order is at the beginning of the same day on which the order is published in the Gazette, as the actual publication of the Gazette often occurs at a later time of the day. On the other hand, concern has also been raised that if the start time of the required prohibition/action specified in the order is later than the date of gazettal of the order, it can give rise to the situation where some unscrupulous persons bound by the order could make use of the time gap to quickly sell the food concerned in the market.

36. Having noted members' views, the Administration has proposed for members' consideration an option to stipulate that the section 78B order will take effect at 12 noon on the day on which it is published in the Gazette. As the Gazette would normally be published in the morning, the Administration

considers that this option would solve the problem in most circumstances.

37. Hon Audrey EU has, however, pointed out that the option of specifying noon as the effective time of a section 78B order published in the Gazette still cannot address the problem that persons bound by the order may unknowingly contravene the order, if the Gazette is published in the evening of the day. Ms EU has proposed that the effective time of a section 78B order published in the Gazette be determined by DFEH on a case by case basis.

38. The Administration has advised that to do so would render the making of the section 78B order published by Gazette less certain to the trade, as this would mean that the effective time of each order will vary. Nevertheless, taking account into members' views, the Administration has agreed to propose CSAs to new section 78C(6) to provide that a section 78B order addressed to a class of persons or all persons will take effect at the time specified in the order.

39. Dr Hon LEUNG Ka-lau and Hon Alan LEONG are of the view that one way to allay members' concerns about the effective time of a section 78B order published in the Gazette is to stipulate in Cap.132 that persons bound by the order may use the grounds that they could not reasonably know the publication of the order in the Gazette as a defence for failing to carry out the act(s) specified in the order at the start time of the order.

40. The Administration has advised that DFEH will exercise discretion in enforcing the compliance of the section 78B orders, if circumstances so justified, as has been done in the enforcement of other orders made under Cap. 132.

41. Some members, including Hon Vincent FANG and Hon WONG Ting-kwong, have urged that sufficient time should be allowed for the traders to take action in accordance with the section 78B order.

42. The Administration has advised that in practice, there would always be a time lag between preparation of the Gazette and actual publication. Public announcements through the media and electronics means will be made immediately to notify the public and the trade of the section 78B order once a decision has been made by DFEH to make the order. Hence, there should be sufficient time for the traders to take action before the section 78B order is formally published in the Gazette. The Administration will also work with the Government Printer to publish the Gazette by uploading it onto the Government's website of Gazette notice at the earliest possible time.

New section 78D - Contravention of section 78B orders

43. New section 78D creates an offence for the contravention of section 78B orders. The proposed penalty level for contravening an order is a fine at level 6 (i.e. \$100,000) and imprisonment of 12 months.

44. Hon Tommy CHEUNG has suggested that in fairness, lower penalty should be imposed on contravening a section 78B order involving food in small quantity, whereas a higher penalty should be imposed on contravening a section 78B order involving food in larger quantity.

45. The Administration has pointed out that the proposed penalty level for contravening a section 78B order is on par with that for similar offences in other legislation aimed at ensuring public health and product safety.

46. Taking note of the concern that an employee who exercises managerial functions may not be responsible for making the decision influencing the act or omission at issue and the difficulty of defining "managerial functions", the Administration has agreed to propose CSAs to new section 78D(3)(b) to provide for a defence available for employees who are not in a position to make or influence a decision regarding the relevant act or omission. This is similar to section 59(5) of the Unsolicited Electronic Messages Ordinance (Cap. 593).

New Section 78G - Appeals to Municipal Services Appeals Board

New section 78H - Compensation

47. New section 78G provides that a person bound by a section 78B order may, within 14 days from becoming bound by it, appeal to MSAB. New section 78H further provides that a person bound by a section 78B order who has suffered loss as a result of the order may apply to the court for an amount of compensation that is just and equitable in all the circumstances of the case and not exceeding the market value of the food at the time of making the order if an appeal has been made to MSAB and the Board has varied or set aside DFEH's order and the person proves that DFEH did not have reasonable grounds to make the order at the time of making the order. The market value of the food at the time of making a section 78B order will depend on the circumstances. For instance, if the person concerned is a retailer, the market value of the food concerned would be the retail price of the food.

48. Some members, including Hon Tommy CHEUNG, Hon Vincent FANG and Hon Cyd HO, hold the view that the Administration should automatically compensate a person bound by a section 78B order the market value of the food at the time of making the order, if the food test proved that the food concerned was not problematic, as it is extremely difficult, if not impossible, for a person bound by a section 78B order to prove that DFEH did not have reasonable grounds in making the order in order to be awarded compensation from the court.

49. The Administration has pointed out that adopting the criterion that compensation should automatically be made by the Government to persons bound by section 78B orders if food tests proved that the food concerned to be not problematic is neither fair nor appropriate, not to mention that to do so would defeat the purpose of the Bill to enable DFEH to take timely and prompt

action to protect public health. In order to simplify the procedures for aggrieved persons to claim compensation from the Government, the Bill provides that an application for claims may be made to the Small Claims Tribunal, for claims up to the maximum jurisdiction of the Tribunal, and to the District Court, irrespective of the amount claimed. The Administration has also pointed out that among all legislation of developed countries overseas such as Australia, New Zealand, European Community, United Kingdom, only the Australian legislation has compensation provisions.

50. Members have urged the Administration to expedite its food testing work to mitigate the adverse effect on persons bound by section 78B orders. The Administration has advised that the time required for conducting the food tests varies, depending on the type and nature of the test. It could be as short as 24 hours, as in the case of testing of melamine. This would, however, not be the case if the testing involved detection of chemical substances in food which had never been carried out and/or where no international testing methods have been or have yet to be developed, or if the testing involved detection of bacteria/viruses in food. The Administration has further advised that FEHD would revoke a section 78B order as soon as possible if the result of food tests confirmed that there is no hazard in the food which would cause public health concern, regardless of whether person(s) bound by the order had made appeal to MSAB.

51. Hon Vincent FANG has asked the Administration to give an undertaking that it would complete testing of the food that is the subject of a section 78B order, say, within one week to 10 days immediately after the making of the orders so as to mitigate the adverse effect on persons bound by the orders.

52. The Administration has responded that although most food tests could be completed within one week to 10 days, it could not be ruled out that more time would be needed if the testing involved detection of new chemical substances in food which had never been carried out and/or where no international testing methods had been or had yet to be developed. Nevertheless, the Administration has assured members that testing of food in relation to the making of section 78B orders would be carried out in the first instance and expeditiously.

53. Some members, including Hon Andrew LEUNG and Hon Vincent FANG, have suggested that apart from the market value of the food at the time of making the section 78B order, the person who has suffered loss as a result of the order should also be allowed to claim compensation for all costs incurred as a direct result of the order, such as storage and transportation costs.

