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中華人民共和國香港特別行政區政府總部食物及衛生局
Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

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林先生：

(2008 年公眾衛生及市政 (修訂) 條例草案)

二零零八年十一月七日來信收悉。

我們就來信提出的問題所作的回應，載於隨附的資料概要。如有進一步的查詢，請隨時與我們聯絡。

食物及衛生局局長

(張馮泳萍



代行)

二零零八年十一月十四日

《2008年公眾衛生及市政(修訂)條例草案》

就助理法律顧問的意見所作的回應

1. 新訂的第78A條

- (a) 新訂的第78A條中“供應”一詞的定義，與《玩具及兒童產品安全條例》(第424章)、《消費品安全條例》(第456章)及《能源效益(產品標籤)條例》(第598章)中“供應”一詞的定義相近，不同的是《條例草案》沒有納入出租的元素(原因是出租在食物方面是不適用的)。即使“供應”的定義項下第(a)段所述的“售賣該食物”，應涵蓋大部分為收取金錢代價的交換食物活動，我們認為如第(c)段和第(d)(ii)段中的“代價”一詞的定義不局限於“非金錢代價”，會令條文更加全面。我們認為，第(a)段和第(c)段或第(d)(i)段和第(d)(ii)段的定義同時涵蓋某一項作為，這個做法是沒有問題的。
- (b) 我們在草擬《條例草案》時，考慮過你的提議。如“供應”包括為非商業目的而送出食物，則《條例草案》的涵蓋範圍會很廣闊，以至任何人把食物作為禮品(或以任何理由)送給朋友、鄰居或辦公室同事的情況，都包括在內。這並非《條例草案》的政策原意。再者，就送出食物而言，何謂“慈善用途”也可能難以界定。我們並不認為販商會把有問題的食物“棄卸”給慈善機構，亦不認為在政府當局已廣泛宣傳發出命令禁止供應這些食物時，慈善機構還會接受這些食物。

2. 新訂的第 78B(1)(c)條

我們在草擬《條例草案》時曾參考多條海外法例，包括澳洲新南威爾士及維多利亞的食物安全法例，有關係文載於附件 A。澳洲的法例賦權有關當局禁止進行關於任何食物的活動，我們認為這項條文有助處理無法預見的食物事故。

至於根據新訂的第 78B(1)(e)條作出的命令而准許進行關於食物的活動，就該食物而言，只要該項活動是按照命令指明的條件進行，就不會出現違規情況。然而，情況或會出現改變，例如食物環境衛生署署長(食環署署長)後來取得更多有關食物的資料。在此情況下，他可根據第 78B(4)條更改或撤銷原先的命令。根據第 78B(2)條的規定，如署長有合理理由，則可更改原先的命令或作出新的命令以禁止供應食物、禁止進行有關活動或指示將食物(如已供應)收回，或指示將食物查封、隔離、銷毀或以其他方式處置。因此，我們認為並無需要特別把收回食物的權力擴及受第 78B(1)(e)條所作命令規管的食物。

3. 新訂的第 78B(1)(e)條

(a) 正如上文第 2 點所述，我們認為第 78B(1)(e)條可用於處理無法預見的食物事故。在第 78B(1)(e)條涵蓋第 78B(1)(a)及(b)條沒有涵蓋的活動，是合乎邏輯的做法。不過，由於“輸入”和“供應”是擬議的第 78B 條的命令所針對的兩大主要類別，把它們放在條文的最前列述，會更易於理解。第 78B(1)條賦權食環署署長作出命令，飭令作出第 78B(1)(a)至(e)條所述任何一項或多於一

項的事項。即使第 78B(1)(e)條的涵蓋範圍足以包括輸入及供應，食環署署長在作出命令時，也是在第 78B(1)條的涵蓋範圍下行事，因此實屬恰當。我們認為，第 78B(1)條下的各段不一定要互相排斥。

