

DRAFT

LC Paper No. CB(2)62/00-01(01)
EC(2000-01)XX

For discussion
on 15 November 2000

ITEM FOR ESTABLISHMENT SUBCOMMITTEE OF FINANCE COMMITTEE

HEAD 92 – DEPARTMENT OF JUSTICE Subhead 001 Salaries

Members are invited to recommend to Finance Committee the creation of the following permanent directorate posts in the Civil Division of the Department of Justice –

- (a) 1 Deputy Principal Government Counsel
(DL 2) (\$116,650 - \$123,850)
with effect from a current date; and
- (b) 1 Deputy Principal Government Counsel
(DL 2) (\$116,650 - \$123,850)
with effect from 12 December 2000

PROBLEM

The existing directorate establishment in the Civil Division (CD) is insufficient to cope effectively with the complicated commercial law matters in the Department of Justice (the Department). In addition, the Department needs continued directorate support to cope with the workload

in insider dealing cases when the existing supernumerary post of Deputy Principal Government Counsel (DPGC) (DL2) created for this purpose lapses on 12 December 2000.

PROPOSAL

2. The Secretary for Justice (SJ) proposes to create the following posts in the Commercial Unit of the Civil Division -

- (a) a permanent post of DPGC in the Commercial Law Team with effect from a current date to strengthen the directorate support in complicated commercial law matters; and
- (b) a permanent post of DPGC in the Insider Dealing Tribunal (IDT) Team with effect from 12 December 2000 to provide continued directorate support to the Financial Services Bureau (FSB) in relation to insider dealing cases.

JUSTIFICATION

Creation of a DPGC post in the Commercial Law Team

3. The Commercial Law Team is one of the two teams under the Commercial Unit of the CD. It advises government bureaux and departments on all aspects of commercial law in connection with Government's own commercial activities and the Government's regulation of certain commercial activities. It provides legal advice on negotiation, drafting and interpretation of contracts, matters relating to privatisation and

other aspects of public sector reform, trade-related matters, broadcasting, telecommunications and public transport franchises, substantial infrastructural franchises and commercial leases. It also advises on the exercise of statutory regulatory powers and the process of enactment of new regulatory functions.

4. In recent years there has been a significant increase in the complexity and range of the legal work undertaken by the Team. That increase has arisen partly as a result of new technology and partly from a number of new initiatives of the Government which include increased competition for the provision of various services to the public. In telecommunications and broadcasting, for example, there are now a variety of means by which services are delivered to consumers and there is considerable competition between a large number of licensees. Competition has also been introduced into public transport services and in the moves towards outsourcing a number of activities previously undertaken directly by Government. Other major initiatives include –

- (a) implementation of major projects including the East Rail and West Rail Project Agreements, the Walt Disney Theme Park and the Cyberport;
- (b) public sector reform including corporatisation of various Government activities, privatisation of the Mass Transit Railway Corporation;
- (c) reform of companies and securities legislation, including reform of the Companies Ordinance and the proposed composite Securities and Futures Bill;

- (d) information technology matters such as Electronic Transactions Ordinance, E'Commerce and the Certification Authority Registration Office;
- (e) retirement protection initiatives, including the Mandatory Provident Fund Schemes Ordinance and the registration of Occupational Retirement Schemes; and
- (f) demutualisation of the Stock Exchange with a view to the public listing of the Stock and Futures Exchanges.

5. The Team now comprises one DPGC, eight Senior Government Counsel (SGC) and two Government Counsel (GC), increasing to three GC on creation of an additional post in 2000-01 to cope with the increase in workload. The DPGC has a wide portfolio overseeing the work of ten counsel, to be increased to 11 counsel, in the wide range of commercial law matters and himself providing legal advice on the more complex and sensitive cases. In addition, he has to represent the Department on high level working parties and steering groups and appear before the Executive Council and Legislative Council panels and committees on commercial matters. With the growth in the workload and portfolio of the Team, it is no longer possible for the DPGC to cope with the demand and provide adequate supervision for the counsel in his Team.

6. There is a need to strengthen the directorate establishment of the Team. Given the workload of the other units in the Division, SJ does not consider it possible to re-deploy resources from within the Division, or elsewhere in the Department, to meet the need. It is necessary to create a permanent DPGC post in the Team to share the responsibilities in advising government bureaux/departments on the more complicated commercial law

matters and overseeing the work of the SGC/GC in the Team in respect of the new initiatives. We set out the duty list of the existing DPGC in the Commercial Law Team and the proposed duty lists of the two DPGC after creation of a DPGC post at Enclosures 1 to 3.

