



## **Submissions on Legislative Council Bills Committee on Companies Bill on the retention of the Headcount Test for members' schemes (clause 664)**

The Law Society welcomes the opportunity to present its views to the Bills Committee on this important matter.

We continue to believe that the headcount test for members' schemes of arrangement should be abolished, as stated in our submission to the Financial Services and Treasury Bureau dated 23 March 2010. The main reasons are as follows:

1. The headcount test has been rendered largely irrelevant given the prevalence of nominee shareholders who hold shares for a large number of individual beneficial owners. This means that the votes cast on a headcount do not give an accurate reflection of the wishes of the minority, and therefore the test can have unfair consequences.
2. It is contrary to the "one share, one vote" principle which generally permeates the company law and is recognized to be fair and reasonable.
3. The test is unnecessary since minority shareholders are adequately protected by other means including:
  - the court's discretion not to approve a scheme if it believes it is unfair to minority shareholders;

- the “90% rule” in the Takeover Code;
- the requirement for the company to set up a Committee of independent non-executive directors to advise minority shareholders, which must in turn instruct an independent financial adviser to advise on the implications of the scheme and in particular whether the price is fair .

4. The Government’s proposal to give the court discretion to dispense with the test will create undesirable commercial uncertainty, in the experience of our members who advise companies on these schemes.

Moreover, other jurisdictions are moving towards abolishing the test. The Cayman Islands has recently decided to do so, in an effort to improve its attractiveness as a jurisdiction to seek listing. The specialist advisory committees of the UK and Australian governments have also made recommendation that it be abolished in those jurisdictions. We also note that a majority of members of Hong Kong’s Standing Committee on Company Law Reform believe the test is unnecessary to protect minority shareholders.

**The Law Society of Hong Kong**  
**Company Law Committee**  
**5 March 2012**

739863