

Legal Services

Achievements

- Helped ensure the smooth implementation of the SFO and over 40 items of subsidiary legislation made under it
- Formulated amendments to subsidiary legislation to address market developments
- Revised the Outline of Part XV of the SFO to provide further guidance to the market on the new Disclosure of Interests regime
- Advised on possible breaches of the old ordinances and the new SFO regime
- Conducted significantly more successful prosecutions for regulatory offences
- Published a summary explaining the SFC's consultation procedures

This Chapter Is About

- >> **The Securities and Futures Ordinance**
- >> **Prosecutions and appeals**
- >> **Legal support for the Commission's work**
- >> **Legal advice and assistance in policy initiatives**

WHAT WE DO

- ›› **Assist with reform of the laws governing the securities and futures markets;**
- ›› **Conduct prosecutions in the Magistrates' Courts for a wide range of regulatory offences;**
- ›› **Advise the operational divisions on possible breaches of the securities laws;**
- ›› **Advise the Commission in relation to suspected insider dealing;**
- ›› **Handle civil litigation matters involving the SFC and appeals;**
- ›› **Provide general in-house legal advice and support;**
- ›› **Handle policy initiatives with a significant legal content and participate in major cross-divisional policy initiatives.**

WHAT WE DID

The Securities and Futures Ordinance

In the lead-up to and following commencement of the SFO on 1 April 2003, the Division was actively involved in the implementation process to help ensure a smooth transition to the new regime for the market. We assisted the operational divisions in responding to questions from the industry and the public about the application of various provisions of the SFO or items of subsidiary legislation. The Division also provided advice to the operational divisions about the new law.

At the beginning of the transitional period, we responded to a great number of queries from both practitioners and the public about the operation of the new Disclosure of Interests regime. We revised the Outline of Part XV of the SFO, which gives guidance on when and how to complete the forms to disclose interests in shares of listed companies, to address many of the common queries and to assist the market to comply with the requirements.

One of the advantages of the SFO regime is that many of the detailed and technical regulatory requirements are prescribed in subsidiary legislation which can be amended relatively quickly, thus providing the SFO with the flexibility to address changing market and global conditions. Shortly after the legislative drafting team had completed the major tasks of drafting and gazetting of the considerable body of subsidiary legislation, we, together with the operational divisions, started to consider and formulate amendments to some of the items of subsidiary legislation to address market developments.

In late 2003 the Securities and Futures (Price Stabilizing) (Amendment) Rules were gazetted. The amendment includes the UK as a recognised jurisdiction under the Hong Kong Price Stabilizing Rules to facilitate offerings in both jurisdictions. More recently, we gazetted the Securities and Futures (Contracts Limits and Reportable Positions) (Amendment) Rules.

Six months into the new regime, the SFC began the task of the ongoing maintenance of the SFO. The objectives are to examine if the existing provisions are effective in meeting the SFC's policy objectives and to consider if any provisions need to be updated in view of market developments. The maintenance exercise will result in an Amendment Bill and various amendment rules which will be released for public consultation.

Following the Government's publication on 26 March 2004 of the Consultation Conclusions on Proposals to Enhance the Regulation of Listing, the legislative drafting team has commenced work on the new statutory rules to be made by the SFC under Section 36 of the SFO, which will contain the important listing requirements to be given statutory backing. The plan is to include amendments to the primary legislation required for the new statutory framework in the Amendment Bill.



The new Disclosure of Interests requirements give a more complete picture of dealings by substantial shareholders and directors.

Prosecutions and Appeals

The Commission prosecuted a wide range of offences in the Magistrates' Courts pursuant to its powers under Section 62 of the now repealed Securities and Futures Commission Ordinance (SFCO) and Section 388 of the SFO.

With the commencement of the SFO, the Division has been advising on various offences both under the former regime of 10 ordinances and the SFO. The Division also continued to advise on evidence and to prosecute cases under the old ordinances, including market manipulation, unregistered dealing, breach of disclosure requirements, promotion of unauthorised investment arrangements, failures to comply with requirements to attend interviews and failure to give full assistance with an SFC investigation.

Over the year, there has been a significant increase in cases handled by the prosecution team which comprises one third of the Division staff (four out of 12 lawyers). There was also an increasing trend for persons prosecuted by the Commission to enter pleas of not guilty which resulted in more than twice as many cases proceeding to trial as in the previous year.

For the first time, the SFC successfully prosecuted a licensed leveraged foreign exchange trader (Hong Kong Forex) for failing to ensure that a person (Ms Yu Wai Fong) who was actively engaged in leveraged forex trading was licensed. Hong Kong Forex was convicted after trial and was fined \$30,000 and ordered to pay the SFC's investigation costs.

Yu was convicted of unlicensed forex trading under the Leveraged Foreign Exchange Trading Ordinance. In addition, she was convicted of making unsolicited calls to induce a person to enter into a leveraged forex trading contract.

