OFFICIAL RECORD OF PROCEEDINGS

Friday, 6 July 2012

The Council continued to meet at Nine o'clock

MEMBERS PRESENT:

THE PRESIDENT
THE HONOURABLE JASPER TSANG YOK-SING, G.B.S., J.P.

THE HONOURABLE ALBERT HO CHUN-YAN

IR DR THE HONOURABLE RAYMOND HO CHUNG-TAI, S.B.S., S.B.ST.J., J.P.

THE HONOURABLE LEE CHEUK-YAN

THE HONOURABLE FRED LI WAH-MING, S.B.S., J.P.

DR THE HONOURABLE MARGARET NG

THE HONOURABLE JAMES TO KUN-SUN

THE HONOURABLE CHAN KAM-LAM, S.B.S., J.P.

THE HONOURABLE MRS SOPHIE LEUNG LAU YAU-FUN, G.B.S., J.P.

DR THE HONOURABLE PHILIP WONG YU-HONG, G.B.S.

THE HONOURABLE WONG YUNG-KAN, S.B.S., J.P.

THE HONOURABLE LAU KONG-WAH, J.P.

THE HONOURABLE MIRIAM LAU KIN-YEE, G.B.S., J.P.

THE HONOURABLE EMILY LAU WAI-HING, J.P.

THE HONOURABLE TAM YIU-CHUNG, G.B.S., J.P.

THE HONOURABLE ABRAHAM SHEK LAI-HIM, S.B.S., J.P.

THE HONOURABLE LI FUNG-YING, S.B.S., J.P.

THE HONOURABLE TOMMY CHEUNG YU-YAN, S.B.S., J.P.

THE HONOURABLE FREDERICK FUNG KIN-KEE, S.B.S., J.P.

THE HONOURABLE AUDREY EU YUET-MEE, S.C., J.P.

THE HONOURABLE WONG KWOK-HING, M.H.

THE HONOURABLE LEE WING-TAT

THE HONOURABLE JEFFREY LAM KIN-FUNG, G.B.S., J.P.

THE HONOURABLE ANDREW LEUNG KWAN-YUEN, G.B.S., J.P.

THE HONOURABLE CHEUNG HOK-MING, G.B.S., J.P.

THE HONOURABLE WONG TING-KWONG, S.B.S., J.P.

THE HONOURABLE RONNY TONG KA-WAH, S.C.

THE HONOURABLE CHIM PUI-CHUNG

PROF THE HONOURABLE PATRICK LAU SAU-SHING, S.B.S., J.P.

THE HONOURABLE KAM NAI-WAI, M.H.

THE HONOURABLE CYD HO SAU-LAN

THE HONOURABLE STARRY LEE WAI-KING, J.P.

DR THE HONOURABLE LAM TAI-FAI, S.B.S., J.P.

THE HONOURABLE CHAN HAK-KAN, J.P.

THE HONOURABLE PAUL CHAN MO-PO, M.H., J.P.

THE HONOURABLE CHAN KIN-POR, B.B.S., J.P.

DR THE HONOURABLE PRISCILLA LEUNG MEI-FUN, J.P.

THE HONOURABLE CHEUNG KWOK-CHE

THE HONOURABLE WONG SING-CHI

THE HONOURABLE WONG KWOK-KIN, B.B.S.

THE HONOURABLE IP WAI-MING, M.H.

THE HONOURABLE IP KWOK-HIM, G.B.S., J.P.

THE HONOURABLE MRS REGINA IP LAU SUK-YEE, G.B.S., J.P.

DR THE HONOURABLE PAN PEY-CHYOU

THE HONOURABLE PAUL TSE WAI-CHUN, J.P.

THE HONOURABLE ALAN LEONG KAH-KIT, S.C.

THE HONOURABLE LEUNG KWOK-HUNG

THE HONOURABLE TANYA CHAN

THE HONOURABLE ALBERT CHAN WAI-YIP

THE HONOURABLE WONG YUK-MAN

MEMBERS ABSENT:

DR THE HONOURABLE DAVID LI KWOK-PO, G.B.M., G.B.S., J.P.

THE HONOURABLE CHEUNG MAN-KWONG

THE HONOURABLE LEUNG YIU-CHUNG

THE HONOURABLE LAU WONG-FAT, G.B.M., G.B.S., J.P.

THE HONOURABLE ANDREW CHENG KAR-FOO

THE HONOURABLE TIMOTHY FOK TSUN-TING, G.B.S., J.P.

THE HONOURABLE VINCENT FANG KANG, S.B.S., J.P.

DR THE HONOURABLE JOSEPH LEE KOK-LONG, S.B.S., J.P.

DR THE HONOURABLE LEUNG KA-LAU

DR THE HONOURABLE SAMSON TAM WAI-HO, J.P.

PUBLIC OFFICER ATTENDING:

PROF THE HONOURABLE K C CHAN, G.B.S., J.P.
SECRETARY FOR FINANCIAL SERVICES AND THE TREASURY

CLERK IN ATTENDANCE:

MRS PERCY MA, ASSISTANT SECRETARY GENERAL

BILLS

Committee Stage

CHAIRMAN (in Cantonese): Good morning, Members. Committee now continues to consider the clauses to which no amendment is proposed.