54. Having considered members' views, the Administration has agreed to propose CSAs to new section 78H to the effect that if the criteria set out in section 78H are met and the court agrees to award compensation, the

compensation recoverable should be just and equitable in all circumstances of the case and should cover the following losses arising as a direct result of compliance with the relevant section 78B order -

- (a) total or partial loss of the food that is the subject of the order and that (i) has been destroyed or otherwise disposed of; (ii) is no longer fit for human consumption; or (iii) is depreciated in value and the compensation in relation to such loss should not exceed the market value of the food immediately before the time of making the order; and
- (b) costs or expenditure actually and directly incurred and the compensation in relation to such loss should not exceed the actual amount of the costs or expenditure incurred.

55. Furthermore, having considered members' view that more time should be allowed for an aggrieved person to make an appeal, the Administration will amend new section 78G(1) such that a person bound by a section 78B order may, within 28 days (instead of the original 14 days) from becoming bound by it, appeal to MSAB.

56. Hon WONG Ting-kwong opines that compensation should also be provided to persons whose food products have become less fresh, albeit still saleable but at a reduced market value, as a result of the seizure action by the Administration. The Administration has pointed out that the power under new section 78I will only be revoked if it appears that a term of a section 78B order has been contravened.

57. Hon Cyd HO and Dr Hon LEUNG Ka-lau consider it unfair for food traders to bear losses, through no faults of their own, for the sake of safeguarding public health. Ms HO has requested the Administration to discuss with the insurance industry on introducing an insurance product to help share the risk of losses that were attributable to the making of section 78B orders. If this could not be realised, it is incumbent upon the Administration to automatically compensate persons bound by section 78B orders if results of food tests revealed that the food concerned was not problematic.

58. The Administration has pointed out that at present, the Government does not compensate food traders who voluntarily remove food from the shelves/recalled food from the market. Hence, the Administration does not see the justification for the Government to automatically compensate persons bound by section 78B orders if results of food tests reveal that the food concerned is not problematic. The Administration has further pointed out that no overseas places would automatically compensate food traders for the loss they have suffered for removing food from the shelves/market, irrespective of whether the act is voluntary or mandatory, and the food concerned turned out to be not problematic.

59. The Administration has also advised that it would be very difficult, if not impossible, for the insurance industry to come up with a "one-size-fit-all" insurance product to insure against the loss suffered by persons bound by section 78B orders as the risks faced by food traders vary depending on, say, their mode of operation and the potential hazard and quantity of the food they supplied.

60. Members have agreed to invite the Hong Kong Federation of Insurers (HKFI) to give views on providing insurance coverage to the food trade for the loss they have suffered as a result of the making of section 78B orders. HKFI has replied that there is at present no insurance product tailor-made to protect local food traders for the loss they have suffered in relation to food incidents. The insurance industry would, however, be happy to contribute to further deliberations on the feasibility of introducing such an insurance product should there be a genuine market demand for it.

61. Hon Alan LEONG has asked for the reason why a person aggrieved by a section 78B order has to prove to the court that DFEH does not have reasonable grounds to make the order at the time of making the order, after MSAB has come up with a decision to vary or set aside the order.

62. The Administration has explained that this is because decisions to vary or set aside a section 78B order are not confined to the reason that DFEH did not have reasonable grounds to make the order at the time of making the order.

63. Hon WONG Ting-kwong is of the view that if MSAB is assigned the task to vary or set aside a section 78B order, the quickest way for persons aggrieved by section 78B orders to obtain compensation is to empower MSAB to award compensation. If this could not be done, persons aggrieved by section 78B orders should be allowed to seek compensation from the court direct as they so wish. Dr Hon Joseph LEE and Hon Andrew CHENG are of the view that the Bill should provide for persons aggrieved by section 78B orders the options to seek compensation from the court direct.

64. On review, the Administration has agreed to propose CSAs to remove the requirement that a person bound by a section 78B order must first seek a decision from MSAB if he wants to seek compensation under the new section 78H.

65. The Legal Adviser to the Bills Committee has advised that under the proposed revised appeal and compensation mechanism, there would be an anomaly if MSAB determined that the decision of DFEH in making a section 78B order is reasonable, whereas the District Court or Small Claims Tribunal determines that DFEH did not have reasonable grounds to do so and awarded compensation accordingly.

66. The Administration has explained that the scenario of the decision of MSAB being different from that of the court is not unique in Hong Kong's legal system. For instance, an aggrieved patient may appeal to the Medical Council of Hong Kong and make civil claim to the court separately. Under the proposed revised appeal and compensation mechanism, any aggrieved person may choose to seek a ruling from the MSAB first, with minimal cost and less waiting time. If the aggrieved person is not satisfied with MSAB's decision, he may apply for judicial review of MSAB's decision. Alternatively, he may seek compensation from the court direct without seeking a ruling from MSAB first.

67. Hon Audrey EU has opined that some judges may refuse to hear a claim for compensation from a person bound by a section 78B order if that person's appeal to MSAB has not yet finalised, such as still awaiting MSAB's decision or result of judicial review of MSAB's decision, to prevent abuse of court procedures.

68. The Administration has pointed out that the chance where the decision of MSAB and that of the court are made on the same day is extremely low, as the waiting time for the court to hear a case is generally much longer than that of MSAB.

69. Hon Audrey EU has further opined that the court may also refuse to hear a claim for compensation by person bound by a section 78B order, based on the legal principle of *issue estoppel* and *res judicata*, if the person has already obtained MSAB's decision on the same order.

70. The Administration has advised that section 78H provides a statutory basis for claiming compensation before the court which is separate from the appeal to MSAB under new section 78G. While the issue of whether DFEH has reasonable grounds to make a section 78B order could be an issue common to the appeal under new section 78G and the compensation proceedings under new section 78H, there are no provisions under the Bill or the MSAB Ordinance (Cap. 220) to render the MSAB's decision conclusive on the said issue in the compensation proceedings. Neither are there provisions to restrict the evidence that the court may receive from the parties before it, which may include "fresh" evidence over and above the evidence adduced before MSAB, such that the court may, on such evidence before it, justifiably come to a decision different from that of MSAB. The MSAB's decision should, therefore, not be treated as being conclusive on the issue for the purposes of the compensation proceedings.

71. The Legal Adviser to the Bills Committee has pointed out that although there are merits in the Administration's analysis, any argument based on statutory construction might be subject to different judicial interpretation. To put the matter beyond doubt, consideration should be given to adding provisions to new sections 78G and 78H to the effect that notwithstanding the

decision of MSAB, the court may still determine the same issue under new section 78H; and that notwithstanding the decision of the court, MSAB may still proceed to determine the same issue under new 78G and under Cap. 220.

