

# 立法會

## *Legislative Council*

LC Paper No. LS11/08-09

**Paper for the House Committee Meeting  
On 7 November 2008**

### **Legal Service Division Report on Public Health and Municipal Services (Amendment) Bill 2008**

#### **I. SUMMARY**

- 1. Objects of the Bill** To —
  - (a) empower the Director of Food and Environmental Hygiene (the Director) to make orders in relation to food for the protection of public health; and
  - (b) provide for incidental and connected matters.
  
- 2. Comments**

The Bill proposes to empower the Director to make an order (section 78B order) to prohibit the import and supply of food, and to direct that any food supplied be recalled, under specified circumstances.

A person bound by a section 78B order may -

  - (a) appeal to the Municipal Services Appeals Board against the order; and
  - (b) apply for compensation from the Government in specified circumstances.

A person who contravenes a section 78B order commits an offence and is liable to a fine at level 6 (\$100,000) and imprisonment for 12 months.
  
- 3. Public Consultation** The Administration has consulted various advisory committees, stakeholders, the general public, District Councils and Consulates General on the proposals in the Bill.
  
- 4. Consultation with LegCo Panel** On 23 October 2008, the Administration briefed the Panel on Food Safety and Environmental Hygiene (the Panel) on the proposals in the Bill. Members of the Panel were supportive of the Bill and urged its early implementation, but also expressed various concerns.
  
- 5. Conclusion** The Bill proposes to grant powers to the Director to prohibit the import and supply of food, or to direct that any food supplied be recalled under specified circumstances. Members of the Panel and the trade have already expressed concerns on various aspects of the Bill. It is recommended that a Bills Committee be formed to consider the Bill in detail.

## **II. REPORT**

### **Objects of the Bill**

To —

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

### **LegCo Brief Reference**

2. FH CR 1/3231/07 issued by the Food and Health Bureau dated 21 October 2008.

### **Date of First Reading**

3. 5 November 2008.

### **Comments**

4. Under the proposed section 78B, if at the time of making the order the Director 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 any adverse consequence of a danger to public health, the Director may by order (section 78B order) prohibit the import of any food, prohibit the supply of any food, direct that any food supplied be recalled, direct that any food be impounded, isolated, destroyed or otherwise disposed of, and prohibit or permit the carrying on of an activity in relation to any food. Under the proposed section 78A, "food" has the meaning given by the definition of "food" in section 2(1) of the Public Health and Municipal Services Ordinance (Cap. 132). In section 2(1) of Cap.132, "food" includes drink and articles and substances used as ingredients in the preparation of food or drink or of such products, but does not include live animals, live birds or live fish. However, for the purposes of the new Part VA (new sections 78A to 78J) added by the Bill to Cap. 132, "food" includes live poultry, live reptiles and live fish.

5. The factors that the Director will take into consideration in deciding whether there are reasonable grounds for him to make a section 78B order are not specified in the Bill. They are set out in paragraph 7 of the LegCo Brief instead.

6. Under the proposed section 78D, a person bound by a section 78B order commits an offence if he contravenes a term of the order. The penalty is a fine at level 6 (\$100,000) and imprisonment for 12 months. The section also provides that it is a defence for an employee charged with an offence 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.

7. Under the proposed section 78E, the Director may by notice require a person bound by a section 78B order to inform him the actions taken in relation to the order, or to provide samples of the food that is the subject of the order for examination. Failure to comply with the notice or providing information false in a material particular is an offence. If a sample is provided in compliance with a notice, the section requires the Director to 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.

8. Under the proposed section 78F, the Director may by notice require a person to provide information or produce documents that may assist the Director in deciding whether to make, vary or revoke a section 78B order. Failure to comply with the notice, or providing information that is false in a material particular, is an offence.

9. Under the proposed section 78G any person bound by a section 78B order who is aggrieved by the order may appeal to the Municipal Services Appeals Board (MSAB) within 14 days from becoming bound by it. An appeal to the MSAB does not suspend the order unless the Director decides otherwise. The MSAB is established under the Municipal Services Appeals Board Ordinance (Cap. 220). In the said Ordinance, there is no provision of appeal from a decision of the MSAB, but for the purposes of any appeal the MSAB may refer any question of law to the Court of Appeal by way of case stated.

10. Under the proposed section 78H, a person bound by a section 78B order may apply for compensation from the Government if -

- (a) an appeal has been made to the MSAB and the MSAB has varied or set aside the order; and
- (b) the person proves that -
  - (i) the Director 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 to seize, mark or destroy food that is subject of the order.

11. Under the proposed section 78I, an authorized public officer may seize, affix a mark or seal etc. to, or destroy any food that is the subject of a section 78B order if a term of the order has been contravened.

12. Under the proposed section 78J, an employer is liable for an act done or omission made by an employee in the course of the employee's employment as if the act

was done or the omission was made by the employer. It is a defence for the employer to show that he has exercised all due diligence to prevent the employee from doing the act or making the omission in the course of the employee's employment.

## **Public Consultation**

13. According to paragraph 20 of the LegCo Brief, the Administration has consulted the established advisory committees (like the Advisory Council on Food and Environmental Hygiene and Expert Committee on Food Safety), all the 18 District Councils or their relevant committees, the Consulates General in Hong Kong and also conducted trade consultations forums and public forums. In general, both the public and the trade have expressed support for the proposals in the Bill. Some members of the trade were concerned that the proposed new measures would impose extra burden on the trade. They were also concerned about the proposed additional powers given to the Director and considered that the Government should compensate for their loss if the Government prohibits them from selling the food.

## **Consultation with LegCo Panel**

14. On 23 October 2008, the Administration briefed the Panel on Food Safety and Environmental Hygiene (the Panel) on the proposals in the Bill.

15. Members were supportive of the Bill and urged its early implementation. Some of them had the following concerns or suggestions -

- (a) in view of the wide range of factors that the Director would take into consideration in making a section 78B order, a code of practice in this regard should be drawn up;
- (b) as some food products, such as live fish, had a very short saleable period, separate prohibition and recall orders and compensation for this type of food should be devised;
- (c) although a person bound by a section 78B order might appeal to the MSAB, he might not have the resources to instruct a lawyer to represent him in the proceeding;
- (d) setting the fine at level 6 (\$100,000) and imprisonment for 12 months for contravening a section 78B order lacked deterrent effect on large food importers and suppliers; and
- (e) apart from paying compensation not exceeding the market value of the food at the time of making the order, anticipated profits and any costs incurred for recalling food from the market should also be included, albeit a ceiling could be set on the amount that could be recovered from the Government.

## **Conclusion**

16. The Bill proposes to grant powers to the Director to prohibit the import and supply of food, or to direct that any food supplied be recalled under specified circumstances. Members of the Panel and the trade have already expressed concerns on various aspects of the Bill. It is recommended that a Bills Committee be formed to consider the Bill in detail. Meanwhile, the Legal Service Division will continue to scrutinize the legal and drafting aspects of the Bill.

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