MR WONG YUK-MAN (in Cantonese): A quorum is not present.

CHAIRMAN (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members entered the Chamber)

COMPANIES BILL

(Bill originally scheduled to be dealt with at the last Council meeting)

CHAIRMAN (in Cantonese): Does any Member wish to speak? Mr WONG Yuk-man, please speak.

MR WONG YUK-MAN (in Cantonese): Chairman, now I am going to discuss the provisions about "Registration of transfer or refusal of registration" of clause 146 under Division 4 of Part 4, "Transfer and Transmission of Shares".

Clause 146 corresponds to sections 68 and 69(1) to (2) of the existing Companies Ordinance (predecessor Ordinance). In response to the criticism against companies' practice of refusing the registration of transfer of shares without giving any reasons under the existing provisions, the authorities added new provisions to clause 146, requiring the company concerned to comply with the requirement of providing reasons for refusing registration of transfer upon receiving such request. It commits an offence if it fails to do so.

Since the company concerned is not required to state in the notice of refusal the reasons for refusing the registration of transfer under the predecessor Ordinance, the authorities formulated clause 146, in particular subsections (3) and (4), to require the company concerned to provide reasons for its refusal of registration of transfer within 28 days after receiving the request. According to the Government, the purpose of adding this clause is to enhance transparency so as to ensure that directors of companies perform their duties. This clause is actually based on section 771 of the United Kingdom Companies Act, under which the giving of reason for refusal of registration is mandatory, while Australia, another Commonwealth country, does not have similar requirement.

Clause 146(1) covers both the transferee and the transferor of shares in a company, making it possible for either the transferee or the transferor to lodge the transfer with the company. In comparison to the right conferred upon the transferor under section 68 of the predecessor Ordinance to apply for the transfer, clause 146(1) can be taken as an additional clause to cover both the transferee and the transferor in that light.

Clause 146(2) prescribes that the company is responsible for registering the transfer unless it sends the transferee and the transferor notice of refusal to register the transfer under clause 146(2)(b). In other words, the company has to register the transfer unless it sends to the transferee and the transferor notice of refusal to register the transfer pursuant to clause 146(2)(b).

According to section 69(1) of the predecessor Ordinance, "If a company refuses to register a transfer of any shares or debentures, the company shall, within 2 months after the date on which the transfer was lodged with the company, send to the transferor and the transferee notice of the refusal." The amendment was made in 1984. Apparently, the requirement under clause 146(2) is simpler and presented in a better way which goes, "Within 2 months after the transfer is lodged, the company must either — (a) register the transfer; or (b) send the transferee and the transferor notice of refusal to register the transfer." The requirement is stated in a much lucid style as compared with section 69(1) of the predecessor Ordinance. Directors of companies will find it easier to understand without confusion.

Subsection (3) may in fact signify the major breakthrough brought by clause 146: "If a company refuses registration, the transferee or transferor may

request a statement of the reasons for the refusal." Actually, "述明理由" (statement of reasons) can be put as "說明理由" (explanation on reasons) because the word "述" is also used in the latter part of the sentence. Certainly, subsection (3) is a relatively eminent breakthrough, but some people worry that clause 146(3) will be abused. So why not add also to clause 146(2) the requirement that the company should send a statement of the reasons for the refusal together with the notice of refusal to register the transfer? The requirements in this regard will then be complete should they be set out in the provision. Therefore, those people's view actually holds that both the transferee and the transferor need to be informed of the reasons for refusal of registration by the company.

Besides, we have concerns about abuse of the procedures. For example, clause 146(4) requires that the company must, within 28 days after receiving the request of subsection (3), send the person who made the request a statement of the reasons, or register the transfer. This requirement indirectly allows the company to defer registering the transfer by 28 days where the company is not required to undertake any responsibility for such a deferral as a statutory basis is provided by clause 146(4). This provision will lead to the result that the company concerned will manipulate the opportunity with the 28 days given to defer the transferee's entitlement to the rights of being a member of the company. Those rights include the rights to attend and vote at general meetings of shareholders. Such a provision will thus weaken shareholders' power to voice objection against the management at general meetings of shareholders. Hence, we have concerns that the requirement of registering the transfer within 28 days in clause 146(4) will affect the transferee's rights.

Furthermore, clause 146(5) prescribes a fine at level 4, namely $25,000 as the maximum penalty for any contravention of subsection (2) or (4) and, in the case of a continuing offence, a further fine of $700 for each day during which the offence continues. Although the maximum fine level has been raised from 3 to 4, I still consider it too low. To those plutocrats of the business sector, $700 is just enough to pay for a lunch. A further fine of $700 for each day is no big deal at all and they may keep on deferring the register just because they can afford it. The minority shareholders can do nothing about this. Some may not even have the opportunity to become a minority shareholder as their rights have been deferred during the course of transfer of shares.

What's more, it is not mentioned in clause 146(5) what will happen if both subsections (2) and (4) of clause 146 are contravened concurrently. The clause only prescribes respective penalties for the contravention of subsection (2), namely not having registered the transfer within two months, or subsection (4). It does not provide for the contravention of both subsections (2) and (4) at the same time. Will the penalty be exactly the same if both subsections (2) and (4) are contravened concurrently? Secretary, no particular explanation is made in this regard, right?