72. The Administration does not see the need to include such provisions as suggested by the Legal Adviser to the Bills Committee as MSAB is not empowered to determine the issue of compensation under new section 78G and neither is the court legally bound by the decision of MSAB in determining the issue of compensation under new section 78H. Order 35 rule 3 of the Rules of the District Court (Cap. 336H) provides that the judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit. Section 26 of the Small Claims Tribunal Ordinance (Cap. 338) also provides that the tribunal may at any time, either of its own motion or on the application of any party, adjourn the hearing of proceedings on a claim on such terms as it thinks fit. Such power of adjournment of court/tribunal proceedings may be exercised judiciously on good grounds. The Administration has also pointed out that it is not aware of any legal provision in the Hong Kong laws which have similar effect to the provisions suggested by the Legal Adviser to the Bills Committee. Hon Audrey EU has stated that she was not in favour of the Legal Adviser's suggestions, as to do so would disrupt the established common law practice.

New section 78I - Seizure, marking or destruction of food

73. New section 78I stipulates that if it appears to an authorised public officer that a term of a section 78B order has been contravened by a person bound by a section 78B order in respect of any food, the public officer may -

- (a) seize and remove from the person any such food or any package in which it is contained;
- (b) affix to any such food that is in the person's possession a mark, seal or other designation; or
- (c) destroy or otherwise dispose of any such food that is in the person's possession or cause it to be destroyed or otherwise disposed of.

74. The Administration has assured members that unless a person has contravened a term of a section 78B order, authorised public officers will not (and could not) exercise the power under section 78I to seize, mark or destroy his food. Only in the case where, for example, a food product, the supply of which has been prohibited under a section 78B order, was still found on a market shelf in a supermarket will an authorised public officer consider exercising the power under section 78I. If it is necessary to invoke section 78I, CFS will consider whether there are suitable storage facilities for the food concerned. If the trades have such facilities, CFS will most likely affix a

mark, seal or other designations on the food concerned. However, where the traders do not have the suitable storage facilities to hold the food products or if the traders refuse to cooperate with the authorities (which is uncommon), CFS will need to invoke power to seize the food. In such cases, the food products will be properly handled and stored by CFS to ensure that they remain, as far as possible, at the same conditions at the time when they are seized. 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.

New section 78J - Liability of employers

75. The Administration has agreed to propose CSAs to section 78J to provide for the liability of principals and agents, which is modelled after section 59 of the Unsolicited Electronic Messages Ordinance (Cap. 593).

Consumer redress during recall

76. Hon Audrey EU has asked the Administration whether it would consider incorporating provisions related to compulsory consumer redress during recall under the new section 78B, as has been done in Australia. Ms EU has pointed out that section 65F(1)(f) of the Trade Practices Act 1974 of Australia requires the supplier of recalled goods to inform the public that it would undertake to repair, replace or refund the price of the recalled goods as appropriate.

77. The Administration has reservations about including a provision on mandatory refund to consumers in the Bill based on the following considerations -

- (a) the Trade Practices Act 1974 of Australia aims to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. It is a piece of legislation on general consumer protection and is not specifically related to food safety;
- (b) according to the Food Act of New South Wales and that of Victoria, which provide specifically for food recall and which the Administration has made reference to in drafting the Bill, there is no provision for refund to consumers;
- (c) the provision of refund is a commercial issue between the seller and the buyer (in this case, the consumer). While the Consumer Council may be most concerned with the interest of the final consumers, it must bear in mind that there are indeed multiple parties in the whole food chain. There are the food manufacturers, food importers, food distributors/suppliers, food retailers of

various sizes and scales, and the final consumers. The primary aim of new Part VA is to ensure the safety of food and to protect the public's health - its principal objective does not concern commercial considerations, such as transactions between sellers and buyers at any or all levels of the food chain;

- (d) none of the local legislation which have similar provisions for product recall, such as the Toys and Children's Products Safety Ordinance (Cap. 424), the Consumer Goods Safety Ordinance (Cap. 456), the Public Health (Animals and Birds) (Chemical Residues) Regulation (Cap. 139N) and the Electricity Ordinance (Cap. 406), have provided for refund in the case of recall;
- (e) it is noted in the Trade Practices Act 1974 of Australia that the amount of a refund may be reduced by the supplier by an amount attributable to the use which a person has had of the goods. The inclusion of this provision is to cater for the situation where the goods concerned have been used (or partly used) by the consumers. In the case of food, the situation would be very complicated (e.g. the food has been partly consumed, the food has passed its expiry date/best-before date, etc), especially if a large volume of food products and buyers are involved. Actual implementation will be extremely difficult;
- (f) if the Bill requires all food retailers to provide refund to consumers, it means that non-compliance will be an offence. If the refund arrangement is included in the section 78B order, non-compliance of the refund arrangement will be a non-compliance with the order - and the maximum penalty level would be a fine at level 6 (\$100,000) and 12 months of imprisonment. The Administration does not consider that the failure to provide refund is so serious as to warrant such a high level of penalty; and
- (g) there is also a practical issue about enforcement. CFS will be the enforcement department of the Amendment Bill. Its enforcement action should aim at protecting public health, meaning that it should deploy its limited staff resources to target at food businesses which continue to put on the market shelf problem food (which is the subject of a section 78B order). The CFS staff resources should not be put to enforcing the proposed refund provision.

Follow-up actions by the Administration

78. The Administration has undertaken to include in the speech to be given by the Secretary for Food and Health when the Second Reading debate on the Bill is resumed that -

- (a) DFEH would exercise his power provided under new section 78B in a prudent manner; and
- (b) testing of food in relation to the making of section 78B orders would be carried out in the first instance and expeditiously, and the revocation of a section 78B order would be made in the same manner as the making of the order in the first place and as soon as possible.

Consultation with the House Committee

79. The Bills Committee consulted the House Committee on 17 April 2009 and obtained its support for the Second Reading debate on the Bill to be resumed at the Council meeting on 29 April 2009.

Council Business Division 2
Legislative Council Secretariat
23 April 2009

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

Membership list

Chairman Hon Fred LI Wah-ming, JP

Members Hon WONG Yung-kan, SBS, JP
Hon Andrew CHENG Kar-foo
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Dr Hon Joseph LEE Kok-long, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon WONG Ting-kwong, BBS
Hon Cyd HO Sau-lan (up to 17 February 2009)
Dr Hon LEUNG Ka-lau

(Total : 12 Members)

Clerk Miss Mary SO

Legal Adviser Mr Stephen LAM

Date 18 February 2009

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

A. Organisations which have given oral representation to the Bills Committee

1. Association for Hong Kong Catering Services Management
2. Chinese Cuisine Management Association
3. Consumer Council
4. Democratic Party
5. Federation of Hong Kong Industries
6. Hong Kong Catering Industry Association
7. Hong Kong Federation of Restaurants & Related Trades
8. Hong Kong Food Council Ltd.
9. Hong Kong Imported Vegetable Wholesale Merchants Association
10. Hong Kong & Kowloon Provision, Wine & Spirit Dealers Association
11. Hong Kong Medical Association
12. Hong Kong Retail Management Association
13. Hong Kong Suppliers Association Ltd.
14. Kowloon Fruit & Vegetable Merchants Association Ltd.
15. Maxim's Caterers Ltd.
16. Merchants Association of First Wholesalers/Jobbery of Imported Fresh Fruits & Vegetables Limited
17. Pizza Hut
18. The Hong Kong Chinese Importers' & Exporters' Association

