

Re: Public Health and Municipal Services (Amendment) Bill 2008

Submission of the Hong Kong Bar Association

1. The Bills Committee on the Public Health and Municipal Services (Amendment) Bill 2008 (“the Amendment Bill”) has invited the Hong Kong Bar Association (“HKBA”) to comment on the Amendment Bill.
2. The HKBA supports the purpose of the Amendment Bill, which is to empower the Director of Food and Environmental Hygiene (“the Director”) to order the prohibition of the import and supply of food and to direct the recall of food to prevent or mitigate a danger to public health. The HKBA’s comments below are directed at the proposed mechanisms for the exercise of these proposed powers, as well as the compensation scheme.
3. The HKBA notes that the Amendment Bill proposes that the Director may have the power to make a section 78B order addressed to and binding on *all persons* and requiring *all persons* to take specified action in respect of particularized food at the pain of penalty. An example of such an order would be a recall order requiring any one who has particularized food in his or her possession to take the food to collection points. Failure to do so would be a criminal offence carrying the maximum penalties of a level 6 fine (ie \$100,000) and 12 months imprisonment. Yet the Administration proposes that a section 78B order is not subsidiary legislation; see the proposed section 78B(5). The Administration should explain whether it is proposing to confer upon the Director legislative power and if not, the justification for the proposition.

4. Turning to the compensation scheme, it is proposed in section 78H that a claim for compensation is only viable if there has been a successful appeal to the Municipal Services Appeal Board (“the MSAB”); and that such a claim will only be successful if the claimant proves that the Director did not have reasonable grounds to make the order at the material time.

5. The HKBA does not understand why it is proposed that the claimant must prove that the Director did not have reasonable grounds to make the order in the first place at the material time, when there is proposed a pre-condition to a claim that there has been a successful appeal to the MSAB, which under section 7 of the Municipal Services Appeals Board Ordinance (Cap 220) exercises all the powers and discretions that are conferred on the administrative decision maker in the determination of the appeal before it. This proposal appears to be onerous in practice since it is unlikely that the claimant would have access to all relevant information relating to the food and the associated public health risk or danger at the material time and the process of discovery from the Director does not necessarily result in access to all such information. On the other hand, the MSAB is in a better position since the administrative decision-maker is required under section 9(1)(b) of the same Ordinance to lodge with it a copy of “every other document or part of a document that is in the possession or under the control of the respondent and is considered by him to be relevant to the appeal”.

6. The HKBA notes the proposed Committee Stage Amendments outlined in the Food and Health Bureau’s paper on Compensation (December 2008) (LC Paper No CB(2)466/08-09(01)) and considers that these proposed CSAs are in the right direction.

Dated 24 December 2008.

Hong Kong Bar Association