

**Securities and Futures Legislation
(Provision of False Information) Bill 2000 (“Bill”)
A submission to
the Legislative Council Bills Committee for the Bill (“Committee”)**

1. The Bills Committee asked for:
 - (a) examples of instances in which a person who gave information false or misleading information to the SFC had been prosecuted in circumstances where the giving of the information was not a crime under statute
 - (b) examples of instances in which the SFC had been misled by oral information in circumstances where the giving of the information was not a crime under statute
 - (c) examples of case law under the US, UK and Australian provisions which were used as a basis for comparison in preparing the draft Bill
 - (d) information on the equivalent Canadian laws and
 - (e) information on what information would fall under subsection (1) of each proposed offence dealing with statutorily required information and what information would fall under subsection (2) of each proposed offence dealing with information relevant to a regulator’s functions.

Prosecutions

2. Two examples follow in which prosecutions have been brought for a person who gave information false or misleading information to the SFC had been prosecuted in circumstances where the giving of the information was not a crime under statute

Example 1

3. A listed company, company A, sought to acquire another listed company, company B. In order for company A to do so without being required to make a general offer to all the shareholders in company B, it was necessary for 31.5% of company B’s shares to be placed to third parties independent of company A and its directors. Confirmations of the independence of each of these places were lodged with the SFC. It was eventually discovered that these confirmations were false and the parties to whom the shares were placed were related to company A and its directors. A prosecution was brought for conspiracy to defraud the SFC among other things. The outcome of the case was a finding of not guilty.

Example 2

4. A private company, company W, owned by Mr X, sought to acquire a listed company, company Y. During the course of the acquisition, Mr X told the SFC in a meeting that he would be selling his interest in company W to Mr Z. Mr X subsequently did so. Documentary representations to the same effect were also made. On this basis Mr X was exempted from having to make a general offer

for company Y under the Takeovers Code and Mr Z made a general offer for company Y instead. It was later discovered that Mr Z was related to Mr X. A prosecution was brought for conspiracy to defraud the SFC and forgery among other things. The outcome of the case was a finding of not guilty on the conspiracy charge but guilty on a charge of forgery.

Oral information

5. Below are several recent instances in which the SFC, acting as the Executive which administers the Takeovers Code has been misled by oral information.

Example 3

6. A senior staff member of an investment bank orally represented to the Executive that there were no contacts between two parties (one of which was the bank's client) in connection with a possible takeover transaction. The Executive thought that should also mean no contacts between the two parties' advisers and made a decision that an announcement was not required. Subsequently, through another source, the Executive was advised that such was not the case – the bank, as adviser to one of the parties, had approached the adviser to the other party to discuss the possible takeover. The bank told the Executive that its statement was not misleading in that they did not say the two advisers had no contacts but just meant the two principals.

Example 4

7. In a Takeover Panel hearing, one party made oral representations to the Panel that he was in effect the beneficial owner of the shares of a listed company. The Panel relied on such representations and made a ruling. Now the Executive has been advised that those shares were beneficially owned by another person. If the Panel were aware of this, it is highly likely that it would have made a different decision.

Example 5

8. Ms A acquired more than 35% of a listed company and accordingly made a general offer for the remaining shares. After several years, Mr B purchased Ms A's shares and made another general offer. Both Ms A and Mr B advised the Executive that they had financial resources to make the offers and they were beneficial owners. It was subsequently discovered that both Ms A and Mr B were not beneficial owners of their shares and they were funded by the same principal. They both contravened the Takeovers Code.

International comparison case law

9. The SFC and Government examined offences in the US, Australia and the UK in drafting the proposed offences for the Bill. What follows are brief summaries of some decisions under the offences in those jurisdictions.

United States

10. The following cases concern cases under s 1001 18 USC.

11. In the case of *US v Sylk*, Sylk was convicted for attempting to obtain an exemption for the company Nylonet Corporation, from the requirement to have a share offering registered by filing with the SEC an offering circular containing financial statements which he knew concealed the true financial state of the company.
11. In the case of *US v Brenek*, Brenek was convicted for lodging false financial information with the SEC that concealed the true liquid assets of his registered broker-dealership, Francis J Brenek & Co, Inc.
12. In the case of *US v Weiner*, Weiner was convicted for giving the SEC a letter the falsely explained her conduct in connection with her plan to have an investment fund, of which she was secretary, acquire worthless securities from a company she had incorporated and controlled.
13. In the case of *US v Mahler*, Mahler the owner of a registered broker-dealer was convicted for giving false testimony when under subpoena before an SEC investigator in which he denied being paid undisclosed commissions by another broker-dealer to market securities offered by that other broker dealer to the regular customers of his broker-dealer.

