

LEGISLATIVE COUNCIL BRIEF

Public Health and Municipal Services Ordinance
(Chapter 132)

PUBLIC HEALTH AND MUNICIPAL SERVICES (AMENDMENT) BILL 2008

INTRODUCTION

At the meeting of the Executive Council on 21 October 2008, the Council ADVISED and the Chief Executive ORDERED that the Public Health and Municipal Services (Amendment) Bill 2008, at Annex A, should be introduced into the Legislative Council on 5 November 2008.

JUSTIFICATIONS

Existing Food Safety Legislation

2. The existing control of food safety is mainly provided 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. Section 54 of Cap 132 further provides that no person shall sell any food which is intended for but unfit for human consumption.

Proposed Food Safety Bill

3. Food incidents in the past years revealed inadequacies in Cap 132 in the control of food safety. In this regard, we have been working on a proposed Food Safety Bill to introduce new food safety control tools for the better protection of public health. The Bill will include new food safety control measures, including a mandatory registration scheme for food importers and distributors, requirement for food traders to maintain proper records on the movement of food so as to enhance

traceability, tightened import control on food, and powers for the Authority to make orders administratively to prohibit the import and supply of problem food and order a recall of the problem food. We briefed the Legislative Council Panel on Food Safety and Environmental Hygiene on 11 December 2007 on the proposed Bill and has thereafter conducted public consultation. We are planning to introduce the Bill into the Legislative Council in 2008-09.

4. 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. On past experience, the food trade is generally cooperative in withdrawing problem food which do not comply with legal requirements from the market. That said, the recent incident of detecting melamine in milk and dairy products has triggered calls for the Authority to have the power to prohibit the import and supply of food and to order a recall of the food concerned when there is a possibility of a danger to public health. Furthermore, Hong Kong depends heavily on imported food, in particular fresh food from the Mainland. The sheer diversity of food from around the world due to globalization of the food trade, advancement in food technology, rapid information flow, improvements in living standard and heightened consumers' expectations have made the work of food safety management increasingly difficult and challenging. Given the increasing number and complexity of food incidents happening all over the world and that food safety remains a concern of the general public, we must possess the necessary statutory power to make orders administratively to deal with food incidents in a timely and effective manner for the protection of public health.

5. It would, however, not be possible to introduce the full Food Safety Bill at this juncture as the Bill requires further liaison with the trade on the operational details and involves many complex legal issues. Given the immense public concerns on this matter of importance, we have therefore expedited work on the part of administrative orders to prohibit the import and supply of food and to order a recall of the food concerned in the Food Safety Bill and proposed to urgently amend Cap 132 accordingly, ahead of the introduction of the full Food Safety Bill.

Prohibition of Import and Supply of Problem Food and Food Recall

6. We propose to empower the Director of Food and Environmental Hygiene (DEFH) under Cap 132 to make orders administratively to prohibit the import and supply of any food and direct that any food supplied be recalled in the manner specified in the order, if DFEH has reasonable grounds to believe, at the time of making the order, that the making of the order is necessary to prevent or reduce the possibility of a danger to public health or to mitigate any adverse consequence of a danger to public health.

7. DFEH will take into consideration the following factors in deciding whether there are reasonable grounds for him to make the order –

- (a) information or document provided by the food traders, if any, on the safety of the food;
- (b) results of food tests conducted by the Public Analyst, if available;
- (c) results of food tests conducted by food safety authorities of other countries or places;
- (d) food alerts issued by food safety authorities of other countries or places;
- (e) time required for conducting the food test;
- (f) the exposure of the general public and/or particular vulnerable groups to the food;
- (g) consumption pattern relating to the food;
- (h) statutory standard of the concerned substances in the food, if any;
- (i) availability of information on the contamination of a particular batch or consignment of the food;
- (j) availability of information on the contamination of a particular food factory or the whole region; and
- (k) any other relevant considerations.

8. Given the large amount of food imported into Hong Kong, we

consider that a prohibition of import order is a highly effective and direct measure for stopping problem food from entering the Hong Kong market. It has to be stressed that this measure is solely for addressing public health concerns and has nothing to do with the putting up of trade barrier. Where DFEH is aware that 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, the prohibition of import order will apply to that particular plant or that particular batch of food, instead of the whole exporting country/place.

9. Where the problem food has already entered Hong Kong or the food is locally produced or manufactured, DFEH will consider issuing a prohibition of supply order. Food traders will no longer be allowed to put the food products concerned on the market for the period specified in the order.