Encls. 1
to 3

Creation of a DPGC post in the IDT Team

7. The IDT Team is the other team in the Commercial Unit of the CD. Established for a period of three years in December 1997, the IDT Team comprises one DPGC and 2 SGC. It advises the Financial Secretary through the FSB on the merits of having a Tribunal inquire into investigations referred to him by the Securities and Futures Commission (SFC) by providing pre-enquiry legal advice, and once the Tribunal commences an inquiry, it provides counsel and solictorial services during the inquiry process.

8. Established in 1994 under the Securities (Insider Dealing) Ordinance (SIDO) Cap. 395, the Tribunal conducts inquiries into insider dealing, a type of market fraud that in Hong Kong and in other developed jurisdictions, had previously proved easy to detect but difficult to prosecute and punish. The SIDO has now shown itself to be a success in this respect. Its provision for a Judge of the Court of First Instance of the High Court to sit with two lay expert assessors with the liberty to decide upon its own procedure within a civil regime, has successfully made Hong Kong one of the few jurisdictions which has been able both to detect and to punish this particularly insidious type of market misconduct.

9. The role of the Tribunal is becoming increasingly important. Article 109 of the Basic Law provides by that “The Government of the Hong Kong Special Administrative Region shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre”. To achieve this, Hong Kong has to maintain an open and fair market place for both local and international investors and market operators. With the rapid expansion and development of the Hong Kong securities market, both the securities industry and the investing public have the expectation that the Government will uphold the standards of the market place and, in particular, provide a level playing field for all alike. This requires the Regulator and the Government to deal swiftly and decisively with suspected insider dealing cases and anything short of this will not only tarnish Hong Kong’s reputation as an international financial centre but will also adversely affect the further development of our market.

10. From 1994 to November 1997, the Tribunal completed five insider dealing inquiries. Since the creation of the IDT Team in December 1997, the Tribunal has completed another seven insider dealing inquiries, the last of which, Hanny, was of such a scale that it took more than a year to complete. At present, the Tribunal has just commenced a new inquiry concerning China Apollo. The IDT Team is also advising the FSB in respect of a further five referrals from the SFC, some of which are likely to be substantial inquiries. We expect that the SFC will continue to refer more cases to the Tribunal in future.

11. The SIDO makes provision for more than one division of the Tribunal to sit at the same time. With the back-log of referrals and bearing in mind that some of the SFC investigations have taken a considerable time and cover events occurring some time ago, it will take more than two years to complete the present cases even with two divisions of the Tribunal sitting simultaneously. While it is difficult to predict the future workload in quantitative terms, as the financial market of Hong Kong expands further in both its volume and value, we expect future cases to increase in both number and complexity.

12. The work of the IDT Team in the Department involves reading voluminous documents and evidence, setting out in detail the subject matter of the inquiry, examining and cross-examining witnesses, making submissions and advising the Tribunal on points of law and procedure, and making submissions at the commencement and at the conclusion of the inquiry. Insider dealing cases often involve complicated commercial law and practice and numerous intricate transactions involving the parties. The establishment of one DPGC and two SGC posts is the minimum to cope with the existing workload and level of complexity of work. We will create the two SGC posts in the IDT Team permanently on 12 December 2000. SJ proposes to create one DPGC post on a permanent basis on 12 December 2000 upon the lapse of the existing supernumerary DPGC post in the IDT Team. The proposed duty list of the DPGC post is at Enclosure 4. The establishment of a dedicated team of staff will enable the Team to continue developing case-law precedents and to retain and further develop the expertise in this difficult area of law, which is essential if the fight against insider dealing and malpractice within the securities market is to continue effectively.

Encl. 4

13. We envisage that the workload would soon stretch the Team's present resources beyond their limit. Furthermore, the IDT Team has provided legal input regularly during the drafting of Parts XI, XIII and XIV of the proposed Securities and Futures Bill, which the government published in the form of a White Bill for a three-month consultation that ended in June 2000. The Bill will likely be enacted in the current session of the Legislative Council. We anticipate that the workload of the Team will increase substantially if the proposed Bill becomes law. The Government regards the proposed Bill as a major step forward in reforming the regulatory framework for the securities and futures market. It proposes, amongst other things, the establishment of a Market Misconduct Tribunal (MMT) to replace the IDT. The MMT will have a wider scope than the IDT and will deal with insider dealing, as well as market manipulation and other market misconduct. We will review the need to increase the staffing complement of the IDT team further, upon the enactment of the proposed Bill.