B. Organisations which have provided written submissions only

1. Advisory Council on Food and Environmental Hygiene
2. Hong Kong Bar Association

3. Hong Kong College of Community Medicine
4. Hong Kong Doctors Union

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**CODE OF PRACTICE ON
SECTION 78B ORDERS
UNDER PART VA OF
PUBLIC HEALTH AND MUNICIPAL SERVICES ORDINANCE
(CAP. 132)**

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Appendix II	Sample Order – Revocation of Section 78B Order
Appendix III	Sample Order – Variation of Section 78B Order
Appendix IV	Food Recall Notification Form

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CHAPTER 1: BACKGROUND

1.1 The Public Health and Municipal Services (Amendment) Ordinance 2008 was enacted by the Legislative Council on [xx 2009], introducing amendments to the Public Health and Municipal Services Ordinance (Cap 132) (“the Ordinance”) to empower the Director of Food and Environmental Hygiene (“the Authority”) to make an order under the new section 78B of Cap. 132 (“section 78B order”) if the Authority has reasonable grounds to believe that the making of the order is necessary to prevent or reduce the possibility of a danger to public health or to mitigate the adverse consequence of a danger to public health. The orders may –

- (a) prohibit the import of any food;
- (b) prohibit the supply¹ of any food;
- (c) direct that any food supplied be recalled;
- (d) direct that any food be impounded, isolated, destroyed or otherwise disposed of; or
- (e) prohibit the carrying on of an activity in relation to any food or permit the carrying on of such activity in accordance with conditions.

¹ “Supply” means (a) to sell the food; (b) to offer, keep or exhibit the food for sale; (c) to exchange or dispose of the food for consideration; (d) to transmit, convey or deliver the food in pursuance of (i) a sale; or (ii) an exchange or disposal for consideration; or (e) for commercial purposes, to give the food as a prize or to make a gift of the food

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CHAPTER 2 INTRODUCTION

2.1 This Code of Practice is issued under the new section 78K of the Ordinance. This Code of Practice (hereinafter referred to as the “Code”), is identified as “Code of Practice on Section 78B Orders” in Gazette Notice (xx of xx), and takes effect on xx 2009. Although a failure on the part of any person to observe any provision of the Code shall not of itself render that person liable to any civil or criminal proceedings, it is important to note that compliance with the Code does not of itself confer immunity from any legal obligations in Hong Kong. If in any legal proceedings², the court³ is satisfied that a provision of the Code is relevant to determining a matter that is in issue in the proceedings –

- (a) the Code is admissible in evidence in the proceedings; and
- (b) proof that the person contravened or did not contravene a relevant provision of the Code may be relied on by any party to the proceedings as tending to establish or negate that matter.

2.2. The Authority may from time to time revise the whole or any part of the Code after consulting stakeholders, if possible, and may at any time revoke the Code.

2.3 This Code aims to –

- (a) explain the relevant powers of the Government; and
- (b) set out the actions that the trade should take for compliance with section 78B orders.

2.4 The making of a section 78B order is in the common interest of the industry, the government and, in particular, the consumers. While it is an effective and powerful tool to remove from the market any food that may be unsafe, it is always in the best interest of both the trade and the consumers for the relevant traders to suspend import/ supply or carry out recalls voluntarily. An industry-initiated recall (voluntary recall), which is much more common than a mandatory one in different overseas jurisdictions, is a fundamental way for any responsible trader to ensure that unsafe food is not consumed. It must be emphasized that the objective of a section 78B order is not to penalize a trader, but to secure cooperation from the trade to protect public health in a systematic and effective manner.

² “Legal proceedings” includes proceedings of the Municipal Services Appeals Board for an appeal against a section 78B order

³ “Court” includes a magistrate and the Municipal Services Appeals Board

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CHAPTER 3 SCOPE OF APPLICATION

3.1 Legal provisions related to section 78B order issued under new Part VA of the Ordinance are applicable to food that has the meaning given to it by section 2(1) of the Ordinance (e.g. meat, dairy products, vegetables, bakery products, canned food, bottled soft drink and bottled water, flour, egg, etc.) but includes also live poultry, live reptiles and live fish. The scope of an individual order however depends on what is specified in the actual order.

“Food” in section 2(1) of Cap 132	includes (a) drink; (b) chewing gum and other products of a like nature and use; (c) smokeless tobacco products; and (d) articles and substances used as ingredients in the preparation of food or drink or of such products, but does not include (i) live animals, live birds or live fish (excluding shell fish); (ii) water, other than (A) aerated water; (B) distilled water; (C) water from natural springs, either in its natural state or with added mineral substances; and (D) water placed in a sealed container for sale for human consumption; (iii) fodder or feeding stuffs for animals, birds or fish; or (iv) articles or substances used only as drugs
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CHAPTER 4: STATUTORY POWERS

4.1 The Authority may make a section 78B order if the Authority 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.

4.2 The Authority is empowered to make a section 78B order to do any one or more of the acts as specified below –

- (a) prohibit the import of any food for the period specified in the order;
- (b) prohibit the supply of any food for the period specified in the order;
- (c) direct that any food supplied be recalled and specify the manner in which, and the period within which, the recall is to be conducted;
- (d) direct that any food be impounded, isolated, destroyed or otherwise disposed of and specify the manner in which, and the period within which, the impounding, isolation, destruction or disposal is to be conducted;
- (e) prohibit the carrying on of an activity in relation to any food, or permit the carrying on of such activity in accordance with conditions specified in the order, for the period specified in the order.

4.3 A section 78B order may be addressed to a particular person or particular persons, a class of persons or all persons. Hence, the Authority may confine the persons to whom the section 78B order will apply by specifying that person or persons in the order.

4.4 A person bound by a section 78 order who contravenes a term of the order commits an offence and is liable on conviction to a fine at level 6 (\$100,000) and imprisonment for 12 months.

4.5 If it appears to a public officer, authorized in writing in that behalf by the Authority, that a term of a section 78B order has been contravened by a person bound by the order in respect of any food, the public officer may seize and remove from the person any such food or any package in which it is contained; affix to any such food that is in the person's possession a mark, seal or other designation; or destroy or otherwise dispose of any such food that is in the person's possession.

4.6 Apart from the power to make a section 78B order, the Authority may also require a person bound by the order to inform the Authority of the

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actions taken by the person in relation to the order (e.g. providing progress reports on a recall exercise), or to provide samples of the food that is the subject of the order for testing and analysis. If the Authority has reasonable grounds to believe that a person possesses any information or document that may assist the Authority in deciding whether to make, vary or revoke a section 78B order, the Authority may require the person to provide any such information or document. Anyone who fails to provide the Authority with the required information or document may be liable to a fine at level 3 (\$10,000) and imprisonment of 3 months.

