

## Summary of Investigation Reports

### Complaints against Food and Environmental Hygiene Department for Improper Handling of Food Safety Complaints

#### Foreword

Food safety is of crucial importance to people's health and is closely related to our daily lives. Consuming food contaminated with bacteria or toxins can cause short-term or long-term harmful effects on our health, and the consequence can be serious.

2. Tasked with enforcing food safety legislation in Hong Kong, the Food and Environmental Hygiene Department ("FEHD") plays a vital gatekeeper role.

3. On receipt of reports or complaints from members of the public, FEHD should take due actions promptly if food safety is found to be at stake. To safeguard people's health, such actions include prosecuting the restaurant/food vendor concerned, stopping the supply of food with a similar problem and giving the public a food safety warning.

4. Nevertheless, we notice from the following two recent complaint cases that FEHD has failed to handle public complaints properly and not fulfilled its duty to ensure food safety.

#### Case (1): "Boiled Prawns" Case

##### *The Complaint*

5. While having dinner with his family at a Chinese restaurant ("Restaurant A"), the complainant, Mr X, found a black, wriggling worm-like object ("the Object") in a dish of boiled prawns served.

6. FEHD followed up on the case and later wrote to inform Mr X of its findings: the Object might be a living thing, but its species could not be identified just from its appearance. Having considered all available evidence, FEHD decided not to prosecute Restaurant A. Mr X found FEHD's decision unreasonable and lodged a complaint with this Office.

##### *Our Findings*

##### Public Health and Municipal Services Ordinance

7. Section 52(1) of the Public Health and Municipal Services Ordinance ("PHMSO") provides that if any person sells to the prejudice of a purchaser any food

which is not of the nature, substance or quality of the food demanded by the purchaser, he shall be guilty of an offence.

FEHD’s Justifications for Not Instituting Prosecution

8. FEHD’s account of the event was as follows.

9. On receipt of Mr X’s food safety complaint, the local District Environmental Hygiene Office (“DEHO”) of the Department collected the Object from him and delivered it to FEHD’s Pest Control Advisory Section (“PCAS”) for identification, to the Government Laboratory (“GL”) for laboratory tests and to the Biodiversity Conservation Division (“BCD”) of the Agriculture, Fisheries and Conservation Department (“AFCD”) for biological analysis.

10. The results of the laboratory tests/identification were as follows:

	Results of Laboratory Tests/Identification
<b>FEHD’s PCAS</b>	Gave no comments.
<b>GL</b>	Believed that the Object was a living thing. However, had no expertise in that field and could not provide further comments.
<b>A conservation officer of AFCD’s BCD</b>	Could not identify from its appearance the species of the Object.

11. The Food Complaint Unit (“FCU”) of FEHD’s Centre for Food Safety (“CFS”) decided not to prosecute Restaurant A for the following reason. Having considered the evidence collected, past prosecution experience and the legal advice provided by the Department of Justice (“D of J”) on similar cases, FCU could not rule out the possibility that the Object was “from the prawns” rather than being foreign substance, as none of the “experts” consulted was able to confirm what kind of living thing the Object was. In this light, FCU considered that there was insufficient evidence to lay charges against Restaurant A. Nevertheless, FCU issued a warning letter to the restaurant, instructing it to take measures to ensure that the nature, substance and quality of its food meet the demand of purchasers.

FEHD’s Process of Decision Careless and Perfunctory

12. In our view, FCU had not tried its best to arrange proper identification of the Object: PCAS’s main responsibility is confined to the control of rodents, mosquitoes and other **arthropods** that may affect human health, GL’s to food safety analysis and assessment, and the identification work done at BCD was only by a Conservation Officer. All of them are hardly **experts in worms**, so it is not surprising that they could

not confirm what creature the wriggling Object was. We consider that as the department responsible for food safety, FEHD should have made its best endeavours to bring the fact to light, such as sending the Object to relevant authorities in tertiary institutions for identification before considering whether or not to take prosecution action against Restaurant A.

13. FCU's statement that it could not rule out the possibility that the (wriggling) Object was "from the prawns" defies common sense and is unacceptable.

14. Besides, given the extraordinary nature of this case, even if FCU still could not ascertain what creature the Object was, there was nothing to prevent the Unit from consulting D of J on whether the evidence at hand was already sufficient for prosecuting Restaurant A.

15. Overall, it was careless and perfunctory of FCU in its process of considering whether or not to prosecute Restaurant A.

## **Case (2): "Indian Lettuce" Case**

### ***The Complaint***

16. The complainant, Mr Y, had bought two cabbages of Indian Lettuce from a vendor ("Vendor B") in a market. When Mr Y was about to cook the Indian Lettuce, he found on it substance suspectedly to be pesticide residues. He then complained to FEHD.

17. Later, FEHD informed Mr Y of the laboratory test result that the pesticide residues found on the Indian Lettuce exceeded the maximum residue limit ("MRL") under the law, but the Department did not intend to prosecute Vendor B. Mr Y was dissatisfied with FEHD's decision and lodged a complaint with this Office.

