Paper for Bills Committee Meetings on

Companies Bill to be held on 23 March 2012

Company Bills:

"The headcount test for approving a company's scheme of compromise or arrangement be retained, while the court is given new discretion to dispense with the rest in special circumstances. (clause 664);"

Our major view:

It is true that minority shareholders would have more say in the headcount test. However, CMA Australia Hong Kong branch does not recommend retaining it for approving a company's scheme of compromise or arrangement in Hong Kong.

Justifications:

Under section 166(2) of the Companies Ordinance ("CO"), in order for a compromise or argument between a company and its members or creditors to be approved at a meeting ordered by the court, a "majority in number" of those who cast votes at the meeting must have voted in favor of the compromise or arrangement.

The attempted privatization by scheme of arrangement by PCCW Ltd in 2009 has drawn public attention to current requirement under section 166(2). Some believe it should follow an automatic court review, as used in Australia. Under those laws, if a deal is blocked but there is evidence of share split, then courts can intervene immediately and decide whether to approve the deal. However, we believe the controversial headcount rule should be scrapped completely.

Firstly, the headcount test is inconsistent with the "one share one vote" principle in other provisions dealing with shareholder meeting in the CO.

The Institute of Certified Management Accountants
Hong Kong Office
12/F, Tai Yip Building, 141 Thomson Road,
Wanchai, Hong Kong

Tel: (852) 2574 1555
Fax: (852) 2574 1455
Email: info@cmaaustralia.org
www.cmaaustralia.org

Secondly, retaining the headcount test gives minority shareholders an opportunity to have a significant say under a scheme. However, the headcount test may also places significant veto power in the hands of small shareholders, out of proportion to their financial involvement in the company, so that the headcount test is not indicative of the decisions of the beneficial owners of the shares.

Thirdly, the headcount test requirement attracts attempts to manipulate the outcome of the vote (for or against the scheme) by share splitting.

Conclusion:

As mentioned above, the headcount test deviates from the "one share one vote" principle and is prone to be circumvented by share splitting. Further, as very large proportion of shares in listed companies are held by nominees and custodians, the headcount test is not indicative of the decisions of the beneficial owners of the share. However, if the headcount test is abolished, there may be concern over the adequacy of safeguards fro minority shareholders under the CO or the Takeovers Code. The Government seems to be of the view that the Takeover Code already renders some safeguard to minority shareholders (for instance, Rule 2.10(b) of the Takeovers Code stipulates that the number of votes cast against the resolution shall not be more than 10% of the voting tights attached to all disinterested share, i.e. shares not held by the controlling shareholders or their connected parties) and that any additional safeguard should be tackled separately by the Securities and Futures Commission and the Takeover Panel through the normal consultation process on Takeovers Code amendments.

The Institute of Certified Management Accountants
Hong Kong Office
12/F, Tai Yip Building, 141 Thomson Road,
Wanchai, Hong Kong

Tel: (852) 2574 1555
Fax: (852) 2574 1455
Email: info@cmaaustralia.org
www.cmaaustralia.org