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CHAPTER 5: FORMS OF ORDER

Prohibition of import

5.1 Given the large amount of food imported into Hong Kong, a section 78B order to prohibit import is a highly effective and direct measure for stopping problem food from entering the Hong Kong market. If only the food products produced by a particular overseas plant or only the food products of a particular batch to be imported from overseas are problematic, a prohibition of import is likely to apply to that particular plant or that particular batch of food, instead of all of the relevant food products from the whole exporting country/place.

Prohibition of supply

5.2 If the problematic food has already entered Hong Kong or the food is locally produced or manufactured, the Authority will consider making a section 78B order to prohibit supply. Food traders will no longer be allowed to put the food concerned on the market for the period specified in the order.

Recall

5.3 If the problematic food has already left the control of the food manufacturers, importers or distributors, it may be necessary for the Authority to make a section 78B order directing the parties concerned to take action to recall the food. A recall means the recovery of the food from all points in the food chain, including the final consumers. The order will direct that any food supplied be recalled in the manner specified in the order. For example, the order may require the food traders to arrange a public recall announcement and immediately notify all known consumers of the recall and the related arrangements.

Impounding, etc. or activity in relation to food

5.4 Depending on the circumstances, the Authority may also make a section 78B order to require the food traders to impound, isolate, destroy or otherwise dispose of the problem food concerned in the manner specified in the order, or to prohibit the carrying on of an activity in relation to any food, or to permit the carrying on of such activity in accordance with specified conditions.

Points to note

5.5 It must be emphasized that the making of a section 78B order is not an impediment to the taking of any other legal action that may be available to the Government under any law. Also, it is not a defence for a person who

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has contravened a section 78B order to show that the food concerned is the subject of a licence, permit or any other form of authorization issued or granted under any Ordinance.

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CHAPTER 6: ROLE OF GOVERNMENT

Making of a section 78B order

6.1 In determining whether there are reasonable grounds to make a section 78B order to prevent or reduce the possibility of a danger to public health or to mitigate the adverse consequence of a danger to public health, the Authority may, in so far as is practicable and reasonable, take into account all factors relevant to the circumstances of the case that the Authority considers appropriate, including but not limited to the following –

- (a) information obtained from any importer or supplier of the food;
- (b) information, reports or testing results obtained from a public analyst;
- (c) information (including reports, alerts, warnings and advisories) obtained from any international food or health authority or the food or health authority of any place;
- (d) the time required for obtaining reports or testing results from a public analyst;
- (e) characteristics of any hazard in the food, the level of the hazard in the food, consumption pattern of the food and the exposure of the general public and vulnerable groups to the food;
- (f) any statutory requirement relating to the food;
- (g) information on the source and extent of the hazard, in particular on whether the hazard exists throughout or in any part of the manufacture or supply chain or is limited to a particular batch of food.

6.2 The Authority is to state clearly in the order the person, persons or class of persons to be bound by the order, the particulars of the food, the reason for making the order, the prohibition or action required and conditions (if any) under the order, and the period within which the relevant act is prohibited or required. Sample orders are provided at Appendices I, II & III. The sample orders are for reference only and a section 78B order is subject to modifications taking into account the actual circumstances of each case.

6.3 In cases where there is only a sole importer or a local manufacturer and a few easily identified retailers, a section 78B order may be addressed to and served on the particular importer or local manufacturer and the retailers. In such cases, an order will take effect when it is served. However, in cases where the food concerned has been widely distributed, it may not be possible for the Authority to serve the order on every single food trader. In order to protect public health, the orders will be published in the Gazette. In such

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cases, an order will take effect at the beginning of the day on which it is published in the Gazette.

6.4 After a section 78B order is made, the Food and Environmental Hygiene Department (“FEHD”) may take the following actions –

- (a) make public announcements through press release, electronic alerts, and internet;
- (b) enforce the order and monitor the progress;
- (c) assess the adequacy of actions taken;
- (d) request for information;
- (e) take samples of the food that is the subject of the order for analysis, bacteriological or other examinations;
- (f) vary or revoke the order;
- (g) monitor the disposal of food;
- (h) audit the effectiveness of the order; and
- (i) consider the need to tighten up the licensing requirements (where the recall / cessation of supply is related to serious defects in the manufacturing process locally).

6.5 For industry-initiated recalls / cessation of supply or import of food (voluntary recalls / cessation of supply or import), the FEHD may also take the above actions as necessary, depending on the actual circumstances. For both mandatory and voluntary recall / cessation of supply or import, the FEHD may publicize the recall / cessation of supply or import when it considers that the public needs to be alerted to the possible danger to public health or that clarification of the situation needs to be made to allay public concerns. The FEHD may, depending on circumstances, alert the public before making a section 78B order.

Make public announcements through press release, electronic alerts and internet

6.6 Even before a section 78B Order is made, the FEHD may via press release or the website of the Centre for Food Safety (CFS) (www.cfs.gov.hk) announce a food alert or the possibility of making an order. Information will also be disseminated to the traders concerned through the Rapid Alert System of the CFS. Traders interested to join the system should approach the Risk Communication Section of CFS at 2867 5125 for details or visit the CFS’s website (http://www.cfs.gov.hk/english/whatsnew/whatsnew_rasi.gtml).

Enforce the order and monitor the progress

6.7 FEHD officers will contact parties concerned, if necessary, to check on the actions taken in relation to the order, or to request detailed information on the volume of import or distribution, time of import or distribution, stock remaining and distribution chain. As explained in paragraph 4.6, a person

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bound by a section 78B order is obliged under the law to provide the information requested. The Authority may, as necessary, require traders to submit interim reports at interval (e.g. within 2 weeks) on the relevant information, including the progress of meeting the requirements set out in the section 78B order. Depending on the circumstances in each case, the Authority may require the traders to take all, or some, of the steps listed in paragraph 7.13 or to include other requirements. FEHD officers may conduct checking at retail outlets to ensure that the section 78B order has been complied with and the remaining stock are properly stored and protected.

Assess the adequacy of actions taken

6.8 FEHD may assess the adequacy of the traders' action, including the following:

- (a) prompt announcement of recall / prohibition of supply or import through the media;
- (b) setting up of customer enquiry service;
- (c) agreement amongst the importers, distributors and retailers on recall / prohibition of supply or import arrangement, such as convenient and adequate locations for return of the food concerned;
- (d) the promptness in withdrawing the food concerned from shelves at retail end and proper storage of food in locations which are inaccessible by the customers pending return to warehouse of importers or distributors;
- (e) the promptness in returning the food withdrawn to the warehouse of importers or distributors and the appropriate way of disposal; and
- (f) whether proper record of the recalled food is kept by traders concerned;
- (g) the investigation into the cause of defect and the remedial action taken (investigation report with improvement measures to be submitted to FEHD).