Encl. 5 14. The proposed organization chart of the CD is at Enclosure 5.

FINANCIAL IMPLICATIONS

15. The additional notional annual salary cost of the proposal to create two permanent DPGC posts is \$2,886,000 and the full annual average staff cost, including salary and staff on-cost, is \$5,166,000.

16. In addition, the continuing workload of the IDT Team will necessitate the permanent retention of two SGC posts (MPS 45-49) with a notional annual mid-point salary cost of \$1,970,520 and a full annual

average staff cost of \$3,531,624.

17. We have included sufficient provision in the 2000-01 Estimates to meet the cost of these proposals.

BACKGROUND INFORMATION

18. On 12 December 1997, the Finance Committee approved Members' recommendation (paper EC(97-98)37) for the creation of a supernumerary DPGC post in the CD to head the IDT Team in the Commercial Unit for three years. The Department has recently reviewed the work of the Commercial Unit. The work of commercial law matters and insider dealing inquiries has been increasing rapidly both in volume and in complexity, with the growth in the government's commercial activities, its regulation of utilities, licenses and certain commercial activities, and in Hong Kong's securities market leading to the need for insider dealing inquiries. There is a need for the dedicated attention of a directorate officer on a permanent basis to head the IDT Team and another to strengthen the supervision of the Commercial Team.

CIVIL SERVICE BUREAU COMMENTS

19. [To be advised by CSB.]

**ADVICE OF THE STANDING COMMITTEE ON DIRECTORATE
SALARIES AND CONDITIONS OF SERVICE**

20. [To be advised by CSB.]

Department of Justice
September 2000

**Existing Main Duties and Responsibilities of the
Deputy Principal Government Counsel (DL2)
(Senior Assistant Law Officer (Civil Law) (Commercial))**

Responsible to the Deputy Law Officer (Civil Law) (Commercial) (DL3) for –

- (1) maintaining an overview of the work of the Commercial Law Team in respect of advice on commercial contracts, company law matters, insurance, retirement protection, public transport franchises, telecommunication and broadcasting, implementation of major projects, public sector reform, privatisation, information technology, securities and futures trading;
- (2) providing legal advice on more complex and sensitive cases in respect of such commercial law matters;
- (3) drawing up or vetting undertakings, agreements, commercial contracts, franchises, and licences;
- (4) representing the Department of Justice on high level working parties and steering groups, including the Steering Committee on the Implementation of the Hong Kong Disney Land Project;
- (5) advising on and vetting draft Executive Council memoranda and drafting instructions for major legislation;
- (6) appearing before the Executive Council and Legislative Council panels and committees on matters with which he is dealing;
- (7) supervising the SGC/GC and providing guidance to them in their legal work; and
- (8) performing such other duties as may be assigned from time to time by the Law Officer (Civil Law) and the Deputy Law Officer (Civil Law) (Commercial).

**Proposed Main Duties and Responsibilities of the
Deputy Principal Government Counsel (DL2)
(Senior Assistant Law Officer (Civil Law) (Commercial)1)**

Responsible to the Deputy Law Officer (Civil Law) (Commercial) (DL3) for –

- (1) maintaining an overview of the work of the Commercial Law Team in respect of advice on commercial contracts, company law matters, insurance, retirement protection, public transport franchises, telecommunication and broadcasting;
- (2) providing legal advice on more complex and sensitive cases in respect of such commercial law matters;
- (3) drawing up or vet undertakings, agreements, commercial contracts, franchises and licences;
- (4) representing the Department of Justice on high level working parties and steering groups;
- (5) advising on and vet draft Executive Council memoranda and drafting instructions for major legislation;
- (6) appearing before the Executive Council and Legislative Council panels and committees on matters with which he is dealing;
- (7) supervising and providing guidance to the SGC/GC in the Team; and
- (8) performing such other duties as may be assigned from time to time by the Deputy Law Officer (Civil Law)(Commercial).