10. Food recall, together with the power to prohibit import and supply, are important food safety tools which are common among overseas food safety legislation. When the problem food has already left the control of the food manufacturers, importers or distributors (i.e. the upper end of the food chain), the Government must possess the power to order 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 (i.e. the bottom end of the food chain). We therefore propose to empower DFEH to make a food recall order. The order will direct that any food supplied be recalled in the manner specified in the order. 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.

11. DFEH may also make an 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.

12. An order made by DFEH will state clearly the particulars of the food, the reason for making the order, the prohibition or action required of the traders, and the period within which the relevant act is prohibited or required. For cases where there is only a sole importer and a few easily identified retailers, the orders may be served directly upon the

particular importer and the retailers. In such cases, an order will take effect upon being served. However, in cases where the food concerned has been widely distributed, it may not be possible for DFEH to serve the order on every single food trader. In order to protect public health, we propose that the orders be made in writing addressed to a class of person or all persons and such orders shall be published in the Gazette. In such cases, an order will take effect on the date of its publication in the Gazette.

13. The contravention of an order made by DFEH will constitute an offence. We propose that the level of penalty for contravening an order should be a fine at level 6 (i.e. \$100,000) and imprisonment of 12 months.

14. Any person bound by an order who is aggrieved at the order may appeal to the Municipal Services Appeals Board (MSAB) within 14 days from becoming bound by it. In order to protect public health, an appeal made to the MSAB would not suspend the order unless DFEH decides otherwise.

15. A claim for compensation in relation to the above orders may be made to the court if the person has suffered loss as a result of the order or as a result of the exercise of a power by a public officer under the new section 78I(1) in relation to the order (i.e. seizing or destroying the food in question). The amount of the compensation should not exceed the market value of the food concerned at the time of making the order. An award would be made only if the MSAB has varied or set aside the order; and DFEH did not have reasonable grounds to make the order at the time of making the order. An award of compensation, if any, must be of an amount that is just and equitable in all the circumstances of the case, taking into account all factors relevant to the circumstances.

Legislative Timetable

16. We plan to introduce the Public Health and Municipal Services (Amendment) Bill 2008 into the Legislative Council for first and second reading on 5 November 2008.

THE BILL

17. Clause 2 of the Bill adds a new Part VA to Cap 132 –
- (a) The new section 78B empowers DFEH to make orders (“section 78 B orders”) if it is necessary to prevent or reduce a possibility of danger to public health or to mitigate any adverse consequence of a danger to public health, and the orders may –
 - (i) prohibit the import of any food;
 - (ii) prohibit the supply of any food;
 - (iii) direct that any food be recalled;
 - (iv) direct that any food be impounded, isolated, destroyed or otherwise disposed of; or
 - (v) prohibit the carrying on of an activity in relation to any food or permit the carrying on of such activity in accordance with conditions.
 - (b) The 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.
 - (c) The new section 78D creates an offence for the contravention of section 78B orders.
 - (d) The new section 78E empowers DFEH to require a person bound by a section 78B order to inform DFEH of the actions taken in relation to the order or provide samples.
 - (e) The new section 78F empowers DFEH to obtain information or copies of documents before making, varying or revoking section 78B orders.
 - (f) The new section 78G provides that appeals against section 78B orders lie with the MSAB.

- (g) The new section 78H provides for compensation.
- (h) The new section 78I provides for the seizure, marking or destruction of food that is the subject of a section 78B order if a term of the order has been contravened.
- (i) The new section 78J provides for liability of employers for acts and omissions of their employees.

LEGISLATIVE TIMETABLE

18. The legislative timetable will be -

Publication in the Gazette	24 October 2008
First reading and commencement of second reading debate	5 November 2008
Resumption of second reading debate, committee stage and third reading	To be notified

IMPLICATONS OF THE PROPOSAL

19. The implications of the proposal are set out in Annex B.

PUBLIC CONSULTATION

20. We briefed the Legislative Council Panel on Food Safety and Environmental Hygiene on the proposed Food Safety Bill on 11 December 2007. We have since conducted public consultation. In addition to consulting the established advisory committees, like the Advisory Council on Food and Environmental Hygiene, Expert Committee on Food Safety, Advisory Committee on Agriculture and Fisheries, Business Facilitation Advisory Committee (and its Retail Task Force), Small and Medium Enterprises Committee and the Market Management Consultation Committees of 80 public markets, we have conducted trade consultations forums as well as public forums to listen to the views of the stakeholders and the general public. We have consulted all the 18 District Councils or their relevant committees. We

have also consulted the Consulates General in Hong Kong to seek their views on the proposal.