I also have concerns about the application of clause 146 in private companies. While the Bill was being scrutinized by the Bills Committee, some members enquired whether a private company's right of restricting the transfer shares would be contradicted if it is stipulated in the Bill that either the transferee or the transferor has the right to require the company concerned to provide reasons for its refusing to register the transfer of shares?

Regarding this issue, we should first understand the meaning of "private company". We all know that small and medium enterprises (SMEs) are crucial to economic development and they also enjoy a special position under the company law. Private companies should be granted exemptions from various regulations and restrictions. For example, reporting exemption is specified in clause 358 of the Bill, under which private companies are exempted from disclosing to the public their financial situations. Also, in clause 320, which deals with the issue of debenture or certificate for debenture stock on transfer, a longer period is specified for the issue of debenture by a private company.

Why should the regulation on private companies be reduced? Simply because private companies are not listed companies, nor are they controlled by plutocrats. A small company can survive on the profits it makes, but if the regulation is excessively harsh on it, it just cannot afford to engage an accountant like Mr Paul CHAN to provide professional accounting service because it does not have the resources. This will only bring trouble to the company if it cannot afford such expenses. Thus, the best policy is to keep everything as simple as possible.

In addition, a private company is an individual incorporation and thus enjoys the advantages of partnership as well as those of limited companies. Meanwhile, a private company restricting its members' right to transfer shares

helps to reduce the chances of transferring the ownership of its shares to outsiders. Hence, it is more suitable for families or friends to set up private companies as partners for running businesses. Chairman, a quorum is not present.

CHAIRMAN (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

CHAIRMAN (in Cantonese): Mr WONG Yuk-man, please continue with your speech.

MR WONG YUK-MAN (in Cantonese): I mentioned just now that regarding private companies, some members queried whether a private company's right concerning transfer of shares will be contradicted if it is prescribed in the Bill that either the transferee or the transferor has the right to require the company concerned to provide reasons for refusing to register the transfer of shares. The nature of private companies will be distorted if both the transferee and the transferor have the right to require the company concerned to provide reasons for refusing to register the transfer of shares because most private companies do not have an official company framework. It is possible that a private company refuses to register the transfer of shares on private grounds, such as that the personal integrity of a shareholder is in question. In such a case, wouldn't it be ridiculous to require the company to provide a statement of the reasons for refusal? The company may be a small company formed by three partners, say Mr Jeffrey LAM, Mr Andrew LEUNG and Dr Philip WONG. It has not yet been expanded into a large company when one of them gets into trouble. If in such a case the company is required to furnish a statement of reasons, it will be like imposing a difficult task on the company.

And also, explanation on the legal status of the statement of reasons is not provided in the clause. First, will the private company concerned be penalized if the reasons given in the statement are unreasonable? Second, does the statement

involve certain legal proceedings? Or let me put it this way: will the statement be used in legal proceedings? If it will, then the exemption from government intervention enjoyed by private companies will be undermined. Hey Buddy, if the Government imposes on private companies the same restrictions as those imposed on large corporations while chanting aloud its policies of positive non-interventionism and encouraging a free business environment, how much room is left for the survival of private companies then? They will be in greater trouble if government intervention is inevitable. Hence, I hope all SMEs will pay attention to such a requirement since the clause will have tremendous impact on the SMEs in Hong Kong.

Concerning the issue of a company restricting its members' right to transfer shares, reference can be drawn from many different places, just as the saying goes, "Other people's good suggestion can be employed to remedy one's own defects". According to various relevant studies of overseas places, there are generally two ways for a company to restrict a member's right to transfer shares. First, the board of directors has absolute power and shall not be precluded from approving the transfer of shares. Second, members have the right of pre-emption to purchase shares from any member of the same company. However, the Bill has not provided for the ways to restrict members' right to transfer shares.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I want to discuss clause 134. Yesterday Mr WONG Yuk-man mentioned this clause, which is related to the "repeal of power to issue share warrants". As a matter of fact, I have a deep understanding of the uses of these share warrants issued — "Yuk-man" has left the Chamber — at one time Mr WONG Yuk-man had operated an online media organization and I was a guest speaker. He had not paid me anything for a very long time. Before I left a tea gathering of ours, he handed me a share warrant issued. But can these things be used as money? It has turned out they can actually be used as money. At that time I asked him, "Why have you given me this?" He said, "This share warrant can be converted before such and such date. You can select to convert it at the highest price. I am not going to give you any salaries. Just try your luck. But you must

remember not to lose the share warrant. I cannot issue another share warrant to you because there is no way to prove it." I did not understand what he was saying back then. Now I understand that was the so-called share warrant referred to in this Ordinance.

I hold that the relevant power should be repealed because the share warrant issued is in fact a derivative. It is extremely favourable to those who issue the share warrant, but extremely unfavourable to the bearer of the share warrant, such as me. I did not know when and where to convert it. Eventually when I took the share warrant which I had inserted between the pages of a book, I found that it was past due. The goodwill showed by Mr WONG Yuk-man to me was lost as the share warrant was past due and no longer convertible.

