

**PUBLIC HEALTH AND MUNICIPAL SERVICES
(AMENDMENT) ORDINANCE 2009**

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HONG KONG SPECIAL ADMINISTRATIVE REGION

ORDINANCE NO. 3 OF 2009



Donald TSANG
Chief Executive
7 May 2009

An Ordinance 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.

[8 May 2009]

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Public Health and Municipal Services (Amendment) Ordinance 2009.

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 to it by section 2(1) but includes live poultry, live reptiles and live fish;

- “hazard” (危害) means a biological, chemical or physical agent in, or condition of, food with the potential to cause an adverse health effect;
- “section 78B order” (第 78B 條命令) means an order made under section 78B(1) and, as the context requires, includes such an order as varied from time to time under section 78B(5);
- “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) In determining whether there are reasonable grounds under subsection (2), 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.

(4) 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 and the principal factors that led to the making of 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.

(5) 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.

(6) 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) A section 78B order addressed as referred to in subsection (1)(b) or (c) 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 addressed as referred to in subsection (1)(b) or (c) takes effect at the time specified in it.

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) the 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 was not, at the relevant time, in a position to make or influence a decision regarding that act or omission.

**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 28 days from becoming bound by the order, appeal to the Municipal Services Appeals Board against the order as originally made.

(2) A person bound by a section 78B order who is aggrieved by a variation of the order under section 78B(5) may, within 28 days from becoming bound by the variation, appeal to the Municipal Services Appeals Board against the order as so varied.

(3) 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.

(4) An appeal under this section 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, that is just and equitable in all the circumstances of the case, for any loss of a kind set out in subsection (3).

(2) 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.

(3) The losses referred to in subsection (1) are the following 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) in relation to the 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;
- (b) costs or expenditure actually and directly incurred.
- (4) The amount of compensation recoverable—
 - (a) in relation to a loss of a kind set out in subsection (3)(a), must not exceed the market value of the food immediately before the time of making the section 78B order or immediately before the time of the variation, as the case may be; and
 - (b) in relation to a loss of a kind set out in subsection (3)(b), must not exceed the actual amount of the costs or expenditure incurred.
- (5) 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 and principals

(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) An act done or omission made by an agent of another person with the authority (whether express or implied and whether precedent or subsequent) of that other person is treated for the purposes of this Part as done or made by that other person, as well as by the agent.

(3) In any proceedings for an offence under this Part brought against a person in respect of an act or omission alleged to have been done or made by an employee or agent of the person, the person is liable to be convicted of and be punished for that offence unless the person establishes the defence described in subsection (4).

(4) If any proceedings are brought against a person by virtue of this section, it is a defence for the person to show that the person exercised all due diligence to prevent the employee or agent from—

- (a) doing the act or making the omission; or
- (b) doing an act or making an omission of that description in the course of the employee's employment or the agent's authority.

78K. Codes of practice

(1) The Authority may issue any code of practice that in the Authority's opinion is suitable for providing practical guidance in respect of this Part.

(2) If a code of practice is issued under subsection (1), the Authority must, by notice published in the Gazette—

- (a) identify the code;
- (b) specify the date on which the code is to take effect; and
- (c) specify for which of the provisions of this Part the code is so issued.

(3) The Authority may from time to time revise the whole or any part of a code of practice issued under subsection (1).

(4) Subsection (2) applies, with the necessary modifications, in relation to any revision made under subsection (3) as it applies in relation to the issue of a code of practice.

(5) The Authority may at any time revoke a code of practice issued under subsection (1).

(6) If a code of practice is revoked under subsection (5), the Authority must, by notice published in the Gazette—

(a) identify the code; and

(b) specify the date on which the revocation is to take effect.

78L. Use of codes of practice in legal proceedings

(1) 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.

(2) 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—

(a) the code of practice is admissible in evidence in the proceedings; and

(b) proof that the person contravened, or did not contravene, the provision may be relied on by any party to the proceedings as tending to establish or negate that matter.

(3) In any legal proceedings, a code of practice which appears to the court to be the subject of a notice under section 78K is taken to be the subject of that notice in the absence of evidence to the contrary.

(4) In this section—

“code of practice” (實務守則) means a code of practice issued under section 78K(1) as revised from time to time under section 78K(3);

“court” (法院) has the meaning given to it by section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) and includes a magistrate and the Municipal Services Appeals Board;

“legal proceedings” (法律程序) includes proceedings of the Municipal Services Appeals Board for an appeal under section 78G.”.

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
78K 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 —”.