21. The proposals under the Food Safety Bill, including the proposal to empower DFEH to make orders to protect public health, were generally supported by both the public and the trade. They considered the proposed Food Safety Bill a right move to enhance food safety and public health.

22. Some members of the trade were concerned that the proposed new measures would impose extra burden on the trade and requested the Administration to simplify the procedures of the proposed measures and minimize any costs involved under the proposal. With regard to the proposal on additional powers added by the Bill, some trade representatives considered that the Government should compensate for their loss if the Government prohibits them from selling the food.

PUBLICITY

23. We will issue a press release and brief the Legislative Council Panel on Food Safety and Environmental Hygiene on the Amendment Bill.

ENQUIRIES

24. Enquiries on this Brief should be addressed to Dr Jim Chu, Assistant Secretary for Food and Health (Food) at 2973-8125.

Food and Health Bureau

21 October 2008

**PUBLIC HEALTH AND MUNICIPAL SERVICES
(AMENDMENT) BILL 2008**

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PART VA

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A BILL

To

Amend the Public Health and Municipal Services Ordinance to –

- (a) empower the Director of Food and Environmental Hygiene to make orders in relation to food for the protection of public health; and
- (b) provide for incidental and connected matters.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Public Health and Municipal Services (Amendment) Ordinance 2008.

2. Part VA added

The Public Health and Municipal Services Ordinance (Cap. 132) is amended by adding –

“PART VA

ADDITIONAL POWERS IN RELATION TO FOOD

78A. Interpretation of Part VA

In this Part –

“food” (食物) has the meaning given by the definition of “food” in section

2(1) but includes live poultry, live reptiles and live fish;

“section 78B order” (第 78B 條命令) means an order made under section

78B(1);

“supply” (供應), in relation to food, 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.

78B. Additional powers in relation to food

(1) The Authority may make an order to do any one or more of the following –

- (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.

(2) The Authority may only 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.

(3) A section 78B order must specify –

- (a) the person, persons or class of persons intended to be bound by the order;
- (b) particulars of the food that is the subject of the order;
- (c) the reason for making the order;
- (d) the prohibition or action required, as the case may be, and conditions (if any) under the order;
- (e) the period referred to in subsection (1)(a), (b), (c), (d) or (e), as the case may be; and
- (f) the provision under which the order is made and the consequences of a contravention of any term of the order.

(4) The Authority may, in the same manner as a section 78B order was made, vary or revoke the order, and section 78C applies, with the necessary modifications, in relation to the variation or revocation of a section 78B order under this subsection as it applies in relation to a section 78B order.

(5) A section 78B order is not subsidiary legislation.

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

(1) A section 78B order must be in writing and may be addressed to –

- (a) a particular person or particular persons;
- (b) a class of persons; or

(c) all persons.

(2) A section 78B order addressed as referred to in subsection (1)(a) must be served on the person, or each of the persons, to whom it is addressed.

(3) Notice of a section 78B order addressed as referred to in subsection (1)(b) or (c) setting out the terms of the order and who is bound by the order must be published in the Gazette.

(4) A section 78B order, when it takes effect, is binding on the person or persons to whom it is addressed.

(5) A section 78B order that is served on a person takes effect in relation to the person when it is served on the person.

(6) A section 78B order, notice of which is published under subsection (3), takes effect at the beginning of the day on which the notice is published in the Gazette.

78D. Contravention of section 78B orders

(1) A person bound by a section 78B order who contravenes a term of the order commits an offence.

(2) It is not a defence for the person to show that the food concerned is the subject of a licence, permit or any other form of authorization issued or granted under this or any other Ordinance.

(3) It is a defence for an employee charged with an offence under subsection (1) to show that –

- (a) any act done or omission made by the employee in contravention of a term of a section 78B order was done or made in the course of the employee's employment and under instructions given by the employer in the course of that employment; and
- (b) the employee did not exercise managerial functions at the relevant time.

78E. Actions taken in relation to section 78B orders and provision of samples

(1) The Authority may serve on a person bound by a section 78B order a notice requiring the person (at the time or times, or within the period, specified in the notice) to –

- (a) inform the Authority of the actions taken by the person in relation to the order; or
- (b) provide to the Authority samples of the food that is the subject of the order, in the quantity specified in the notice, for analysis, or for bacteriological or other examination.

(2) If any sample of food is provided to the Authority in compliance with a notice under subsection (1)(b), the Authority must pay to the person appearing to have the lawful custody of the food the market price of the sample, or if the market price is unknown or not readily ascertainable, a reasonable price.

