



成立於1913年
Founded in 1913

香港華人會計師公會
The Society of Chinese Accountants & Auditors

(在香港註冊成立之有限公司)
(Incorporated in Hong Kong as a company limited by guarantee)

CB(1)1332/11-12(23)

16th March, 2012

By Fax (2840-0797) and Email: bc 03 10@legco.gov.hk

Clerk to Bills Committee on Companies Bill
Legislative Council Secretariat

Attn: Ms. Christina Shiu

Dear Sirs,

Re: Views on retention of headcount test for members' and creditors' schemes (clause 664)

We refer to your letter dated 14th February, 2012 and would like to submit our opinions on the retention of headcount test for members' and creditors' schemes pursuant to clause 664 of the Companies Bill.

The Society of Chinese Accountants and Auditors is an incorporated body of professional accountants in Hong Kong established since 1913. Our members are practising Certified Public Accountants and representing a significant number of practising firms of accountants in Hong Kong. Our primary objectives include:

- to provide a professional development channel for all practising accountants in Hong Kong,
- to assist members to maintain high standards of professional conduct, and
- to provide services to its members and their members' staff, and to advance the theory and practice of accountancy.

In general, we are in support of the retention of headcount test to protect the interests of minority shareholders and creditors. The key comments from our Council are summarised as attached.

We should be glad to discuss with you our comments in further details if so required. Please contact the undersigned at our email address at info@scaacpa.com.hk, facsimile no. (852) 2526 6434 or telephone no. (852) 2869 6680 or our Mr. Kenny Tam, Chairman of Insolvency Management Committee at his email address at ktcpa@netvigator.com, facsimile no. (852) 2851 2616 or telephone no. (852) 2851 2623.

Yours faithfully,

Nelson Lam
President,
The Society of Chinese Accountants and Auditors

VIEWS ON RETENTION OF HEADCOUNT TEST FOR MEMBERS' AND
CREDITORS' SCHEMES
(CLAUSE 664 OF COMPANIES BILL)

I. Members' schemes of listed companies

We are of the view that headcount test (a majority in number of members present and voting for the scheme) for members' schemes of listed companies should be retained given the court has a discretion to dispense with the test because of the following reasons:

1. It protects the rights of minority shareholders and give them a say in the future nature and structure of a company under a scheme.
2. It reduces the chance of schemes being ignoring the interests of minority shareholders as a sanctioned scheme has the capacity to bind all members including the dissenting or apathetic ones.
3. It serves as an essential check to counterbalance the value test (at least 75% in value of the members present and voting for the scheme). This check is particularly important for minority shareholders in special circumstances, such as privatisations or takeover, since a sanctioned scheme will bind all shareholders and permit the compulsory acquisition of the shares of minority shareholders.
4. It places Hong Kong in line with other countries, such as Singapore, United Kingdom, Australia, Bermuda and the Cayman Islands.
5. It is said that headcount test is not necessary as Code on Takeovers and Mergers (the "Code") already offers protection for minority shareholders. However, the Code's protection for minority shareholders may not be sufficient. We uphold that the Code can supplement, but not substitute, the statutory protection of headcount test. Abolition of headcount test may weaken the protection of interests of minority shareholders.
6. There is a view that headcount test fails to reflect the decisions of beneficial owners of shares under the Central Clearing and Settlement System. This issue could be overcome by the proposed introduction of a scripless market in Hong Kong. Under the new system, procedures for shareholders to register their shares in their own names are much simplified and less expensive.
7. Whilst there is an argument that headcount test attracts vote manipulation, no credible evidence to support the same.
8. It is argued that headcount is against the one share one vote principle, i.e. giving disproportionate weight to minority shareholders in the scheme approval process. To tackle the issue, Clause 664 gives the court a discretion to dispense with the headcount test in special circumstances, such as the vote had been unfairly influenced by share splitting. It allows the court to intervene in the event of possible abuses of the processes and strikes a reasonable balance between protecting the minority shareholders' right and avoiding giving them too much veto power.

II. Members' schemes of Non-listed companies

We hold the view that headcount test for members' schemes of non-listed companies should be retained given the court has the discretion to dispense with the test because of the similar reasons as mentioned above except arguments regarding the Code (Point 5) which is not applicable to non-listed companies.

III. Creditors' schemes

We hold the view that headcount test for creditors' schemes should be retained because of the following reasons:

1. It can effectively protect the small creditors.
2. It is said that minority creditors will be able to petition for winding up of the company. In reality, the substantial legal costs of winding up will preclude this from happening.
3. The position of large creditors do not usually align with the small creditors in the context of schemes of arrangement. The headcount test serves as a protection for the small creditors when their interests are jeopardised. The monetary impact of the creditors' schemes to the total assets of minority shareholders could be relatively higher than that of the majority shareholders.