- (b) 以下是會援用第 78B(1)(e)條的一個可能情況：接獲海外食物規管機構的通知，某批產品 A(連批號及有效期的詳情)在製造過程中因非系統性問題而做成對健康有所危害，而不同批次(包括不安全的那批)的產品 A 被發現存於進口商的一個貨倉內。我們可以作出第 78B 條命令，准許其他批次的產品 A 可供售賣，但進口商須應要求就這些批次的產品提供安全證明。

4. 新訂的第 78B(2)條

第 78B(2)條也是以澳洲新南威爾士及維多利亞的食物安全法例為藍本。該條文的第一個環節旨在防止對公眾衛生的危害或減少危害公眾衛生的可能性，第二個環節考慮到對公眾衛生的危害的不良後果可能出現或可能不出現。例如，在接報得知本地出現食用某些生蠔後感染諾沃克病毒而引致食物中毒的個案後，當局可能須作出命令，禁止供應相關生蠔，以免再出現中毒個案，換言之，此舉是緩解對公眾衛生的危害的不良後果。

5. 新訂的第 78C(3)條

由於第 78B 條命令並非附屬法例，我們認為關於該命令的憲報公告亦非附屬法例。不過，經進一步研究該條文後，為免生疑問，我們同意就新訂的第 78C(3)及(6)條提出委員會審議階段修正案，訂明刊登是該命令(而非通知)。我們稍後會草擬有關修正案。

6. 新訂的第 78D(3)(b)條

在刑事訴訟中，僱員在有關時間是否行使管理職能是一個事實問題。在草擬《條例草案》時，政府當局注意到有人關注如前線基層員工會因服從僱主的指示而觸犯法律，對員工並不公平。有鑑於此，我們在第 78D(3)條為並非行使管理職能的僱員訂立一個免責辯護。這與第 598 章第 5(4)及(5)條的條文相近。雖然如此，我們明白你關注到“管理職能”一詞的意思。我們會一併考慮你和法案委員會各委員的意見，研究如為那些不是處於可作出或影響關乎該作為或不作為的決定的僱員提供該項免責辯護，是否會較為恰當。這與《非應邀電子訊息條例》(第 593 章)第 59(5)條的條文相近。

7. 新訂的第 78H 條

(a) 第 78B 條命令旨在規管有關食物，而根據新訂的第 78I 條行使的權力也是一樣。因此，以受影響食物的市值而非其他項目(例如供應食物的業務的價值)來計算補償額或釐定補償額的上限，是公平的，同時亦與現行的各項法定補償條文一致，例如《公眾衛

生及市政條例》(第 132 章)第 59 條。此條訂明獲授權的公職人員如覺得任何食物不宜供人食用，可在該等食物加上標記、印記或其他名稱，或銷毀或以其他方式處置該等食物。任何人如認為感到受屈，可於 72 小時內向法庭提出申訴，而法庭則可完全或部分確認或拒准有關作為；如任何作為被拒准或被部分拒准，法庭須命令將全部或與被拒准作為有關部分的標記、印記或其他名稱除去，或將被檢取和移走的全部食物或與被拒准作為有關部分的食物歸還，或如有關食物或其任何部分已遭銷毀或已以其他方式處置，或不再適宜供人食用，或在命令作出時已因有關作為而致貶值，則法庭須命令主管當局付出一筆法庭在顧及個案情況下認為公正的款項以作補償，但以不超過該等食物在有關作為作出時的市值為限。

- (b) 我們認為“損失”一詞恰當。有關損失應為可合理歸因於該項第 78B 條命令或根據新訂的第 78I 條就該命令行使權力而蒙受的任何金錢損失。因此，有關損失要符合資格獲得補償，其關係不得過遠。關於該項損失是否屬新訂的第 78H(1)(b)(ii)條的範圍，須視乎每宗個案的實際情況而定。舉例來說，如根據第 78B 條命令禁止供應食物的有效期為三日，販商可能會因容易腐壞的食物而蒙受損失，但如有關食物並不容易腐壞並可保存數年，則販商可能不會蒙受任何損失。任何人在第 78H(1)(b)(ii)條所述的情況下蒙受的損失範圍，與上文第 7 段(a)所提根據新訂的第 78H(1)條支付的最高補償額並不相同。