(3) A person who, having been served with a notice under subsection (1) –

- (a) fails to comply with the notice; or
- (b) in purported compliance with the notice –
 - (i) provides information that the person knows is false in a material particular; or
 - (ii) recklessly provides information that is false in a material particular,

commits an offence.

78F. Power to obtain information or copies of documents

(1) 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 serve on the person a notice requiring the person to –

- (a) provide the information specified in the notice within the period so specified; or
- (b) produce the document specified in the notice at the time and place so specified and permit a public officer, authorized in writing in that behalf by the Authority, to take copies of the document at that time and place.

(2) A person who, having been served with a notice under subsection (1) –

- (a) fails to comply with the notice; or
- (b) in purported compliance with the notice –
 - (i) provides information or produces any document that the person knows is false in a material particular; or
 - (ii) recklessly provides information or produces any document that is false in a material particular,

commits an offence.

78G. Appeals to Municipal Services Appeals Board

(1) A person bound by a section 78B order who is aggrieved by the order may, within 14 days from becoming bound by it, appeal to the Municipal Services Appeals Board.

(2) In the case of an appeal against a section 78B order addressed as referred to in section 78C(1)(b) or (c), if the Municipal Services Appeals Board Ordinance (Cap. 220) authorizes or requires any document to be served or any notice to be given to the persons bound by the order, the document may be served or the notice may be given by –

- (a) publication in the Gazette; or
- (b) any other means specified by the Chairman of the Municipal Services Appeals Board by notice in writing signed by the Chairman.

(3) An appeal under subsection (1) does not suspend the section 78B order unless the Authority decides otherwise.

78H. Compensation

(1) A person bound by a section 78B order may apply for an amount of compensation recoverable as a civil debt due from the Government (not exceeding the market value of the food at the time of making the order) that is just and equitable in all the circumstances of the case, taking into account all factors relevant to the circumstances, if –

- (a) an appeal has been made under section 78G(1) and the Municipal Services Appeals Board has varied or set aside the order; and
- (b) the person proves that –
 - (i) the Authority did not have reasonable grounds to make the order at the time of making the order; and
 - (ii) the person has suffered loss as a result of the order or as a result of the exercise of a power under section 78I(1) in relation to the order.

- (2) An application under subsection (1) may be made –
- (a) to the Small Claims Tribunal, for claims up to the maximum jurisdiction of the Tribunal; or
 - (b) to the District Court, irrespective of the amount claimed.

78I. Seizure, marking or destruction of food

(1) 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 –

- (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.

(2) The Authority may, in a court of competent jurisdiction, recover from the person referred to in subsection (1) any reasonable costs incurred under subsection (1)(a), (b) or (c) as if those costs were a debt due to the Authority from that person.

(3) If a person removes, alters or obliterates any mark, seal or other designation affixed under subsection (1)(b), with intent to deceive any other person, the person commits an offence.

(4) Before a public officer destroys or otherwise disposes of any food or causes any food to be destroyed or otherwise disposed of under subsection (1)(c), the public officer must record a description and other details that are sufficient to identify the food, and the Authority must keep the record in the Authority's custody for a period of not less than 12 months.

(5) In the case of any conviction for an offence under this Part, the court may order that any food to which the conviction relates, and any similar food found on the defendant's premises or in the defendant's possession at the time of the commission of the offence or of the seizure of

the food in question, is to be forfeited, together with all packages in which the food is contained.

(6) Any food, and any package in which it is contained, forfeited under subsection (5) may be disposed of in the manner specified by the Authority.

78J. Liability of employers

(1) An act done or omission made by an employee in the course of the employee's employment is treated for the purposes of this Part as done or made by the employer, as well as by the employee.

(2) In any proceedings for an offence under this Part brought against an employer in respect of an act or omission of an employee of the employer, the employer is liable to be convicted of and be punished for that offence unless the employer establishes the defence described in subsection (3).

(3) If any proceedings are brought against an employer by virtue of this section, it is a defence for the employer to show that the employer exercised all due diligence to prevent the employee 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.”.

3. Designated Authorities

The Third Schedule is amended by adding –

“78B	Director of Food and Environmental Hygiene
78E	Director of Food and Environmental Hygiene
78F	Director of Food and Environmental Hygiene
78G	Director of Food and Environmental Hygiene
78H	Director of Food and Environmental Hygiene
78I	Director of Food and Environmental Hygiene”.

