

# Legal Services

62

## ACHIEVEMENTS

- **Gazettal of 40 pieces of subsidiary legislation within a short timeframe to enable the commencement of the SFO**
- **Prepared for publication an article giving a comprehensive overview of the SFO as well as an outline giving specific guidance on disclosure of interests**
- **In conjunction with the other operational divisions, prepared resources and provided training to aid SFO compliance**
- **Advised on numerous possible breaches of ordinances and conducted prosecutions in respect of a wide range of regulatory offences on behalf of the Commission**

## THIS CHAPTER IS ABOUT

- **The Securities and Futures Ordinance**
  - Subsidiary legislation
  - Preparing the market
- **Prosecutions and appeals**
- **Legal support to the Commission's work**
- **Legal advice**

## What We Do

- Assist with legislative reform of the securities market;
- Provide legal advice to the Board and the operational and support divisions; and
- Conduct prosecutions in the Magistrates' Courts in respect of a wide range of regulatory offences and handle various civil proceedings involving the Commission.

## What We Did

### The Securities and Futures Ordinance

#### ■ Subsidiary Legislation

The SFO came into force on 1 April 2003, opening a new chapter in Hong Kong's regulation of the securities and futures markets.

Since the enactment of the SFO in March 2002, the Division devoted substantial resources to drafting the considerable body of subsidiary legislation needed to underpin the SFO. The legislative drafting team played a pivotal role in co-ordinating this major cross-divisional exercise involving a total of 40 pieces of subsidiary legislation and completing the task within a tight timeframe. The subsidiary legislation prescribes many of the detailed and technical requirements of the new regulatory regime and, as it can be amended relatively quickly, is instrumental in providing the SFO with the necessary flexibility to address changing market and global conditions.

To transform policy instructions into law and ensure a transparent process, several key steps were required to be taken in respect of each item of subsidiary legislation. These included:

- Producing drafts for public consultation and redrafting in the light of comments received;



Chief Counsel Andrew Young talks on SFO.

- Liaison with the Department of Justice and the FSTB;
- Drafting papers explaining each item for submission to the Legislative Council House Subcommittee on Draft Subsidiary Legislation to be Made under the SFO under the chairmanship of the Honourable Sin Chung Kai;
- Attending debates in the Subcommittee to answer Members' questions and further refining the drafts and producing explanatory memoranda; and
- Arranging for the gazettal of the subsidiary legislation and drafting explanatory briefs for the purposes of negative vetting by the Legislative Council.

Most of the 40 pieces of subsidiary legislation had been gazetted in batches by 13 December 2002 and the seven-week negative vetting period elapsed for these items on 12 February 2003. The last few items were gazetted on 17 January 2003, thus completing this mammoth exercise and paving the way for commencement of the SFO on 1 April 2003.

#### ■ Preparing the Market

The Division participated actively last year in preparations for the SFO implementation, including giving seminars. In addition, the Division prepared a

comprehensive overview article on the SFO entitled “The Securities and Futures Ordinance 2002 – Continuity and Change” which was published in the 2002 spring issue of the *SFC Quarterly Bulletin*. It also prepared a derivation table which indicates from where in the previous legislation the various sections of the SFO have been derived and an outline providing specific and extensive guidance on Part XV on Disclosure of Interests. We also vetted the drafts of many of the 40 sets of codes and guidelines plus forms and other materials produced by operational divisions (See the chapter on *Corporate Affairs* for more details of how the SFC prepared for SFO implementation).

### Prosecutions and Appeals

Under section 62 of the SFCO (now section 388 of the SFO) the Commission is empowered to prosecute offences in Magistrates’ Courts. Throughout the year the Division advised on evidence and prosecuted a large number of cases, including market manipulation, illegal short selling, unregistered dealing, breach of disclosure requirements, promotion of unauthorised investment arrangements and unauthorised online trading services.

In September 2002, China United Holdings Ltd appealed to the High Court against its conviction for two breaches of statutory disclosure requirements following a trial in the Magistrates’ Court. On 26 November 2002, Mr Justice Pang dismissed the company’s appeal. The appeals by two convicted market manipulators against their custodial sentences were also dismissed by the High Court in October 2002.

The Commission appeared, by direction of the trial judge, in the application by Lee Ming Tee to the High Court for a stay of his trial on charges of conspiracy to defraud and publishing a false statement.

Although the stay application was successful, on 11 February 2003 the Appeal Committee of the Court of Final Appeal granted leave to the Secretary for Justice to appeal the decision and also granted the Commission leave to intervene in the appeal proceedings.

### SFC’s Duties Towards Individual Investors Cheng Chung Keung and the SFC

During the year the SFC was involved in an important case which clarified the limits of the SFC’s duties towards individual investors.

This matter arose out of a dispute between Cheng and his futures broker who, it was alleged, had not confirmed an order status with Cheng and had liquidated an open position without his consent. The SFC declined to intervene in the dispute, because it appeared to be a private contractual matter. After Cheng had been unsuccessful in suing his broker for damages, he brought an action in the High Court against the SFC in 2001, alleging misconduct on the SFC’s part and failure by it to perform its supervisory duties. The action was dismissed as disclosing no reasonable cause of action. Cheng appealed to the Court of Appeal.

In October 2002, the Court of Appeal dismissed Cheng’s appeal. The court held that the SFC’s duties as a financial regulator were to supervise the overall operation of financial dealings in Hong Kong. As such, the SFC did not exercise its duties solely for protecting a particular investor or class of investors. To impose such a duty of care would have an adverse impact on the SFC’s operations. In any event, there was no evidence of a relationship between Cheng and the SFC which gave rise to an individual duty of care on the SFC’s part towards him. The Court confirmed the SFC’s view that the particular conduct of Cheng’s broker was a private matter and was not relevant to the question of whether the broker was properly supervised by the SFC.

The Court also noted that, in the absence of any evidence of bad faith on the part of the SFC, the Commission could also rely upon the statutory immunity contained in section 56 of the SFCO (now section 380 of the SFO).

## Legal Support to the Commission's Work

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### ■ Civil Actions

The Commission successfully secured the appointment of administrators by the High Court in respect of the property of two brokers: Law Siu Kong Christopher trading as Lawsons Securities Company and Chow Yuk Wah trading as Teil Stock Investment Company. In each case, the order was preceded by the issue of a restriction notice. Administrators were appointed principally to protect the interests of the clients and creditors of the brokerage firms. In the Lawsons case, the Court also granted, upon the Commission's application, a *mareva* injunction in order to prevent Law from dealing with and diminishing the value of his assets. The Commission has obtained a bankruptcy order against Law pursuant to a bankruptcy petition filed against him under section 46 of the SFCO.

### ■ Takeovers and Mergers Panel

The Division provided legal advisers to assist the Takeovers and Mergers Panel in connection with three cases during the past year. One case concerned whether a concert party had been formed in relation to the acquisition of control of a listed company and if so, the possible application of the Takeovers Code. Another case involved an application to review the Executive's ruling that the parties concerned were not acting in concert. The third case was also a review application in respect of a ruling that a voluntary offer for all the shares in a company was an offer for the purposes of the Takeovers Code, to which a proper response should be made under the Code.

## Legal Advice

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Throughout the year, the Division continued to render legal advice to operational and support divisions on a wide range of other matters including interpretation of statutory provisions and advice on commercial agreements, cases of suspected insider dealing and matters involving personal data privacy and copyright law. The Commission also drew up internal procedures for public consultations and revised its guidelines for the handling of external complaints.