(c) 第 78B 條命令是針對受該命令約束的人，而根據新訂的第 781 條行使的權力也是一樣，因此，只給予受第 78B 條命令約束的人而非其他人保障，是公平的做法。在來信所引述的例子中，如租約是因與有關處所售賣的食物所發出的第 78B 條命令或其他原因而提早終止，業主可根據租約條文尋求補償。再者，即使有關政策是要向受第 78B 條命令間接影響的人作出補償，亦難以界定哪些人應獲得補償，哪些人不應獲得補償。舉例來說，這亦會帶出受第 78B 條命令約束的人的僱員及其貨品和服務供應商是否也應獲得補償的問題。

(d) 請參閱附件 B 所夾附的資料。

(e) 我們在草擬《條例草案》時已參考過多條海外法例，這包括澳洲、新西蘭、歐洲共同體、英國、新加坡、加拿大及美國的法例。在這些海外法例當中，我們發現只有澳洲的法例有訂立關於補償的條文。澳洲新南威爾士和維多利亞的法例訂明，任何人受根據法例作出的命令所約束而蒙受損失，如他認為主管當局並無充分理由作出該項命令，可向主管當局申請補償。主管當局須給予申請人公正和公平的補償。如主管當局在接獲申請的 28 日內未就補償申請作出裁定，則被視為拒絕作出任何補償。如申請人不滿主管當局拒絕補償的裁定或補償金額的裁定，可就該項裁定向審裁處／法院申請覆核。

8. 新訂的第 78J 條

我們會考慮你的建議，訂明主事人／代理人的法律責任。

附件 A

New South Wales Food Act 2003 (Extract)

Part 3 – Emergency powers

30 Making of order

An order may be made under this Part by the Food Authority if the Food Authority has reasonable grounds to believe that the making of the order is necessary to prevent or reduce the possibility of a serious danger to public health or to mitigate the adverse consequences of a serious danger to public health.

31 Nature of order

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

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

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

32 Special provisions relating to recall orders

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

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

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

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

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

33 Manner of making orders

(1) An order under this Part:

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

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

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

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

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

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

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

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

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

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

34 Compensation

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

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

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

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

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

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

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

35 Failure to comply with emergency order

A person must not, without reasonable excuse:

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

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

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

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

36 Limitation on stay of operation of emergency orders

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

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Victoria

Food Act 1984 (Extract)

Part VII—Emergency Powers

44 Making of order

An order may be made under this Part by the Secretary if the Secretary has reasonable grounds to believe that the making of the order is necessary to prevent or reduce the possibility of a serious danger to public health or to mitigate the adverse consequences of a serious danger to public health.

44A Nature of order

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

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

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

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

44B Special provisions relating to recall orders

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

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

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

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

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

44C Manner of making orders

(1) An order under this Part—

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

(2) Notice of an order addressed as referred to in subsection (1)(b) setting out the terms of the order and the persons to be bound by the order must, as soon as practicable after the order is made, be published in a

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

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

44D Compensation

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

44E Failure to comply with emergency order

A person must not, without reasonable excuse—

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

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

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

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

44G Secretary may obtain enforcement order

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



附件 B

新的第 78H 條補償條文的合憲性

本文件旨在探討新的第 78H 條補償條文(於《2008 年公眾衛生及市政(修訂)條例草案》第 2 條訂明)是否符合《基本法》第六條和第一百零五條的規定。

補償條文

2. 新的第 78H 條訂明，受第 78B 條命令所約束的人可申請補償，但申請必須符合有關規定，包括該人能證明主管當局在作出命令時，沒有合理理由作出該命令；以及該人因該命令或因根據新的第 78I 條就該命令行使權力而蒙受損失。¹ 補償款額須為就該個案的整體情況而言屬公正和公平者，但不得超過有關食物在該命令作出時的市值。