Thus, the repeal of power to issue share warrants as specified under clause 134 in Part 4 of the Bill is a correct move. Very often, people like me — who do not know anything about share warrants, or who are forced to be bearers of share warrants, are only able to see the light suddenly in the end that these things are mainly instruments for speculation, providing a chance for the person who issues them to speculate. He is able to manipulate through the market — of course just now we said that information has to be made public within 35 days or 28 days, or whether information has to be made public with regard to charges — those matters can be manipulated by him. We do not know anything about the real situation of the market. For instance, a share warrant may be worth three cents when it is purchased or given to you by the person who issues the share warrant — just like my case. But when it is speculated, its price may soar to 30 cents by application of the leverage theory. He is then able to sell his share warrants. They are bearer instruments, just like "trade cards", and he can issue as many as he wants.

Such products surged between the mid and late 90s of the last century. The major reason for the inevitable formation of bubble — that is, economic bubble — was that there were no traces of their whereabouts. Only the person who issued the share warrants knows how many of them had been issued. All of them were controlled by him. He could issue whatever amount of share warrants in the market, which were bearer ones. I do not know whether the Secretary knows about this. I know only because I was one of the victims. Originally I assumed that Mr WONG Yuk-man would not give me any salaries at that time. I was glad that he gave me a share warrant. If the worth of the share

warrant was seven cents, I would have earned 10 times that amount without doing anything at all if I converted the share warrant at 70 cents. However, that was not the actual fact — of course I am not criticizing Mr WONG Yuk-man here; this is just an example from my personal experience — he gave me a share warrant at that time. If we had not been friends, and he had given me the share warrant as a form of repayment, that is, I did programmes for him and he owed me a debt, that would have been really bad.

Chairman, do you understand? If he said, "'Long Hair', I owe you $70 million. Now the worth of the share warrant is such and such. I have issued these things. I give some to you. The current market price of them is approximately $80 million." Of course I would have been pleased as I would have made an extra profit by one seventh. He could have said further, "If you convert the share warrants at a certain time, the price of them may rise to an even higher level." However, he had not told me there might be a chance that the price would drop, and he could control it. Thus, on this basis, I hold that repealing the power to issue share warrants — an act manipulated by a minority of people — under clause 134 is absolutely correct, for such a product is invented to cater for the manipulation of the market by the person who has issued the share warrants.

However, this will give rise to an issue. Under clause 134(3) — Mr WONG Yuk-man talked about this yesterday — "If the company enters the bearer's name in the register of its members without the share warrant being surrendered and cancelled, the company is liable for any loss suffered by a person as a result of the bearer's name being entered in the register." Mr WONG Yuk-man asked what kind of liability the company would be subject to. Of course, it will be subject to legal proceedings. Imprisonment has not been mentioned in this provision. Neither has the corresponding penalty been specified to indicate the levels of fine to be imposed. Unlike other legislations, it has not specified the penalties that the company will be liable to, which can be a fine at a certain level and imprisonment. Thus, the liability referred here means the civil proceedings instituted.

Why do I know about this? It is because in tackling the ordinance on regulating interception of communications in the past, the Government lodged a similar petition on the ground that since the provision was incorrect, suspension of the implementation should be granted. At that time I opined that

implementation should not be suspended. But the judgment handed down by the Court of Final Appeal affirmed that implementation can be suspended in public interests. However, if someone is the target of interception, or the Administration has continued interception under the circumstance that such act has been ruled by the Court as unconstitutional — the Administration will claim that the interception has been carried out in public interests — the Court will reiterate it is convinced that the Administration has conducted such interception in public interests. Nevertheless, if this gives rise to litigation, for instance, I sue the Administration for conducting illegal interception of communications, or a solicitor has found that his client's conversations have been intercepted and civil proceedings have thus been instituted, the Administration will be liable.

Of course, an individual can choose to file the case as a criminal proceeding. After the case has been filed, the Court may entertain such an application, or the Department of Justice may hold that there have been omissions and prosecution should be initiated again. This may happen. Mr WONG Yuk-man finds this particular point unfair. As "every grudge can be traced to its source and every debtor has a creditor", I hold that it is fair. In inventing the share warrants, those organizations have enabled a number of people to use these share warrants to manipulate the market and deceive many people, and it is not until now that their relevant power is repealed. So why shouldn't they be held liable? With respect to the repeal of the relevant power, when the repeal of such power has given rise to the situation referred to in subsection (3) that the absence of the bearer's name has been replaced by the bearer's name, which results in litigation of whether his name should be entered accordingly and whether the name should be entered in the register, why should other people instead of this group of people who have reaped huge profits be held liable?

Furthermore, insofar as this matter is concerned, we should let them "dog fight" among themselves. Frankly speaking, who will hold so many share warrants? The death of this product is imminent now. Frankly speaking, the Government is playing an expedient role in facilitating its abolition — I hold that this is a good measure. There are many Mainland compatriots who come to Hong Kong to engage in the finance and trade sectors. They really do not know what the product is. If they are allowed to continue the trading of the product, their "death" may be imminent too. Thus, it is correct to repeal this power in order to rationalize the order of our financial market.

Mr WONG Yuk-man holds that clause 134(3) is unclear. But I am of the view that it is, in fact, very clear. The provision has provided that those who hold so many share warrants should be liable, be they people who are holding share warrants and wish to have their names entered or those who are holding share warrants but have not entered their names in the register. Whenever there are law reforms, there are consequences. And I hold that these consequences should be borne by those who stand to benefit prior to the law reforms.