**Proposed Main Duties and Responsibilities of the
Deputy Principal Government Counsel (DL2)
(Senior Assistant Law Officer (Civil Law) (Commercial)2)**

Responsible to the Deputy Law Officer (Civil Law) (Commercial) (DL3) for -

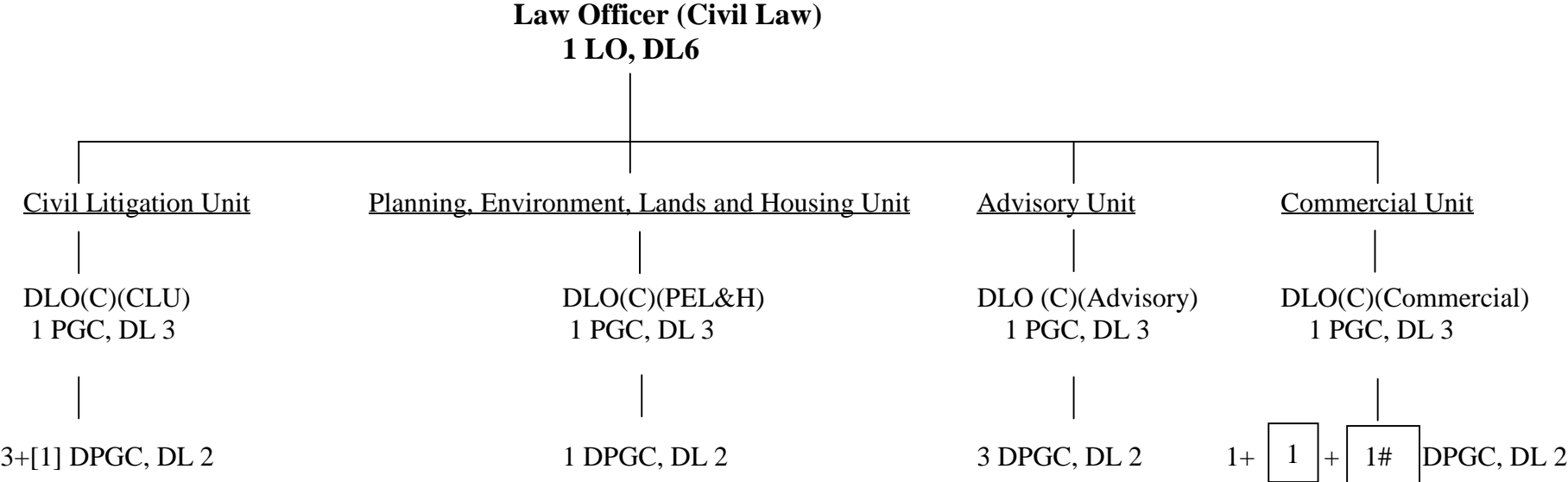
- (1) maintaining an overview of the work of the Commercial Law Team in respect of advice on implementation of major projects, public sector reform, privatisation, information technology, securities and futures trading;
- (2) providing legal advice on more complex and sensitive cases in respect of such commercial law matters;
- (3) drawing up or vet undertakings or agreements;
- (4) representing the Department of Justice on high level working parties and steering groups, including the Steering Committee on the Implementation of the Hong Kong Disney Land Project;
- (5) advising on and vet draft Executive Council memoranda and drafting instructions for major legislation;
- (6) appearing before the Executive Council and Legislative Council panels and committees on matters with which he is dealing;
- (7) supervising and providing guidance to the SGC/GC in the Team; and
- (8) performing such other duties as may be assigned from time to time by the Deputy Law Officer (Civil Law)(Commercial).

**Proposed Main Duties and Responsibilities of the
Deputy Principal Government Counsel ((DL2)
(Senior Assistant Law Officer (Civil Law) (Insider Dealing Tribunal))**

Responsible to the Deputy Law Officer (Civil Law)(Commercial)(DL3) for –

- (1) providing legal analysis and advice on suspected insider dealing cases referred to the Financial Secretary by the Securities and Futures Commission, or any cases of this nature as identified by the Financial Secretary;
- (2) giving advice on the appropriate procedures and prepare necessary documents for the operation of the Insider Dealing Tribunal;
- (3) appearing as Counsel to the Tribunal during insider dealing inquiries and render support to other Counsel to the Tribunal during those inquiries;
- (4) giving legal advice to Government on insider dealing and market manipulation;
- (5) supervising and report on other counsel in the Insider Dealing Unit;
and
- (6) performing such other duties as may be assigned from time to time by the Deputy Law Officer (Civil Law)(Commercial).

Existing and Proposed Organisation Chart of the Civil Division



- Legend:
- LO = Law Officer
 - PGC = Principal Government Counsel
 - DPGC = Deputy Principal Government Counsel
 - DLO(C) = Deputy Law Officer (Civil Law)
 - [] = Supernumerary post held against other vacant post
 - # = Existing supernumerary post
 - [] = Proposed creation of a DPGC post on a permanent basis