Request for information

6.9 Food traders concerned should provide FEHD with information or documents on results of further tests of relevant food and further available information about the food from parties concerned (e.g. manufacturer of product or regulatory agency of the food exporting country).

Take samples of the food that is the subject of the order

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6.10 Food traders concerned should offer assistance to staff of FEHD to take sample of the relevant food for analysis, or for bacteriological or other examination.

Vary or revoke the order

6.11 Based on various factors, such as subsequent test results and professional judgment, the Authority may revoke a section 78B order, or vary the length of the order period, the manner of disposal, etc.

Monitor the disposal

6.12 The Authority may specify in a section 78B order the manner of the disposal of the relevant food and its proper storage in locations which are inaccessible by the customers before disposal. In the case of a section 78B order which does not include a direction to dispose of the relevant food, the trader concerned should upon request, inform FEHD of the quantity of the food concerned and the intended way of disposal in writing before taking action for the disposal. The trader should also seek permission and advice from the Environmental Protection Department before disposal at landfills, and to invite FEHD officers to supervise the disposal at landfills to ensure the recalled food are properly destroyed. For permission to return the recalled food to the country/place of origin or deliver to other destination for reprocessing or disposal, FEHD will consider the request on a case-by-case basis and the applicant will be informed of the way of disposal acceptable to FEHD accordingly.

Audit the effectiveness of a section 78B order

6.13 The food traders concerned should, upon request by FEHD, submit interim reports at intervals. FEHD may also assess the effectiveness of the order by conducting checks at retail outlets to ensure withdrawal of the relevant food from shelves, the compliance of requirements as stipulated in the relevant order, prompt return of the recalled food to distributors, sufficiency of customer hotlines and adequate points for receiving recalled food from the customers, etc. Enforcement action such as marking and sealing the food specified in the order to restrict its further movement may be taken if FEHD finds that the requirements as stipulated in the section 78B order are not complied with.

Consider the need to tighten up the licensing requirements

6.14 If the defects of the relevant food are caused by insufficient licensing control of local licensed food businesses, FEHD may review the licensing requirements or conditions and consider imposing additional licensing requirements or conditions to the licensee in order to prevent recurrence of similar problem in future.

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Seizure, marking or destruction of food

6.15 Under the new section 78I, if it appears to a public officer authorized in writing in that behalf by the Authority that a term of a section 78B order has been contravened by a person bound by the order, the Authority may –

- (a) seize and remove from the person any such food or an package in which it is contained;
- (b) affix to any such food that is in the person's possession a mark, seal or other designation; or
- (c) destroy or otherwise dispose of any such food that is in the person's possession or cause it to be destroyed or otherwise dispose of.

6.16 It means that unless a food trader fails to comply with a term of a section 78B order, FEHD will not exercise the power under section 78I to seize, mark or destroy his food. For example, if a food product that is prohibited for supply under a section 78B order is seen on a market shelf in a supermarket, FEHD will consider invoking the power under section 78I.

6.17 Under most circumstances, FEHD would only affix to the food a mark, seal or other designation such that the food concerned would continue to be held at the traders' premises; but the traders would not be allowed to sell the food or remove, alter or obliterate the mark, seal or designation affixed by a public officer. Such arrangement would facilitate the processing of food by the traders once FEHD decides to release the food to the traders. However, if the traders refuse to cooperate with the Authority, FEHD will need to invoke the power to seize the food. In such cases, the food products will be properly handled and stored by FEHD to ensure that they remain, as far as possible, as the same conditions at the time when they are seized.

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CHAPTER 7: ROLE OF FOOD INDUSTRY

7.1 Once any food trader is aware of the possibility of his food being unsafe, the trader, who may be an importer, distributor or retailer, should inform the FEHD of the situation (except for quality or similar reasons or as a precautionary measure in the absence of ground for an official recall), take all reasonable steps to stop import/ supply of the food, or to recall the food, and keep the FEHD informed of the developments, even in the absence of a section 78B order. Traders should inform FEHD in advance for any voluntary recall action if the company intends to make public announcement about the action, whether or not the action is only a precautionary measure. For voluntary suspension/ recall action, it should be undertaken in consultation with the FEHD, and preferably with prior agreement on the recall strategy. **The food industry bears the primary responsibility of implementing a suspension of import or supply or a recall, including follow-up checks to ensure that recalls are successful and that subsequent batches of the food are safe for human consumption.**

7.2 Traders should keep all relevant parties informed of the latest developments. If the suspension/ recall involves food exported overseas, the trader concerned should notify, as soon as practicable, overseas recipients of the food concerned. For both mandatory and industry-driven suspension (voluntary suspension) of import or supply or recall, the trade should observe the following principles –

- (a) handle the matter with urgency and transparency;
- (b) take all reasonable steps to inform all persons who may possess food that is unsafe or potentially unsafe; and
- (c) retrieve the food or have it disposed of in a suitable manner.

7.3 Along with the particulars of the food concerned, and the description of the problem, actions required from the traders and the time frame will be specified in the relevant section 78B order. The actions generally required are elaborated below.

Prohibition of import

7.4 Food importers concerned should cease immediately the importation into Hong Kong the food in question once a prohibition of import order is made.

7.5 If a consignment of the food concerned is being transported into Hong Kong at the time when an order is in force, FEHD may bar it from entry, mark and seal, or seize the food. Depending on the circumstances, FEHD may permit, on a case-by-case basis, special arrangement allowing the consignment to return to its country/place of origin in its original transporting

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media or directing the consignment to a designated place for temporary storage in a specified period of time, for the purpose of re-exporting to its place/country of origin or other places as accepted by FEHD. In some cases, the person in possession of such food products may consider surrendering the food to FEHD for disposal.

Prohibition of supply

7.6 Importers and distributors should immediately cease supplying the food in question, while retailers should remove the relevant food from the shelves immediately. The food retrieved should be stored in a place not accessible by the customers while pending return to the suppliers concerned. Manufacturers should store the food separately and should not make them available for use in any production processes.

Recall

Notification and progress updates to the FEHD

7.7 For transparency and best protection of public health, the trade should, upon request, keep the FEHD informed of the cause of recall by completing the Food Recall Notification at Appendix IV and submitting it to FEHD either by fax or by post. For details of the recall procedures, Superintendent (Food Surveillance and Labelling) can be contacted at 2867 5567.

Informing the consumers

7.8 The food traders concerned should inform the consumers of the recall at the earliest possible moment. Information dissemination may take the form of a press release, letter to the concerned parties or advertisement in the media. Sufficient telephone enquiry service should be made available. A section 78B order will set out the minimum action required by the persons bound by the order and such persons are recommended to take any other action deemed necessary. Some common actions required include the setting up of telephone enquiry service, making announcement in newspaper, putting up posters in stores, arranging with retailers for receiving the food concerned from customers.

Removal from shelves

7.9 Retailers should remove the relevant food from the shelves immediately and store them in a place which is inaccessible by the customers while pending return to the importer or distributor concerned. Manufacturers should store the food separately and should not make them available for use in any production processes.