MR ALBERT CHAN (in Cantonese): Chairman, please do a headcount. Thank you.

CHAIRMAN (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, please continue with your speech.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, you can take a look at the overall structure of clause 134. First, the company no longer has the power to issue a share warrant. That means the power is no longer granted. It is taken back. However, the other four subsections are measures catered to deal with the aftermath when it has really come to the situation of "ashes to ashes, dust to dust". You have the right to have the bearer's name entered in the register, which you can do so. However, if anything goes wrong, you have to deal with the situation yourself. You are held liable.

Subsection (5) of this clause specifies that the bearer may be given membership after his name has been entered in the register. As a matter of fact, the full extent of such and such as mentioned is very simple. It means if you are a genuine bearer of a share warrant under the circumstance, or a bearer to the

fullest extent or for a certain purpose specified in the articles, you will be regarded as a member of the company. It is that simple.

As a matter of fact, it is very simple. You have invented a product which can be manipulated by people to fool others. A person is allowed to exercise this right under different circumstances in the market. However, since the market can be manipulated, he comes to nothing when he exercises the right because the price of the share warrant is too low for him to exercise his right, or it is meaningless even when he exercises his right. This is dealing with the aftermath only.

Thus, I hold that returning the right to these bearers is a rather ironical phenomenon. This product is dead, but the right is still returned to you. Of course, this responsibility cannot be ignored at the time the legislation is drafted. Previously the product I held was unsubstantiated. Now it is said that this product will cease to exist in the future and my right will be buried at the bottom of the lake. Subsections (2), (3), (4) and (5) are only triggered by subsection (1).

Of course, whether the best job has actually been done is subject to discussion. However, the question is, since the product is dying, and to many people who hold these products — either they no longer use the large number of share warrants to manipulate the market, or have only a small number of share warrants left, someone like me, who had inserted the share warrants given to me by Mr WONG Yuk-man between the pages of a book — they are meaningless.

Thus, personally I think this is a good thing to plug this loophole — a loophole with which the market is being manipulated. I believe that although these remedial measures may not be able to please all, they will not be mentioned again. Therefore, I hope that the requirements specified in subsections (2), (3), (4) and (5) of the clause will be able to offer some help to those in need and those who seek remedy.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR ALBERT CHAN (in Cantonese): Chairman, I would like to raise some questions on the provisions of clauses 489 and 499. These two provisions set

out the expenditure on legal proceedings of a company. However, the relevant legal proceedings are basically not related to the company. Instead, they are related to the directors of the company.

Chairman, in general, when a company or a director of the company is involved in legal litigation directly related to the business operation of the company, it is appropriate for the company to be responsible for the legal expenditure. However, this involves two issues. The first one is the scope of the litigation; secondly, since these litigations may involve the directors of the company, the question lies in how and who to decide whether the scope is related to the company.

Clause 498 is a provision under Subdivision 2 of Division 2 in Part 10 of the Bill. The entire package of the provision is divided into many parts. The provisions in Part 10 are related to the directors and company secretaries. Subdivision 2 under Division 1 of Part 10 deals with the appointment of directors. Subdivision 3 sets out exception for Subdivision 2. Clause 498 sets out exception for expenditure on defending proceedings, and so on. The provision specifies that if a director of the company ……

CHAIRMAN (in Cantonese): Mr CHAN, clause 498 is not under Part 10. It is under Subdivision 3 of Division 2 in Part 11.

MR ALBERT CHAN (in Cantonese): Sorry, it is under Part 11. Chairman, what I had written down was incorrect. It should be Part 11 (Fair Dealings by Directors). Sorry, that was a part of Part 11.

Clause 498(1)(a) provides that "a director of the company or of a holding company of the company with funds to meet expenditure incurred or to be incurred by the director". The following clause 498(1)(a)(i) points out that "in defending any criminal or civil proceedings in connection with any alleged negligence, default, breach of duty or breach of trust by the director in relation to the company or an associated company of the company", while the following clause 498(1)(b) provides "to enable such a director to avoid incurring such expenditure". Of course, there is a subsequent provision specifying that the funds are to be repaid if the director is convicted in the proceedings.

The scope covered by clause 499 is even broader. The provision sets out the "expenditure in connection with investigation or regulatory action". So long as he is a director of the company or of a holding company of the company, he will be provided with funds to meet the relevant expenditure. Of course, under certain specified circumstances, the director has to repay the funds in the future. But in brief, any expenditure in connection with the litigation in the course of the investigation or regulatory action will be met by the company.

Chairman, as I have said just now, two issues are involved in these two provisions. One of the issues is related to the scope covered by clause 498(1)(a)(i), which is too broad. This provision is about any criminal or civil proceedings in connection with any alleged negligence, default, breach of duty or breach of trust in relation to the company or an associated company of the company. If it is true that the director has, to a certain extent, genuinely believed in certain matters in the course of performing his duty, subsequent to which he has inadvertently contravened the law, or has committed certain acts without knowing or understanding certain issues, which has given rise or accidentally given rise to litigation (for instance, malicious lawsuit), it is justifiable for the company to meet the litigation fees of the director under such circumstances.