### ***Our Findings***

#### **Pesticide Residues in Food Regulation**

18. Section 4 of the Pesticide Residues in Food Regulation ("the Regulation") under PHMSO provides that no person may sell for human consumption a food which contains pesticide residues except under the following circumstances:

- (1) the pesticide residues in the food do not exceed the MRL specified in Part 1, Schedule 1 to the Regulation; and

- (2) (where (1) is not applicable) FEHD's risk assessment shows that the pesticide residues in the food do not exceed the safety reference values<sup>1</sup> ("SRV").

### Classification of Indian Lettuce

19. Indian Lettuce is not a worldwide popular type of vegetables. Based on its limited knowledge thereof, FEHD's CFS previously classified it under "Lettuce, Leaf" among the food listed in Part 1, Schedule 1 to the Regulation (see **Appendix**).

20. Subsequently, CFS learned that the scientific name of Indian Lettuce was not exactly the same as "Lettuce, Leaf". Hence, CFS considered it inappropriate to classify the vegetable under "Lettuce, Leaf". Since Indian Lettuce was no longer within any category of food listed in Part 1 of Schedule 1, CFS had to conduct a risk assessment on the Indian Lettuce in question (see para. 18(2)).

### FEHD's Justifications for Not Instituting Prosecution

21. After collecting the Indian Lettuce from Mr Y, DEHO sent it to GL for laboratory tests on pesticide residues and also referred the complaint to FCU of CFS for follow-up. The laboratory test result showed that the Indian Lettuce contained **23 mg of metaldehyde per kg**. At that time, Indian Lettuce was still classified under "Lettuce, Leaf" (see para. 19) while, as specified in Part 1 of Schedule 1 to the Regulation, the MRL for metaldehyde in "Lettuce, Leaf" is **1.73 mg per kg** (see **Appendix**). In other words, the amount of metaldehyde in the Indian Lettuce in question was 13 times the statutory limit, i.e. a breach of the law.

22. Afterwards, FCU learned from the Risk Assessment Section ("RAS") of CFS that the statutory limit for "Lettuce, Leaf" was no longer applicable to Indian Lettuce and, therefore, risk assessment became necessary (see para. 20) for deciding whether prosecution should be instituted against Vendor B.

23. RAS conducted a risk assessment for the Indian Lettuce in question and made the following conclusion in its report:

A long-term, daily consumption of Indian Lettuce with the same level of pesticide residues (i.e. 23 mg of metaldehyde per kg of Indian Lettuce) will exceed the ADI for metaldehyde. While that level did not exceed the ARfD, meaning that adverse acute effect on the health of high consumers was unlikely, **adverse chronic effect on the health of average and high consumers could not be ruled out.**

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<sup>1</sup> Safety reference values refer to the acceptable daily intake ("ADI") of chronic toxicity or the acute reference dose ("ARfD") of acute toxicity. "ADI" refers to the ADI of a chemical, which is the estimate of the amount of a substance of food or drinking water, expressed on a body-weight basis, that can be digested daily over a lifetime without appreciable health risk to the consumer on the basis of all the known facts at the time of the evaluation. ARfD is the amount that can be ingested over a short period of time, usually during one meal or one day, without appreciable health risk to the consumer.

24. FCU enquired further of RAS and asked for a clear indication of:

- (1) whether the Indian Lettuce as described above is dangerous or prejudicial to health, and whether Vendor B had already violated the provisions of the Regulation regarding pesticide residue limits in food; and
- (2) whether the Indian Lettuce as described above was unfit for human consumption, and whether Vendor B had violated section 54 of the PHMSO<sup>2</sup>, which prohibits the sale of food unfit for human consumption.

25. RAS's reply to FCU confirmed the conclusion of its earlier risk assessment (see para. 23) but did not give any direct and specific answers to the questions raised (see paras. 24(1) and (2)). Consequently, FCU decided not to institute prosecution against Vendor B.

26. FEHD explained to us the following. Having taken into account the legal advice provided by D of J on some other cases, FCU held that since RAS had not indicated clearly whether selling the Indian Lettuce in question could be deemed a violation of the relevant provisions under the Regulation or the PHMSO, the risk assessment report, therefore, could not be regarded as evidence that Vendor B had violated those provisions. Even if prosecution was to be instituted, the evidence provided by FEHD acting as the Prosecution would not be able to prove Vendor B guilty "beyond reasonable doubt". Hence, FCU decided not to prosecute Vendor B, and would only issue a warning letter asking the vendor to ensure food safety.

#### FEHD's Process of Decision Rash and Perfunctory

27. RAS's risk assessment report had already pointed out that long-term, daily consumption of Indian Lettuce with the same level of pesticide residues as that in this case would exceed the ADI for metaldehyde and adverse chronic effect to the health of average and high consumers could not be ruled out (see para. 23). We considered this to be a clear indication that the pesticide residues on the Indian Lettuce in question had exceeded the SRV. Therefore, FCU should have considered prosecuting Vendor B based on RAS's assessment result. In this case, however, FCU further asked RAS to state clearly whether selling the Indian Lettuce in question had violated the relevant provisions of the Regulation or the PHMSO. And when no direct and specific answers were given by RAS, FCU instantly decided not to prosecute Vendor B.