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Food recovery

7.10 Retailers should keep a proper record of the quantity of the withdrawn food for returning to the distributor. The recalled food, with proper identification, should be stored in a separate area away from other foods and with proper labelling or marking to prevent accidental delivery.

Follow-up action

7.11 Apart from the progress updates, the traders concerned should also, upon request by FEHD, provide a post-recall report within a period specified by FEHD. The reports should contain essential information such as:

- (a) the circumstances leading to the recall;
- (b) the action taken by the company including details of any publicity;
- (c) the extent of distribution of the relevant batch in Hong Kong and overseas;
- (d) the result of the recall (quantity of stock returned, outstanding, etc.);
- (e) the proposed method of disposal or otherwise record of destruction for returned food; and
- (f) investigation report on cause of defects and the action proposed to be implemented in future to prevent a recurrence of the problem.

7.12 The report helps to establish the effectiveness of the recall. To be effective, recall notification must reach as far as the food has been distributed. The effectiveness of the recall is assessed upon the amount of food returned as a percentage of the amount of food which has left the manufacturer while taking into account the retail turnover of the food. The FEHD may investigate and audit the recall process, if necessary. If the reports are unsatisfactory, extension of recall action may have to be considered.

Details on action required for a recall

7.13 To minimize the risk that may arise, recalls are usually carried out in the shortest time practicable. **Traders are encouraged to develop its own recall procedure beforehand so that it can respond promptly to any emerging situation.** The procedure should be able to achieve the purposes of stopping distribution and sale of an affected item, notifying the public and the FEHD of the problem, and effectively and efficiently retrieve from the market any food which is potentially unsafe. Steps which may be required from a trader in a section 78B order for conducting a recall are explained below for general reference. The list below is by no means exhaustive and the actual requirements may vary between orders according to the needs of each case.

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(A) Importer / local manufacturer

1. Set up telephone enquiry service to handle enquiries related to the recall incident as soon as possible.
2. Within a specified time from the date of the order, arrange a press release/public announcement in appropriate form/ recall announcement (not less than a specified size, if any) in one of the Chinese newspapers and one of the English newspapers with wide circulation in Hong Kong for at least a specified period (if any), one of which is on a Sunday. The announcement shall have:
 - (a) the heading ‘Food/Product’s Name - Recall Announcement’;
 - (b) the description and brand (if any) of the food ;
 - (c) picture(s) of the food;
 - (d) details of the recall arrangement (such as, period of recall, place of recall or return of the food);
 - (e) the full name, address and telephone number of the recalling trader(s)/organization(s) /person(s); and
 - (f) the telephone enquiry service for the recall.
3. Notify all known distributor(s), retailer(s) and consumers of the recall and its arrangement within a specified time.
4. Conduct a stock take of the in-house storage facilities and isolate any remaining stock that relates to the recalled food.
5. Inform FEHD of the list of parties involved (e.g., distributor(s), retailer(s), organization(s) or person(s) to whom the food has been supplied) within a specified time from the commencement.
6. Display posters of not less than a specified size, containing the information as referred to in paragraph 2(a) – (f) above at a conspicuous location on the importer’s or manufacturer’s premises and on the distributors’ and retailers’ premises for not less than a specified period from the date of announcement.
7. If the food concerned is returned by distributor(s), retailer(s) or consumers, the recalling trader(s) shall retract the unsafe food. The arrangement should last for at least a specified period after the

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recall is first announced.

8. Provide the FEHD progress reports periodically as specified with the following details:
 - (a) date and quantity of the food recalled;
 - (b) name, address and telephone number of the companies, organizations or persons from which the food have been returned;
 - (c) name, address and telephone number of the companies, organizations or persons from which the food has not been returned;
 - (d) quantity of the food concerned stored in warehouse before commencement of the recall;
 - (e) corrective action taken to improve effectiveness of the recall and the estimated time frame for the completion of the recall; and
 - (f) location(s) of keeping the recalled food.
9. Submit final report to FEHD within a specified time from the date of completion of recall and the report should contain the following information:
 - (a) the names of the organizations or persons from whom the food was returned;
 - (b) the amount of the food returned;
 - (c) a reconciliation between the delivered and recovered quantities of the food;
 - (d) the results of investigations on the cause of the defect of the food and result of further testing of the returned food, if required;
 - (e) the effectiveness of the recall and what corrective actions have been taken with respect to the recall;
 - (f) the decision on the disposal method of the returned food; and
 - (g) the means of preventing recurrence of the defect.

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(B) Distributor

1. Set up a telephone enquiry service to handle enquiries related to the recall incident as soon as possible.
2. Immediately notify all known retailer(s) and consumers of the recall and its arrangement.
3. Conduct a stock take of the in-house storage facilities and isolate any remaining stock that relates to the food concerned.
4. If the food is returned by retailer(s) or consumers, the recalling trader(s)/organization(s)/person(s) shall retract the unsafe food. The arrangement should last for at least a specified period after the recall is first announced.
5. To keep records of recalled food, which should contain:
 - (a) a description of the food returned such as brand and product name, size, identifying codes;
 - (b) the date and quantity of food returned; and
 - (c) what has been done with the food, for example, returned to the supplier(s).

(C) Retailer

1. Set up a telephone enquiry service to handle enquiries related to the recall incident as soon as possible.
2. Immediately notify all known consumers of the recall and its arrangement.
3. Display posters of not less than a specified size, containing the information as referred to in paragraph (A)2(a) – (f) above at a conspicuous location on the retailer's premises for not less than a specified period from the date of announcement.
4. Remove the food concerned from the shelves immediately and store it in a place not accessible by the customers while pending return to the supplier concerned. Also, the food should be separately stored and not available for use in any production processes in case it is an ingredient for producing food product inside the premises.

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5. If the food is returned by consumers, store the food in a place not accessible by customers while pending return to the supplier concerned.
6. Keep records of recalled food, which should contain:
 - (a) a description of the food returned such as brand and product name, size, identifying codes;
 - (b) the date and quantity of food returned; and
 - (c) what has been done with the food, for example, returned it to the supplier(s).

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CHAPTER 8: APPEAL AND COMPENSATION

8.1 A person bound by a section 78B order (including a varied order) who is aggrieved by the order may appeal to the Municipal Services Appeals Board (MSAB) within 28 days from becoming bound by it. In order to protect public health, an appeal made to the MSAB would not suspend the order unless the Authority decides otherwise.

8.2 A person bound by a section 78B order may apply for an amount of compensation for losses arising as a direct result of compliance with the section 78B order or as a direct result of the exercise of a power under section 78I(1) which concerns -

(a) The total or partial loss of the food that is the subject of the order and that has been destroyed or otherwise disposed of; is no longer fit for human consumption; or is depreciated in value. The compensation must not exceed the market value of the food;

(b) The costs or expenditure actually and directly incurred. The compensation must not exceed the actual amount of the costs or expenditure incurred.