However, the scope covered by the provision may include the circumstance under which the director is involved in corruption. If the director is involved in corruption, receiving advantages, or contravening certain regulations because of personal interests, which has led to legal proceedings, insofar as the company or the minority shareholders of the company are concerned, I hold that it may not necessarily be reasonable or appropriate for the company to meet the litigation expenditure on behalf of the director first under such a circumstance. Expenditure of legal proceedings, be them civil or criminal, can be extremely expensive. This is particularly so when disputes between companies are involved. Sometimes the costs of civil proceedings are even higher than those of criminal proceedings. Some legal proceedings are complicated. The entire procedure may take months and even years. It is very unreasonable if the legal expenditure is to be borne by the company, especially by the minority shareholders.

The second issue is procedural. I hold that the board of directors basically has the right to make this kind of decisions. However, the provision has not mentioned that the minority shareholders are allowed to express views on such

decisions. Neither has any mechanism been put in place to allow minority shareholders to overturn such decisions. In this way, when there are unreasonable cases or unreasonable expenditure, the interests of the minority shareholders will obviously be jeopardized and unprotected.

Another issue is related to the problem of repayment of funds after the judgment is given against the director in the proceedings. Chairman, it is possible that the director has already gone bankrupt when the judgment is given against him, or has already taken away the capital some time prior to this. Once the judgment is given against the director, he loses all standing and reputation, and has to face various problems. The litigation fee often amounts to tens of million or even hundreds of million dollars. In the past, the litigation fees of some large consortia amount to hundreds of million dollars. Take the recent inheritance lawsuit as an example, the cost is hundreds of million dollars.

While the legal fee is such a substantial amount, the legislation only sets out literally that the director has to repay the relevant funds. It has not required him to use assets to secure the funds, or to make arrangements that the funds are guaranteed. I think such a practice is not appropriate at all. When the company meets the expenditure on behalf of the director, the director should provide certain assets to secure the expenditure. This will ensure that even if the judgment is given against the director in the future and the director does not have money to repay the funds, the company will be able to deduct the funds from the assets secured. In this way, the company has something to fall back on. However, this kind of requirement is absent in the entire provision. Thus, insofar as this is concerned, I very much hope that the Secretary …… of course, the Bill has already been drafted. As I have said just now, the relevant fund often amounts to tens of million or even hundreds of million dollars, and since the minority shareholders do not have veto power, the Administration should specify that financial arrangements must be made so as to protect the interests of minority shareholders, with a view to ensuring that chances are provided to recover the relevant funds from the director once the judgment is given against him.

Clause 499 sets out the expenditure in connection with investigation or regulatory action. I think the scope covered by this provision is even broader. And it may be even more unfair if the company is to provide financial assistance, because investigation …… recently a number of people are thrown in a state of panic and plagued by imaginary fears. Chairman, I have reported various

persons to the Independent Commission Against Corruption before. There are often many legal correspondences between companies, irrespective of whether they are related to corruption and other malpractices, or genuine business matters. As a matter of reason, I think it is not necessarily appropriate if the company has to meet the legal expenditure on behalf of a director whenever expenditure in connection with investigation arises. If a more specific definition of "the expenditure in connection with investigation or regulatory action" is set out, or a validating mechanism is in place to ascertain whether the relevant circumstance is similar to what I said at the outset, that is, the act is directly related to the business of the company and not the personal issue of the director, providing financial assistance gives no cause for much adverse criticism. However, as a matter of fact, many cases are involved with acts of corruption and other malpractices of individuals, or persons who sacrifice the interests of their companies for their own interests. In the event of a director sacrificing the interest of the company for his own interest, for instance, a case of corruption and other malpractices is involved; it is unjustifiable for the company to meet the litigation fees on his behalf. This is double unfairness.

Of course, I understand that some large companies are used to adopting this kind of approach. Whenever the company is confronted with a problem, the expenditure incurred is met by the company. This is particularly so with listed companies. When the company is confronted with a problem, the expenditure incurred is met by the company. When the company has the opportunity to make substantial profits, they will try every effort to put the money into their own pockets. I hold that the arrangements set out in clauses 498 and 499 are extremely unfair to minority shareholders.

Chairman, please do a headcount.

CHAIRMAN (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

CHAIRMAN (in Cantonese): Does any Member wish to speak? Mr WONG Yuk-man, please speak.

MR WONG YUK-MAN (in Cantonese): Chairman, just now I have talked about clause 146 of the Bill, which is related to the issue of registration of transfer or refusal of registration. We mentioned that it was not advisable to impose excessively stringent restrictions on the transfer of shares in private companies. If we read the provision again, we will find that the manner in which the right of members to transfer shares is restricted has not been provided for in the provision; instead, a company is allowed to have the discretion to decide on this in its articles. Thus, private companies can use the articles of association as the reason. If this is the case, the practical effect of the relevant mechanism seems to be relatively limited.

The standard restriction on the transfer of shares in a private company in Hong Kong is the power of the directors to decline to register as a member any transferee of shares, in their absolute discretion without giving any reasons, whether or not such share has been fully paid. Let us look back at the stage when the Bill was being scrutinized by the Bills Committee. In the relevant documents issued by the Government during the consultation, it mentioned some practices in foreign countries and cited some cases. The common law position is that there is no need for the directors to give any reason for their refusal to register a transfer and the Court will presume that they have acted properly. As a matter of fact, there are many similar cases in the courts of the United Kingdom.