《基本法》第六條和第一百零五條

3. 《基本法》第六條訂明，香港特別行政區依法保護私有財產權。《基本法》第一百零五條訂明的事項包括，香港特別行政區依法保護私人和法人在其財產被依法徵用時得到補償的權利。

《基本法》第一百零五條中“徵用”一詞的涵義

4. 在 *Weson Investment Ltd 訴 稅務局局長* ([2007]2 HKLRD 567) 一案中，鄧楨副庭長在第 79 段裁定，《基本法》第一百零五條中的“deprivation”一詞，是“expropriation”(“徵收”)的意思，即中文原文所表

¹ 第 78B 條命令可(a)禁止輸入或供應任何食物；(b)指示將任何食物收回、查封、隔離、銷毀或以其他方式處置；或(c)禁止進行關於任何食物的活動或准許按照條件進行該等活動。新的第 78I 條就因有第 78B 條命令的條款遭違反而檢取、標記或銷毀該命令所針對的食物的情況，訂定條文。

運的意思（即“徵用”）²。他認為《基本法》第一百零五條基本上是關乎徵收，猶如土地徵用權般。真誠採取行動以評估和強制繳付稅款，或以行動追討罰款或罰金，即使之後發現屬錯誤，也不屬於《基本法》第一百零五條所指的依法徵用財產。

5. 原訟法庭在審理 *Harvest Good Development Ltd 訴 律政司司長及其他人* ([2007] 4 HKC 1) 和 *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd (No.5)* ([2007] 5 HKC 122) 案件，以及上訴法庭在審理 *巫振漢 對 漁農自然護理署* (民事上訴 2007 年第 143 號) 一案時，也依循上述方式詮釋“deprivation”的涵義。在上述最後一宗案件中，申請人提出的質疑包括，漁農自然護理署根據《公眾衛生(動物及禽鳥)條例》(第 139 章)第 8 條沒收某些禽鳥一事。該條訂明，高級獸醫官或任何在其指示下行事的人，可檢取任何違反第 139 章或違反根據該條例訂立的規例而處理的動物、禽鳥或東西，並可命令沒收該等動物、禽鳥或東西，而該等動物、禽鳥或東西須隨即按高級獸醫官的指示予以毀滅、出售或以其他方式處置。上訴法庭參考了鄧楨副庭長在 *Weson* 一案中對“deprivation”(“徵用”)一詞的解釋，裁定第 8 條符合《基本法》第一百零五條，並駁回有關上訴。

6. 在 *Harvest Good Development Limited* 一案中，(當時的)夏正民法官在察悉鄧楨副庭長於 *Weson* 一案中將《基本法》第一百零五條所指的“徵用”(“deprivation”)解釋為“徵收”(“expropriation”)的做法後，在第 134 段發表以下意見：

“134. 至於“徵收”(“expropriation”)一詞的定義，AJ van der Walt 教授在其所著的 *Constitutional Property Clauses* (1999, Juta & Co. Ltd) 第 18 頁表示：

² 全國人民代表大會常務委員會在 1990 年 6 月 28 日通過以下決定：“……全國人民代表大會法律委員會主持審定的《中華人民共和國香港特別行政區基本法》英譯本為正式英文本，和中文本同樣使用；英文本中的用語的含義如果有與中文本有出入的，以中文本為準。”