Also for the first time, we successfully prosecuted a number of people for hawking futures contracts under the Commodities Trading Ordinance and three people for failing to comply with the requirement to attend an interview with the SFC in relation to an investigation in breach of Section 33(12)(c) of the SFCO and Section 184(1)(c) of the SFO.

Court of Final Appeal Allows Appeal Against Stay of Proceedings Against Mr Lee Ming-tee and Orders Payment of SFC's Costs

From late June to early July 2003, the Court of Final Appeal (CFA) heard the appeal by the Government against the order of Mr Justice Seagroatt for a stay of the prosecution of Mr Lee Ming-tee on charges of conspiracy to defraud and publishing a false statement. The SFC had intervened, with leave of the Court, in the appeal on the basis that a substantial and grave injustice had been done to the SFC and its witnesses by the Judge's mistaken adverse factual findings and conclusions when he ordered a permanent stay of Mr Lee's trial. The Judge's main finding against the SFC was that certain senior SFC officers had deliberately and improperly terminated a disciplinary investigation into the conduct of Mr Meocre Li (the prosecution's expert witness in Mr Lee's trial) with regard to a share placement in order to avoid the need to make disclosure to the prosecution, which might have compromised Mr Li's standing as an expert witness in the trial.

Judgment was handed down by the CFA on 22 August 2003. The Court unanimously allowed the appeal by the Government against the order of Mr Justice Seagroatt and ordered the case to be remitted back to the Court of First Instance for Mr Lee to stand trial.

The CFA found that the Judge's view of the evidence was mistaken in several respects and that his findings of facts, and certain inferences which he had drawn, could not be sustained. The CFA further found that when due weight was given to the seriousness of the conduct alleged against the SFC, the explanations offered on behalf of the SFC and the strong possibility that any errors of judgement on the part of the SFC were innocent, the Court could not be satisfied that the alleged ulterior intention or purpose had been made out or that the inferences sought to be drawn by the respondent were compelling. The CFA stated that the Judge's finding that the SFC terminated its inquiry into Mr Li in order to protect his status and standing as a witness could not be sustained and could not support the grant of a permanent stay.

The CFA also found that, in the particular circumstances of this case, the SFC and Mr Li should have made disclosure of the SFC's disciplinary investigation to the prosecution because the SFC should have realised that the information in its possession arising out of the investigation was potentially damaging to Mr Li's integrity and standing as an expert witness in Mr Lee's trial. However, the CFA found that this failure to disclose could not justify a stay of the prosecution.

In November 2003, the CFA ordered Mr Lee to pay the SFC's costs for the High Court proceedings and the appeal.

Legal Support for the Commission's Work

➤ Civil Actions

The Division is preparing for judicial review proceedings which have been instituted in respect of a disciplinary decision made by the Commission in 2003. We are also reviewing two cases with a view to instituting proceedings under Section 214 or other relevant Sections of Part X of the SFO in the interests of investor protection.

➤ Takeovers and Mergers Panel

The Division provided a legal adviser to assist the Takeovers and Mergers Panel in considering an application for a review of an Executive ruling by CLP Holdings Ltd (Please see details in *Corporate Finance* chapter).

➤ Appeals Against SFC Decisions

The Division represented the Commission in respect of two review applications against the SFC decisions to revoke the applicants' registrations as dealers' representatives following the making of bankruptcy orders against them. The first case was before the SFAP in September 2003. The other was one of the first cases to be heard by the newly established SFAT. Both appeals were dismissed by the appeals bodies.

Legal Advice and Assistance in Policy Initiatives

One of the main functions of the Division is to provide legal advice to the SFC's operational and support divisions. During the year, we advised on matters including:

- the interpretation of securities laws, both under the old regime and the SFO (and subsidiary legislation);
- the provisions of other legislation affecting the Commission such as the Companies Ordinance, the Personal Data (Privacy) Ordinance, the Copyright Ordinance, the Gambling Ordinance and the Employment Ordinance;
- all aspects of the SFC's decision making process: the exercise of our investigative, disciplinary and intervention powers; and
- the SFC's procedures, to ensure procedural fairness in the exercise of our powers.

We also participate in cross-divisional policy initiatives, sometimes in a leading role where the project has major legal content and often assisting with policy initiatives led by other divisions. During the year, we assisted in the formulation of the legislative proposals for a scripless market and worked closely with the Corporate Finance Division in the early formulation of the SFC's policy on regulation of listing. We also assisted in revising our personnel policies and procedures.

In addition, we published a summary of the SFC's consultation procedures in October 2003, explaining why we consult, what we are required to do, what we do and the stages of a typical consultation. This aims to enhance the public's understanding of how the SFC conducts its consultations. Public views improve our decision making process and help ensure that our proposals meet the needs of the market and investors.

The Division also provides general legal support to the Commission in relation to employment matters, insurance and commercial contracts and agreements.