During the drafting stage of clause 146 of the Companies Bill, consultation exercises were also carried out by the Government. Just now I have mentioned that this issue is of much concern to the small and medium enterprises (SMEs). We opine that the relevant restriction should not be so stringent, so that the SMEs are allowed to have more flexibility.

Nevertheless, in a document provided by the Government when the Bill was being scrutinized by the Bills Committee, the Government points out that in the United Kingdom, the position is more stringent, and the giving of reason is mandatory if the company refuses to register the transfer. However, I think this is not applicable to companies in Hong Kong. When I analysed the relevant

requirements in relation to clause 146 just now, I had also expressed some of our views. We know that in Hong Kong or the Asian Region, family-owned private companies are relatively dominant. The conceptions of foreigners in this regard are quite different from ours. With the exception of the colonial era when the British regarded Hong Kong as their land, thus, giving rise to "Hong Kong Land"; this is very feudal …… not feudal, but with a rich colonial flavor. Relatively speaking, Chinese enterprises are predominantly owned by families. This is not the practice in foreign countries. The founder of a company establishes a foundation for his descendents. He may distribute shares or control the shares through the foundation; or even donate all the shares of the company, which is regarded as owned by the society. In Hong Kong or Asia, particularly the plutocrats of the South East Asian Region, all of their companies are operated as family-owned businesses.

Let us look at some so-called success stories and autobiographies. All of them have undergone laborious struggles and years of toil and labour. Be he LI Ka-shing, LEE Shau-kee, or the father of the KWOK brothers, what they have undergone can be written in books depicting how they had developed their initial small companies into enterprises of the present scale. To date, their enterprises still retain a rich flavor of family-owned businesses. Thus, there are relatively more private companies operated as family-owned businesses in Hong Kong or the Asian Region than in Europe and America.

Relatively speaking, insofar as private companies in Hong Kong are concerned, the requirement for transparency is not very high. Thus, though the Government has often mentioned the issue of transparency, as a matter of fact, this may not necessarily be applicable to these private companies. Since this is the case, the requirements should not be so stringent.

Of course, rewriting the Companies Ordinance is something we are happy to see. After all, there are over 900 000 companies territory-wide in Hong Kong. Despite the fact that the existing Companies Ordinance has undergone numerous piecemeal and patchwork changes over the past few decades, it still fails to keep abreast of the times to meet the needs of economic developments. Thus, it is necessary to make some structural changes instead of altering minor details, come up with fundamental reforms and amendments, or even rewrite the Companies Ordinance.

There is a huge pile of documents on our tables at the moment. During the four years I have become a Member of the Legislative Council, I have never seen the contents of a piece of legislation as rich as this. Provisions to be included in the Ordinance without any amendments at the Committee stage have amounted to several hundreds already. It is certainly necessary to improve the Companies Ordinance. I also support regulating these so-called public companies or large companies. Nonetheless, after reading the Companies Ordinance, I have found that the target of control or regulation is large companies. This is somewhat different from the Competition Ordinance. The standards and conditions adopted in the Companies Ordinance target listed companies and large companies, whereas the Competition Ordinance targets the SMEs.

As a matter of fact, when Secretary Prof K C CHAN enforces this legislation, the SMEs will also be affected because he is applying the standards required to be observed by large companies to family-owned companies and private companies at the same time. However, the requirements specified in the Competition Ordinance are tantamount to relaxing regulations on plutocrats and large companies. Even if it is not intentional for him to relax the regulations on them, the actual effect is that the damage sustained by the SMEs is even greater than large companies. This is really interesting because legislations enacted by the same Government have actually different ideological inclinations. The Government is now applying the standards targeted large companies to small companies. Frankly speaking, some small companies only employ a few employees. How can they cope with such complicated requirements? In the event that these companies are less alert, they may be frequently taken to task and inadvertently caught by the long arm of the law.

We, of course, support making more regulations that target large companies or public companies with a view to enhancing transparency. However, the Government should take into consideration that the regulation enforced by the relevant legislations may have adverse impacts on small companies or private companies. This is the worry we have regarding the transfer and registration of shares as set out in clause 146. After the implementation of the provisions, it is necessary for the Government to closely monitor whether the relevant mechanism has been abused. The Government should also put forth amendments whenever necessary, so as to impose some

hurdles to the existing mechanism; or even grant exemption to some private companies. I think this will be more appropriate.

The Government has indicated that during public consultation, only a minority of respondents disagreed with the relevant proposal of clause 146. These opponents considered that under common law, directors were permitted not to give reasons for acceptance or rejection as there are currently sufficient grounds, such as breach of fiduciary duties to sanction against wrongful refusals of directors. On the contrary, during the consultation process, a majority of respondents agreed with the practice of the Government. As a result of this, clause 146 is thus written. It has made amendments to the original clause 68 and clause 69(1) and (2). As a matter of fact, the current practice is similar to the original practice. As I have mentioned just now, this is consistent with the requirements of transfer of shares in clause 68 and clause 69(1) and (2). It is only that clause 146 is an improved mechanism.