28. In our view, the way FCU made its decision was improper, and it was indeed superfluous for it to ask RAS to state clearly whether selling the Indian Lettuce in question had violated the relevant provisions of the Regulation or the PHMSO. Even

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<sup>2</sup> Section 54 of the PHMSO stipulates that any person who sells or offers or exposes for sale... any food intended for, but unfit for, human consumption, shall be guilty of an offence.

if RAS had answered the questions, its answers would not have added evidential value to its risk assessment report based on objective facts. FCU simply would not gain anything from such answers. FCU should have treated the risk assessment report as evidence and thus sought advice from FEHD's senior management and D of J for a decision on whether to prosecute Vendor B.

29. We also noticed that having decided not to institute prosecution, FCU just issued a so-called "warning letter" to Vendor B. However, the warning letter in fact had no substance. It merely informed Vendor B of the pesticide residues level detected in the Indian Lettuce the vendor sold. It even did not indicate whether that level constituted an offence. Such a "warning letter" hardly carried any deterrent effect and the health risk involved was in no way removed.

30. In short, it was too rash and perfunctory of FCU in its process of considering whether or not to prosecute Vendor B and in its action of merely issuing a so-called "warning letter" to that vendor.

#### FEHD's Prosecution Standards Inconsistent

31. Furthermore, we noticed that for the food categories covered by Part 1 of Schedule 1 to the Regulation, FEHD's prosecution standard is the MRL specified in the Schedule (see para.18(1)). For food categories not covered by the Schedule, prosecution or otherwise depends on the ADI and the ARfD under the SRV (see para.18(2)). The prosecution standard for the food categories on the Schedule is very clear and the threshold for prosecution set at a fairly low level. These afford reasonable protection for people's health. Food categories outside the Schedule, however, require risk assessment which, as this case has demonstrated, may involve uncertain factors, resulting in less protection for people's health. Nor does this provide clear rules for regulation of the relevant agricultural practices, and that can easily lead to confusion.

32. Like Indian Lettuce, some other kinds of vegetables commonly consumed in Hong Kong (e.g. white radish, lotus roots and bean sprouts) are also not covered by Part 1 of Schedule 1. Evidently, FEHD's current enforcement system does not provide adequate protection for people's health. An urgent review by the Department is called for.

#### **Concluding Remarks**

33. Both a dish of boiled prawns with a wriggling worm-like object and a bunch of Indian Lettuce with pesticide residues that might cause "adverse chronic effect to the health of average and high consumers" are food worrisome to consumers. The ways that FEHD hastily decided not to take enforcement action fell short of public expectation. Even if the chance of successful prosecution was uncertain, the FEHD officers concerned should have actively tried every means, such as asking for instructions from the senior management (see para. 27), seeking other expert opinion (see para. 12) or D

of J's legal advice (see paras. 14 and 27), with a view to stopping the supply of food with similar problems to the public. FEHD should not have blindly relied on its so-called past experience and given up prosecution so easily (see paras. 11 and 26), thereby leaving the food safety problem unresolved.

34. When this Office received the complaints concerning **Cases (1)** and **(2)**, the six-month time limit for prosecution had already lapsed and FEHD could no longer change its original decisions not to prosecute. We do not want such situations to occur again.

### **Recommendations**

35. In the light of our above findings on **Cases (1)** and **(2)**, The Ombudsman made the following recommendations to FEHD:

- (1) to take effective measures to ensure that FCU would handle similar cases more vigorously and thoroughly in future such that correct and responsible enforcement decisions will be made; and by way of prosecutions, to strive to produce a stronger deterrent effect on restaurants/food vendors, thereby enhancing food safety and better protecting people's health; and
- (2) to review its enforcement system for excessive pesticide residues in food to achieve better protection for people's health; and to issue clearer instructions for the trade to follow.

**Office of The Ombudsman**  
**January 2016**

## Appendix

Part 1 of Schedule 1 to the Pesticide Residues in Food Regulation specifies the maximum residue limit (“MRL”) of the pesticide metaldehyde for the following 13 food categories:

	<b>Description of food</b>	<b>Maximum residue limit ( mg / kg )</b>
(1)	Berries and other small fruits, except strawberry	0.15
(2)	Strawberry	6.25
(3)	Citrus fruits	0.26
(4)	Avocado	1
(5)	Litchi	1
(6)	Stone fruits	1
(7)	Brassica (cole or cabbage) vegetables, Head cabbages, Flowerhead brassicas	2.5
(8)	Brassica leafy vegetables	2.5
(9)	Watercress	3.2
(10)	Lettuce, Head	1.73
(11)	Lettuce, Leaf	1.73
(12)	Tomato	0.24
(13)	Artichoke, Globe	0.07