Australia

14. What follows are decisions made under provisions that were forerunners to ss 1308 and 1309 of the Corporations Law, but were substantially similar to those provisions.
15. In the case of *Roget v Flavel*, Roget, an officer of a company was convicted of knowingly lodging with the stock exchange information which to his knowledge was misleading.
16. In the case of *CAC v Singleton*, Singleton had prepared company minutes which falsely claimed that certain financial statements had been tabled at a company meeting. In fact the statements had been prepared sometime after the meeting, in breach of another statutory provision. Even though the minutes were signed by a director and not by Singleton it was held that Singleton could be held liable for the falsity in the minutes if he possessed sufficient independent discretion and authority as to their contents.
17. In the case of *Linter Group Ltd v Goldberg*, it was alleged in a civil suit that an agreement was void for illegality as the agreement, which was lodged with the CAC (the then securities regulator) was falsely backdated to avoid stamp duty. The court held against the claim.

United Kingdom

18. As yet we have been unable to locate case law under s 200 of the *Financial Services Act*. We have approached the UK Financial Services Authority for assistance and will provide to the Committee any information that is provided to us. The Committee may, however, wish to note that, in the 19th century case of *R v Aspinall*, it was held to be an indictable conspiracy at common law to obtain a listing of securities on the stock exchange by falsely representing that the

requisite amount of shares had been allotted and amounts paid. It was held that the act of misleading stock exchange officials into granting a listing amounted to consequently misleading investors “who should thereafter buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules of the stock exchange, so as to have their shares quoted in the official list.”

Canadian law

19. In Canada, securities and futures law is regulated at the provincial level, with each province having different securities and futures laws and its own securities commission. However, the law in each province is broadly similar. Ontario province has the major securities and futures markets based in Toronto. As such, Ontario’s securities and futures laws are the most significant in Canada and are broadly representative of those in other provinces.
20. In Ontario, the relevant offence governing giving false or misleading information to the securities commission is s 122 of the Securities Act. A copy is attached at Attachment A. Some points to note about the offence are:
 - it applies to information that is untrue or misleading
 - it applies to information given voluntarily
 - it applies to any person and not just categories of person
 - it is a strict liability offence with a reverse onus defence of due diligence, so, in effect, it criminalises mental states knowledge, recklessness and negligence
 - it only applies to information given to the securities commission and not to information given to an exchange or clearing house.

Statutory and non-statutory information

21. The Committee asked for information on when information given to a regulator would fall within subsection (1) or subsection (2) of the various offences. The answer varies depending on the regulator owing to their different statutory functions and is given in the table at Attachment B. The tables are not exhaustive.

Ends.

30 May 2000

Attachment A

Attachment B

Regulator	Statutorily required information Subsection (1)	Non-statutory information Subsection (2)
SFC	<ul style="list-style-type: none"> - Financial Resources Rules returns - Substantial shareholder of registered person approval information - Change of licensing details information (eg address, name of corporation, whether carrying on business) - Registered person's books, accounts or records produced on demand - Auditors reports on registered persons - Notification by a registered person in connection with their register of interests in securities - Registered person financial statements - Commodity godown information inspected - Investment in securities advertisement, invitation or document authorisation information - Listed company shareholder investigation information 	<ul style="list-style-type: none"> - Takeovers Code information - Share Repurchases Code information - Non-statutory code information generally - Unit trust and mutual fund authorisation information - Disciplinary representations - Share suspension representations
Stock exchange	<ul style="list-style-type: none"> - Information required to be produced to substantiate claim from compensation fund - Listed company shareholder investigation information 	<ul style="list-style-type: none"> - Listing Rule information - Exchange Rules information
Futures exchange	<ul style="list-style-type: none"> - Information required to be produced to substantiate claim from compensation fund 	<ul style="list-style-type: none"> - Exchange Rule information
Clearing houses	Nothing	<ul style="list-style-type: none"> - Clearing House Rules information
Recognized exchange controller	Nothing	<ul style="list-style-type: none"> - Recognized Exchange Controller Rules Information eg information submitted to Risk Management Committee etc