

**Edith Shih**  
Head Group General Counsel &  
Company Secretary

Dir Tel : +852 2128-1233  
Dir Fax : +852 2128-1778  
Email : [ediths@hwl.com.hk](mailto:ediths@hwl.com.hk)



# Hutchison Whampoa Limited

1 April 2011

**BY FAX (2840 0797) & BY HAND**

Clerk to Bills Committee on Companies Bill  
Legislative Council Secretariat  
Room 815  
Murray Road Multi-storey Carpark Building  
2 Murray Road, Central  
Hong Kong

Attn: Mr Simon Cheung

Dear Sirs,

**Re: Companies Bill**

We would like to comment on two aspects of the Companies Bill, namely the headcount test (Clause 664(2)) and the proposed codification of the directors' duty of care, skill and diligence (Clause 456). Moreover, we believe that Part IVAAA of the Companies (Amendment) Ordinance 2010 needs to be revised, in so far as it concerns the deemed date of receipt for documents sent electronically or posted on the companies' websites.

As noted in our letter of 11 March 2010 to the Administration (attached for ease of reference) we believe the headcount test should be abolished. It is contrary to the 'one share, one vote' principle, and does not protect the interests of the minority shareholders it purports to represent (because of the prevalence of nominee shareholdings). Minority shareholders are sufficiently protected in other ways. Moreover, we do not believe that giving the court a discretion to dispense with the test would effectively solve the 'share-splitting' issue.

Regarding directors' duties, we believe the law should be allowed to develop through the evolving case-law, at least until such time as there is sufficient experience of codification in the UK to assess whether it is appropriate for Hong Kong. Imposing a subjective standard which is higher than the objective one may discourage highly qualified and experienced individuals from taking up directorships in Hong Kong listed companies. All directors should be treated equally in terms of their responsibilities to the company: having extra skills and experience should not be held against them. If, nevertheless, codification is to proceed, it should not replace the existing case law in Hong Kong as is currently proposed, otherwise there will be a legal vacuum which will only lead to greater uncertainty.



As regards the deemed date of receipt for documents sent electronically, we believe that the documents should be deemed to be received upon transmission. For a document posted on a company's website, it should be deemed to be received upon its first posting, or when a notice of availability is deemed to be served on the recipient (i.e. the day after posting if it is sent by post, or upon transmission if it is sent electronically) whichever is the later. This is consistent with the Government's objective of updating and streamlining the requirements of the Companies Ordinance.

For and on behalf of  
HUTCHISON WHAMPOA LIMITED

EDITH SHIH

# Hutchison Whampoa Limited

**Edith Shih**  
Head Group General Counsel &  
Company Secretary

Dir Tel : +852  
Dir Fax : +852  
Email : [@hwl.com.hk](mailto:edith.shih@hwl.com.hk)



(By Hand and By Post)

Companies Bill Team  
Financial Services and the Treasury Bureau  
15/F Queensway Government Offices  
66 Queensway  
Hong Kong

11 March 2010

Dear Sirs

## Draft Companies Bill – First Phase Consultation

We refer to the above consultation paper.

Before responding to the specific consultation questions, we would like to comment on the proposal to codify the directors' duty of care, skill and diligence.

Since our earlier submission to you on this subject of 4 July 2008 in response to the previous consultation, we have had the benefit of reviewing the Government's summary of responses from other respondents to that consultation, as well as the Government's Consultation Conclusions in this respect. We note that the concern we expressed regarding the potential confusion and uncertainty resulting from the concept of codifying common law duties was shared by many respondents, including in particular the professional bodies representing the legal profession – the Law Society and Bar Association – whose views on this issue we believe deserve particular attention. Both bodies also believe that the proposal is unnecessary, a view which is again shared by a large number of respondents, not least because the guidelines issued by the Companies Registry are designed to serve the purpose of providing clarity, and would no doubt be observed by the courts if the common law in this area is allowed to develop, instead of being replaced as proposed. Unfortunately, we have seen nothing in the Government's Consultation Conclusions, or the current consultation document, which allays these concerns. We therefore remain of the view that instead of creating clarity which is a laudable objective in itself, the proposal might possibly cast an opposite effect resulting in more confusion and uncertainty.

We appreciate that in addition to the intention of creating clarity, the Government is also aiming at enhancing corporate governance by making performance standards more objective - which aim is also achievable through the Companies Registry guidelines and



the developing case law. The proposal of the Government however even goes one step further - by introducing a 'mixed subjective/objective test' in determining the standard. In other words, a director with skills and experience higher than those which can reasonably be expected for the position will be held to that higher standard. The UK provision on which this proposal is based has only been in effect since October 2008, and we understand there is no UK case law as yet providing guidance on how such test would be interpreted in practice. It is therefore even less clear how this provision would be interpreted by the Hong Kong courts in practice. Imposing what is effectively a statutory requirement on directors - enforceable through civil actions for damages - to perform not only to a standard which can be reasonably expected of the position, but to one which a judge determines *ex post facto* as commensurates with their own individual skills and qualifications, carries the risk of deterring well-qualified individuals from taking up directorships in Hong Kong companies. This risk was also highlighted in the responses to the previous consultation. Again, instead of enhancing corporate governance, the proposal might create adverse results.

For the above reasons, we would continue to oppose the proposed codification at this time. In the circumstances, we agree with the previous recommendation by the Standing Committee on Company Law Reform, namely that the Government should refrain from deciding whether to codify the director's duty of care, skill and diligence. Any determination as to whether such codification would be appropriate for Hong Kong should not be made until such time as sufficient experience has been gained with the implementation of the equivalent UK provision.

Regarding the specific questions in the consultation, we would respond as follows:

1. Head Count Test: Option 3 – Abolish the headcount test. The test is contrary to the 'one share one vote' principle and does not serve to benefit the minority interests it purports to protect, as explained in your consultation document. The 90% rule in the Takeover Code provides adequate protection to minority shareholders.
2.
  - a. Option 3 should also apply to non-listed companies.
  - b. No additional protection needs to be provided for non-listed companies.
3. The same approach should apply to creditors' schemes.
4.
  - a. Directors' residential addresses should not appear on the public record: a business address should be sufficient.
  - b. The UK approach is preferred.
  - c. The new arrangements have to start somewhere. Old records could be phased out by passage of time or removal if practicable.



5. Personal ID numbers should not appear on the public record.
6. Option 2 - the concept of 'relevant private company' should be extended to companies associated with non-listed companies.
7. We have no strong views either way.

We thank you for the opportunity of participating in this first phase of the consultation. If there should be any queries, please do not hesitate to contact us.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Edith Shih', written in a cursive style.

Edith Shih