

ACFEH Information Paper 11

Advisory Council on Food and Environmental Hygiene

Control of Unauthorised Extension of Food Business

PURPOSE

This paper briefs members on the Administration's proposal to better control unauthorised extension of food business.

BACKGROUND

2. Unauthorised extension of food business creates potential food safety risks, environmental hygiene problems and often causes street obstruction and noise nuisance. There have been an increasing number of complaints relating to unauthorised extension of food business – 2,123 complaints were received in 2005, and 1,029 complaints in the first four months of 2006. The Food and Environmental Hygiene Department (FEHD) has continued with its enforcement efforts against this malpractice but has encountered difficulties arising from the limitations of the existing legislation.

3. Section 34C of the Food Business Regulation (Cap. 132 sub. leg.) (FBR) deals with unauthorised extension of food business. Under the section, except with the written permission of the Director of Food and Environmental Hygiene (DFEH), no licensee shall carry on a food business at or from any place beyond the confines of the licensed food premises. Non-compliance is an offence and is subject to a maximum fine of \$10,000 and imprisonment for 3 months. A daily fine of \$300 is also applicable. Repeated breaches may lead to licence suspension or cancellation under the Demerit Points System (DPS)¹.

¹ Under the DPS, a pre-determined number of demerit points ranging from 5 to 15 (depending on the nature and severity of the offence) will be registered against a licensee upon conviction of an offence in relation to food safety and environmental hygiene under Cap. 132 and its subsidiary legislation. A licence will be suspended for 7 days if 15 points are accumulated within a period of 12 months (first suspension) and 14 days if another 15 points are accumulated within 12 months from the date of the last offence that led to the first suspension (second suspension). If another 15 points are accumulated within 12 months from the date of the last offence that led to the second suspension, the licence will be cancelled. A breach of section 34C of FBR currently attracts 10 demerit points.

4. In addition, section 133 of the Public Health and Municipal Services Ordinance (Cap. 132) empowers FEHD to exercise the power of the Police under section 102 of the Criminal Procedures Ordinance (Cap. 221) to deal with the property that has come into the possession of FEHD in the course of enforcement action taken under Cap. 132 or its subsidiary legislation. In particular, FEHD may apply to the court to have such property sold, destroyed or forfeited. Hence, if FEHD seizes any property of a licensee during its operation under section 34C of the FBR, FEHD may apply to the court for forfeiture of such property. This serves as an added deterrence against non-compliance.

LIMITATIONS OF EXISTING LEGISLATION

5. Under section 34C of FBR, enforcement action can only be taken against the licensee of food business. Often FEHD comes across cases where the licensee evaded responsibility by claiming that he/she was absent from the scene and that he/she had no knowledge of or association with the unauthorised food business activities that took place outside the licensed premises.

6. Moreover, under section 34C of FBR, the mere existence of dining tables and chairs, etc., outside the licensed area of food premises does not constitute an offence. To invoke this section, it is necessary to prove that a licensee's food business is being carried on at a place outside the licensed area. In the absence of such evidence, FEHD has to rely on section 4A of the Summary Offence Ordinance (Cap. 228) to take enforcement action against street obstruction caused by tables, chairs, etc. placed outside the food premises.²

7. The use of section 4A of Cap. 228 to deal with unauthorised extension of food business is not satisfactory for the following reasons -

- (a) The penalty is less. While the maximum penalty for breach of section 34C of FBR is a fine of \$10,000 and imprisonment for 3 months, a breach of section 4A of Cap.

² Under section 4A of Cap. 228, any person who without lawful authority or excuse sets out or leaves any matter or thing which obstructs, inconveniences or endangers any person or vehicle in a public place shall be liable to a fine of \$5,000 or to imprisonment for 3 months.

228 will at most attract a maximum fine of \$5,000 or imprisonment for 3 months. In 2005, the average fines imposed by the court for breach of section 34C of FBR and section 4A of Cap. 228 were \$2,296 and \$495 respectively;

- (b) The DPS is applicable only to convictions of offences under Cap. 132 and its subsidiary legislation. Therefore, non-compliance with section 34C of FBR will result in sanctions under the DPS but non-compliance with section 4A of Cap. 228 will not; and
- (c) As mentioned in paragraph 4 above, if FEHD takes enforcement action under Cap. 132 or its subsidiary legislation, it may apply to the court for forfeiture of the property which has come into FEHD's possession under section 133 of Cap. 132. However, FEHD cannot exercise section 133 of Cap. 132 for use of section 4A under Cap. 228. This limits the deterrent effect of FEHD's action.

PROPOSAL

8. Given the potential risks associated with food safety and environmental hygiene and noise nuisance problems arising from unauthorised extension of food business, and to enhance FEHD's enforcement actions, we propose to amend the FBR to make it an offence for any person (not just the licensee) engaged in any food business to carry on a food business or to set out or leave any article beyond the confines of the licensed premises. Non-compliance will attract the same level of penalties as that for a breach of section 34C of FBR, i.e. a maximum fine of \$10,000 and imprisonment for 3 months, plus a daily fine of \$300.

9. With the proposed amendment, FEHD will be able to institute prosecution action against any person in connection with the food business when food business is found to have been carried on outside the licensed premises, or when dining tables and chairs are found outside the licensed premises, subject to sufficient evidence being gathered. With the proposed amendment, FEHD will also be able to seize and forfeit such articles under section 133 of Cap. 132. FEHD will register demerit points under the DPS against the licensee concerned

upon conviction to enhance deterrence.

OUTSIDE SEATING ACCOMMODATION

10. In the light that outdoor dining has become more popular in Hong Kong and for trade facilitation, FEHD has since 2002 coordinated and approved applications for outside seating accommodation (OSA) subject to the operators meeting a number of requirements, including those that relate to land use, building safety, fire safety, planning and transport. As at 30 April 2006, 141 applications were granted.

ADVICE SOUGHT

11. Members are invited to note our proposal as set out in paragraphs 8 and 9 above. We will also consult the trade representatives on the proposal before deciding on the way forward.

Health, Welfare and Food Bureau
Food and Environmental Hygiene Department
June 2006