4. Names in which proceedings for offences may be brought under section 131(1)

The Sixth Schedule is amended by adding –

“78D	Director of Food and Environmental Hygiene
78E	Director of Food and Environmental Hygiene
78F	Director of Food and Environmental Hygiene
78I	Director of Food and Environmental Hygiene”.

5. Penalties

The Ninth Schedule is amended by adding –

“78D(1)	level 6 and 12 months imprisonment	—
78E(3)	level 3 and 3 months imprisonment	—
78F(2)	level 3 and 3 months imprisonment	—
78I(3)	level 5 and 6 months imprisonment	—”.

Explanatory Memorandum

The object of this Bill is to amend the Public Health and Municipal Services Ordinance (Cap. 132) (“the Ordinance”) to provide for the additional powers of the Director of Food and Environmental Hygiene (“the Director”) in relation to food for the protection of public health.

2. Clause 2 adds a new Part VA to the Ordinance. In particular –

(a) new section 78B empowers the Director to make orders (“section 78B orders”) if it is necessary to prevent or reduce a possibility of danger to public health or to mitigate any adverse consequence of a danger to public health, and the orders may –

- (i) prohibit the import of any food;
- (ii) prohibit the supply of any food;
- (iii) direct that any food be recalled;
- (iv) direct that any food be impounded, isolated, destroyed or otherwise disposed of; or

- (v) prohibit the carrying on of an activity in relation to any food or permit the carrying on of such activity in accordance with conditions;
- (b) new section 78C provides for the service of section 78B orders addressed to particular persons and publication of notices of section 78B orders addressed to a class of persons or to all persons;
- (c) new section 78D creates an offence for the contravention of section 78B orders;
- (d) new section 78E empowers the Director to require a person bound by a section 78B order to inform the Director of the actions taken in relation to the order or provide samples;
- (e) new section 78F empowers the Director to obtain information or copies of documents before making, varying or revoking section 78B orders;
- (f) new section 78G provides that appeals against section 78B orders lie with the Municipal Services Appeals Board;
- (g) new section 78H provides for compensation;
- (h) new section 78I provides for the seizure, marking or destruction of food that is the subject of a section 78B order if a term of the order has been contravened; and
- (i) new section 78J provides for liability of employers for acts and omissions of their employees.

3. Clause 4 adds the offences under new Part VA to the Sixth Schedule to the Ordinance so that prosecutions for those offences may be brought in the name of the Director.

IMPLICATIONS OF THE PROPOSAL

Public Health and Municipal Services Ordinance
(Chapter 132)

PUBLIC HEALTH AND MUNICIPAL SERVICES (AMENDMENT) BILL 2008

The implications of the Public Health and Municipal Services (Amendment) Bill 2008 are as follows.

Basic Law and Human Rights Implications

2. The proposal is in conformity with the Basic Law, including the provisions concerning human rights.

Binding Effect of the Legislation

3. The Amendment Bill will not change the binding effect of Cap 132.

Financial and Civil Service Implications

4. Subject to a review of the implementation of the proposal, the resource implications arising from the enforcement of the Amendment Bill, if any, will be absorbed by the bureaux/departments concerned. If additional resources are subsequently considered necessary, the bureaux/departments concerned will bid for them according to the established resource allocation mechanism.

5. Article 105 of the Basic Law provides for a right to compensation for lawful deprivation of property, and such compensation shall correspond to the real value of the property concerned at the time. The Amendment Bill provides that a claim for compensation could be made to the court and it is possible that food traders aggrieved by the Director of Food and Environmental Hygiene's (DFEH) order may make such applications. Under the Amendment Bill, an award would be made only if the Municipal Services Appeals Board has varied or set aside the order; and DFEH did not have reasonable grounds to make the order at the time of making the order. As explained in paragraph 9 of the Memorandum, DFEH will consider a host of

factors in deciding whether he has reasonable grounds to make the order. Nevertheless, the potential scope of compensation allowed under the Amendment Bill would be larger than that under the existing Cap 132. This may give rise to higher amount of compensation or legal expenses to be paid by the Government although it is not possible to estimate the quantum of such increase at this stage.

Economic Implications

6. The proposal to empower DFEH to make orders to prohibit the import and supply of problem food and direct that any food supplied be recalled will help protect public health, enhance public confidence in our food trade and contribute towards making Hong Kong a better place to live and to do business.

Environmental Implications

7. The proposal has no environmental implications.

Sustainability Implications

8. In line with the sustainability principle of pursuing policies which promote and protect the physical health of the people of Hong Kong, the proposal would strengthen the Government's capability to ensure food safety, thereby enhancing the protection of public health and consumer interests.

Food and Health Bureau
October 2008