‘徵收(expropriation)一詞……並不適用於或可以充分解釋所有司法管轄區的情況。在從遞憑藉土地徵用權取得財產時，大多數沿用英國傳統的憲法均是指強制取得(compulsory acquisition)，而大多數沿用德國傳統的司法管轄區則是指徵收(expropriation)，而這兩個字詞的涵義大致相同。普遍為人接受的解釋是，這些字詞是指國家實際取得財產，或藉徵收或取得財產而在某方面得到利益，因此，有關破壞或取去財產但不會使國家得到利益的國家行為，均被摒除在外。’”(重點為夏正民法官所加)

7. 就目前的事而言，訂定第 78B 條命令，是為了保障公眾衛生。新的第 78B(2)條訂明，凡主管當局有合理理由相信有需要作出第 78B 條命令，以防止對公眾衛生的危害，或減少危害公眾衛生的可能性，或緩解任何對公眾衛生的危害的不良後果，該命令方可作出。第 78B 條命令不會授權政府實際取得財產，或藉徵收或取得財產而在某方面得到利益。因此，根據上文第 4 至 6 段引述的案例，第 78B 條命令是不會導致《基本法》第一百零五條所指的財產“徵用”。

8. 新的第 78I 條就因有第 78 條命令的條款遭違反而檢取、標記或銷毀該命令所針對的食物的情況，訂定條文。新的第 78D 條規定，凡違反第 78B 條命令，即屬罪行。基於這個理由並根據上文第 5 段引述上訴法庭對巫振漢一案的判決，政府當局在行使新的第 78I 條的權力時，相當可能不會出現《基本法》第一百零五條所指的“徵用”的情況。

事實徵用

9. 在 *Fine Tower Associates Ltd 訴 城市規劃委員會* ([2008] 1 HKLRD 553) 一案中，上訴法庭曾處理事實徵用這問題。上訴法庭裁定，某行為如對財產的用途造成不利影響，即使未至於構成正式徵收，在某些情況下仍可恰當地視為徵用，受影響的人因而有權獲得補償。這類事實徵用可在以下情況出現：財產的用途受到實質干擾，使擁有人被剝奪使用其財產作任何有意義用途或一切有利可圖的經濟用途的權利。在確定上述情況時，法庭必須考慮事情的實質而非形式。在沒有正式徵收的情況下，是否構成事實徵用財產這問題必然須視乎個別案件而定，屬事實與程度的問題。在這方面，上訴法庭注意到有關美國憲法第五次修正案(其

中包括規定如沒有公平補償不得將私人財產徵為公用) 在美國法理學的發展，即財產是否被徵收，需要作出“基本上屬特定和關乎事實的查訊”。此外，正如美國最高法院在 *Penn Central Transportation Co v City of New York* 438 US 104 (1978) 一案中所裁定，在作出上述查訊時，有多個因素是特別重要的：

“……法院的……裁決已指出數個特別重要的因素，有關規例對申索人造成的經濟影響，尤其是規例對明顯有投資為依據的期望有多大干擾，這些當然屬相關的考慮因素……而政府行動的性質也是考慮因素。”

10. 哈佛法律學院的 Professor Joseph William Singer 在仔細研究美國最高法院如何解釋 *Penn Central* 一案的判斷準則的各部分後，得出了以下的觀察：³

- (a) 政府行動的性質：假如政府的行動可定性為限制財產的使用，為的是保護市民免受傷害，或回應財產擁有人使用該財產所引致的界外效應，而非為了向市民謀取利益(在這情況下財產擁有人應獲得賠償)，則有關規例較有可能屬合法行使規管權而無須作出賠償；⁴
- (b) 規例對經濟的影響：假如財產價值大減，但規例所禁止的財產用途，首先從來不屬於擁有人的權利範圍之內，或有理據證明規例在保護人命或保障公眾人士免受傷害方面，具充分重大的公眾利益，在此情況下，規例不大可能被視為奪取；⁵

³ Joseph William Singer, *Introduction to Property* (Aspen Publishers, 2005 年, 第二版) 第 14.4 節。