8.3 The person is entitled to compensation only if the person proves that –

(a) the Authority did not have reasonable grounds to make the order at the time of making the order or to vary the order at the time of a variation of the order; and

(b) the person has suffered the relevant loss.

8.4 An application may be made to the Small Claims Tribunal, for claims up to the maximum jurisdiction of the Tribunal; or to the District Court, irrespective of the amount claimed. The compensation is recoverable as a civil debt due from the Government, and must be just and equitable in all the circumstances of the case.

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CHAPTER 9: DEFENCE

9.1 Under section 78J, an act done or omission made by -

- (a) an employee in the course the employee's employment, is treated as done or made by the employer, as well as by the employee; and
- (b) an agent for another person with the authority (whether express or implied and whether precedent or subsequent) of that other person, is treated as done or made by that other person, as well as by the agent.

However, if any proceedings are brought against a person, it is a defence for the person to show that the person has exercised all due diligence to prevent the employee or agent from doing the act or making the omission, or doing an act or making an omission of that description in the course of the employee's employment or the agent's authority.

9.2 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 the employers have assigned appropriate staff to handle the job, and whether the employers have conducted checking or taken any measures to ensure that the employees have followed the instructions.

Centre for Food Safety

Food and Environmental Hygiene Department

January 2009

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Appendix I

[SAMPLE ORDER]

PUBLIC HEALTH AND MUNICIPAL SERVICES ORDINANCE

(Chapter 132)

(Section 78B(1))

Section 78B Order

Order No. : _____

FEHD Ref. : _____

TO : _____

I now have reasonable grounds to believe that the making of this order in relation to the food specified in Annex A 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, the details of which are specified in Annex B. **I DO**, in exercise of my powers under section 78B(1) of the Public Health and Municipal Services Ordinance (Chapter 132), order that :

- a. you be prohibited from importing into Hong Kong the food specified in Annex A, that is intended for human consumption, for the period from _____ to _____.
- b. you be prohibited from supplying¹ within Hong Kong the food specified in Annex A, that is intended for human consumption, for the period from _____ to _____.
- c. the food specified in Annex A, that is intended for human consumption and has been supplied by you, be recalled in the manner specified in Annex C, within a period of _____ days from the service of this order on you/ the publication of the notice of this order in the Gazette*.

¹ "Supplying" means (a) selling the food; (b) offering, keeping or exhibiting the food for sale; (c) exchanging or disposing of the food for consideration; (d) transmitting, conveying or delivering the food in pursuance of (i) a sale; or (ii) an exchange or disposal for consideration; or (e) for commercial purposes, giving the food as a prize or making a gift of the food.

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- d. the food specified in Annex A, that is intended for human consumption and is in your custody or possession, be impounded/ isolated/ destroyed/ _____

(specify if to be otherwise disposed of)* in the manner specified in Annex D, within a period of _____ days from the service of this order on you/ the publication of the notice of this order in the Gazette*.
- e. you be prohibited from carrying on/ be permitted to carry on* _____
_____ (specify the activity) in relation to the food specified in Annex A, that is intended for human consumption, subject to the conditions specified in Annex E (in the case of permission), for the period from _____ to _____.

(* Delete whichever is inapplicable)

(Complete whichever of paragraphs (a) to (e) is applicable and delete other paragraphs)

If you feel that you are aggrieved by this order, you may, within 28 days from becoming bound by it, appeal to the Municipal Services Appeals Board.

Note : 1 A person bound by this order who contravenes a term of the order commits an offence and is liable on conviction to a fine at level 6 and to imprisonment for 12 months.

Date this _____

()
Director of Food and Environmental Hygiene

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Annex A

FOOD SPECIFIED IN THE ORDER

Brand Name & Food Name/ Designation	Manufacturer's/ Packer's Name & Address	Country/Place of Origin/ Distributor's Address	Count/ Weight/ Volume	Best Before/ Use By Date	Batch No./ Bar Code No.

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Annex B

REASON FOR MAKING THE ORDER

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Annex C

MANNER IN WHICH A RECALL SHOULD BE CONDUCTED

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Annex D

MANNER IN WHICH THE FOOD SHOULD BE DISPOSED OF

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Annex E

**CONDITIONS SUBJECT TO WHICH
THE SPECIFIED ACTIVITY IS PERMITTED**

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Appendix II

[SAMPLE ORDER]

PUBLIC HEALTH AND MUNICIPAL SERVICES ORDINANCE

(Chapter 132)

(Section 78B(4))

Revocation of Section 78B Order

Order No. : _____

FEHD Ref. : _____

TO : _____

NOW I believe that the Order No. _____ made on _____
_____ (published on _____) is no longer necessary to prevent or reduce a
possibility of danger to public health, or to mitigate any adverse consequence of a
danger to public health, **I DO**, in exercise of my powers under section 78B(4) of the
Public Health and Municipal Services Ordinance (Cap. 132), revoke that order with
effect from _____/ the date of this order*.

()
Director of Food and Environmental Hygiene

Dated this _____

(* Delete whichever is inapplicable)

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Appendix III

[SAMPLE ORDER]

PUBLIC HEALTH AND MUNICIPAL SERVICES ORDINANCE

(Chapter 132)

(Section 78B(4))

Variation of Section 78B Order

Order No. : _____

FEHD Ref. : _____

TO : _____

For reason(s) specified in Annex A, **I DO**, in exercise of my powers under section 78B(4) of the Public Health and Municipal Services Ordinance (Cap. 132), vary the Order No. _____ made on _____ (published on _____) (the section 78B order) in the following manner :

If you feel that you are aggrieved by by this variation, you may, within 28 days from becoming bound by this variation, appeal to the Municipal Services Appeals Board against the section 78B order as so varied.

Note : 1 A person bound by the section 78B order as varied from time to time who contravenes a term of the order commits an offence and is liable to a fine at level 6 and to imprisonment for 12 months.

()
Director of Food and Environmental Hygiene

Date this _____

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Annex A

REASONS FOR VARYING THE ORDER

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Appendix IV

Food Recall Notification

To: Director of Food and Environmental Hygiene
(Attn: Superintendent (Food Surveillance and Labelling))
43/F, Queensway Government Offices, 66 Queensway, Hong Kong.
(Facsimile: 2521 4784)

General

Name & Address of Recalling Company :	
Contact Officer : (Position) :	Telephone : (mobile) (office) Fax :
Date of report/complaint to Company :	Date of notification to Food and Environmental Hygiene Department :
<u>Description of Food</u>	
Food Type :	Weight/Count :
Brand Name :	Product/Pack Size:
Date Marking :	Batch/Number code:
Quantity/ No. of Product Affected :	Origin/ Name, Address & Tel. No. of Local/ Overseas Manufacturer :
Name & Tel. No. of person and post reporting the problem:	Date of reporting:

