

UPDATE

'Headcount test' to be abolished for members' schemes of arrangement in the Cayman Islands

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The Companies (Amendment) Act 2021 of the Cayman Islands (**Amendment Act**), which will come into force on 31 August 2022, will abolish the current 'headcount test' which a Cayman Islands members' scheme of arrangement has to satisfy under section 86 of the Companies Act (2022 Revision) (**Companies Act**). This change aims to eliminate the uncertainty that the 'headcount test' has historically brought to schemes of arrangement (particularly where shares of public companies are held by a nominee entity) which are typically used for the privatisations of Cayman Islands companies listed on The Hong Kong Stock Exchange (**HKEX**).

Abolition of the 'headcount test' for members' scheme

There is a welcome Cayman Islands law amendment pending enactment under the Amendment Act that is likely to particularly affect the privatisations of Cayman Islands companies listed on the HKEX. Under section 86 of the Companies Act, a Cayman Islands scheme of arrangement (proposed between the company and its creditors or any class of them, or between the company and its members or any class of them) currently must be approved by a *majority in number*, representing *at least 75% in value*, of the creditors or class of creditors, or members or class of members (as the case may be) who are present and voting either in person or by proxy at the relevant creditors' or members' meeting – these are often known as the 'headcount test' and the 'value test', respectively. Upon the Amendment Act coming into force, the amendment to the shareholder approval threshold for schemes of arrangement will abolish the 'headcount test' in respect of a members' scheme of arrangement. This good news clarifies previous uncertainty which could arise, including with 'take private' deals on the HKEX, where a scheme of arrangement is the favoured mechanic to privatise a Cayman Islands target listed company.

The 'headcount test' has historically created challenges for legal practitioners and the Grand Court where the Victorian era legislation arguably failed to cope with the fact that the vast majority of shares of public companies listed on exchanges are held by a nominee entity (eg HKSCC Nominees Limited in respect of the HKEX) in a clearing system. This typically would raise the question of how ultimate shareholders' 'heads' are counted for the purposes of the voting threshold where shares are held through nominee entities and there were a number of cases such as *In the Matter of Little Sheep Group Limited [2012 (1) CILR 34]* that have attempted to address the point.

It is hoped that the new position will provide certainty as the threshold for consideration on a members' scheme of arrangement will be 75% in nominal value of the members, or class of members, who are present and voting either in person or by proxy at the members' meeting. The headcount test will remain applicable to a creditors' scheme of arrangement.

See our guide titled '[Take privates by way of a scheme of arrangement in the Cayman Islands](#)' for more discussions on a Cayman Islands scheme of arrangement.

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