⁴ 同上，第 724 頁。

⁵ 同上，第 729 頁。

(c) 干擾有投資為依據的合理期望：假如法例的修改可能或應該是意料之內的事情，因此，擁有人對先前的法律會維持不變作出依賴是不合理的，在此情況下，規例不大有可能被視為奪取。⁶

11. 參照上述的美國法理學，第 78 條命令相當可能不會涉及就《基本法》第一百零五條而言的事實徵用。首先，這命令的目的只是防止擁有人對公眾造成危害。第二，這命令在保障公眾衛生方面，具充分重大的公眾利益。第三，食物的售賣和輸入長期以來均受到規管。新的 78B 條所規定的增補權力，符合現時關於食物的規管權力，而且似乎並不干擾在食物規管制度方面有投資為依據的合理期望。

12. 同樣地，上述事實徵用財產的原則亦不適用於根據新的第 87I 條行使的執法權力。上訴法庭對巫振漢一案的判決是在上訴法庭對 *Fine Tower* 一案有了裁決後多月才作出的，基於前者是直接有關的案例，故這項執法權力相當可能不會導致《基本法》第一百零五條所指的“徵用”的情況。

13. 由於第 78B 條命令所規定採取的作為或根據新的第 78I 條所行使的權力不會導致《基本法》第一百零五條所指的“徵用”問題，故在憲法上無須就採取的作為或行使的權力作出符合該條規定的實際價值補償。

“公正平衡準則”

14. 對於不構成徵用財產的干擾財產權情況，歐洲法理學發展出來的“公正平衡準則”可以被爭辯為《基本法》第六條及第一百零五條下的隱含規定，因此適用於該等情況。根據這項準則，對財產權作出任何干擾，須平衡社會整體利益的需要(對財產權作出的干擾必須以維護社會整體利益為目的)和保障個人權利的需要。作出干擾的方法須與希望達至的日

⁶ 同上，第 730 頁。

標相稱，兩者之間要有合理的關係。在歐洲法理學中⁷，一個人並沒有固有的權利，可因財產用途被管制而得到補償，或依此類推，可因和平享用財產的權利受到不構成“徵用”的干擾而得到補償。不過，在評估有關規例與目標是否相稱時，會否給予補償和法例所引致的實質經濟損失有多嚴重，會是相關的考慮因素：見 Jessica Simor 及 Ben Emmerson 御用大律師合著的 *Human Rights Practice* 第 15.060 段。

15. 另外值得一提的，是，上訴法庭在 *Fine Tower* 一案中裁定（見第 33 段），只在使用上加以限制而不構成事實徵用是得不到補償的：如非這樣，在財政上所引致的後果將會是“損害立法機關在提出……對社會有利的法例方面的自由”。

16. 政府當局認為，新的第 78B 及第 78I 條所訂明的規管權力，符合以上的“公正平衡準則”：

- (a) 將有關權力授予主管當局或有關的公職人員，明顯是符合公眾利益的（請參閱現時提出的條例草案的立法會參考資料摘要第 4 段的論述（檔號 FH CR 1/3231/07））；
- (b) 根據新的第 78(2)條，凡主管當局有合理理由相信有需要作出第 78B 條命令，以防止對公眾衛生的危害，或減少危害公眾衛生的可能性，或緩解任何對公眾衛生的危害的不良後果，該命令方可作出。至於新的第 78I 條所賦予的權力，只會在有關人上觸犯該命令的條款時方可行使；
- (c) 根據新的第 78G 條，任何受第 78B 條命令約束的人，如因該命令而感到受屈，可在開始受該命令約束後 14 天內，向市政服務上訴委員會提出上訴；
- (d) 受第 78B 條命令約束的人可獲得補償，惟須符合新的第 78H 條所訂的條件。

⁷ 這種法理學可見於《歐洲人權公約》第 1 號議定書第 1 條：該項條文旨在保護財產權。

17. 基於以上的論點，新的第 78H 條補償條文是符合《基本法》第六條及第一百零五條的規定的。

.....