The Government paid heed to the views of many small companies, private companies or the SMEs in the past. They expressed worries. Thus, we have proposed that the Government should conduct reviews after the implementation of the legislation, and formulate some mechanisms under which exemption will be granted to these small companies.

Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, refusal to register shares is a very serious problem, as this involves the power of the directors of a company. As you may remember, I touched on the issue when I was speaking on clause 146. As a matter of fact, the Government conducted a consultation under the leadership of Secretary Prof CHAN in May 2010 at the time of the "five geographical constituencies referendum". Why did he conduct such a consultation? At that time, he wished to resolve some issues, and that is, the issues explained by Mr WONG Yuk-man just now.

On the surface, any legislation seems to be under the rays of the sun. Under the sun, there will be an ultraviolet effect on any races, be it black or yellow. The sun shines indiscriminately on the good and the bad. The question is, if the Government has an objective when it legislates, it will have to achieve its objective in legislating. From the perspective of the Government, whether a piece of legislation is good or bad hinges on whether it can achieve the legislative objective as expected by the society or whether it can achieve the legislative objective arrived at after consultation. After passage of the Bill, those who are subject to the regulation of the Bill will no longer have a chance to speak. Thus, the views put forward by various sectors during the consultation process, and the views expressed by the Bills Committee of this Council during its negotiation with the Government, or ultimately the debates held at this Council are able to provide an imprint to the Government even after the passage of the legislation; and leave the details of the debates on the Bill to be passed in the record of proceedings of the Legislative Council. Of course, sometimes some pieces of legislation are not passed. However, even if they are not passed, the reasons why they are not passed will be recorded. As a matter of fact, the most normal operation of a legislature should be like this. Unfortunately, insofar as this Council is concerned, "it is better to remain silent than making a sound at this time". I am only discharging my responsibilities now.

With respect to the issue of refusal to register the transfer of shares, under the common law, we have to trust the director. Since the director is exercising his right in accordance with the legislation, we will have to put our trust in his integrity. Thus, in general, there is no need for the directors of private companies to provide evidence of transfer of shares. The current issue is that, we have to tackle some non-private companies. I hold that a greater responsibility should be borne by non-private companies. This is because private companies do not lure investors in the society to contribute their money to facilitate the directors in the operation of that company. Thus, private companies are responsible for their own actions. I hold that this principle of the common law is appropriate; otherwise, the Court will be overburdened with the heavy workload of resolving private disputes. What kind of reforms has the existing clause 146 brought about? I hold that they should target those large companies; otherwise …… the principle of the common law is that you should be responsible for your own matters. A certain director should not be forced to tell. This is a matter to be handled by the few directors themselves. That director

should not be forced to explain why he has refused or has not refused, for this has nothing to do with public interests.

What is the issue we have to tackle now? The issue is that if this company is not a private company, what the relevant arrangement should be. Clause 146 provides that "The transferee or transferor of shares in a company may lodge the transfer with the company". The provision does not require that the transferee or transferor "must" do so. Instead, the transferee or transferor may do so. In other words, it is not required by the legislation that transfer of shares must be lodged with the company. Thus, the transferor or transferee has a right but not a definite responsibility to do so. If he does not lodge the transfer, it is tantamount to giving up his right at his own initiative. Subsection (2) of the clause provides that "Within 2 months after the transfer is lodged, the company must either — (a) register the transfer; or (b) send the transferee and the transferor notice of refusal to register the transfer".

It is therefore evident that the provision has given the responsibility to the relevant company. I think this requirement is appropriate if the company is a listed company. Is the requirement appropriate for private companies? This hinges on the size of the company. There are 910 000 small and medium enterprises in Hong Kong. In fact, this number is rather staggering. What is the population of our adults? Almost …… I do not know why there are so many companies. I am also a holder of a number of companies. The objective of setting up those companies is to organize social movements. They cannot be registered as societies. I have a few companies. But I am not sure whether it is necessary to transfer the shares.

Chairman, this comment of mine is not unfounded. If the nature of those companies can be clearly defined when the legislation is enacted, for instance, the amount of share capital at the initial public offering is specified, it will be useful at the time when a grading system is put in place. This measure will enable some small companies not to be subject to the regulation of this Ordinance. Moreover, this move will also reduce the scope of the problem. Why is that so? Let me cite an example. If I have a company with the name of "April Fifth Action Company", when disputes arise, the game can be "played" like this …… since we have registered in accordance with the law, if there is any dispute, it will give rise to a problem. For instance, if I am fired by "April Fifth Action

Company" — due to my political views or other disciplinary issues, I am fired by this group, if I refuse to hand over the shares, there will be "big troubles".

Thus, Chairman, the existing practice is usually like this — set up two companies, one with the name of "League of Social Democrats Limited", the other one with the name of "League of Social Democrats". If a society registration is required, the name of "League of Social Democrats Limited" will be used for we need to resolve this problem eventually.

Even though I have never run any small businesses, I know that this is a problem that causes a lot of headaches. Thus, if the relevant requirement on the amount of share capital is provided in the Bill, the hurdle for the SMEs will be removed. I think this is more reasonable and appropriate. Otherwise, the companies established to sell peanuts at 20 cents will also be subject to the regulation of this Ordinance.

When I spoke earlier, I mentioned that according to the provision, if the company does not act in accordance with subsection (2)(a) or (b), and subsection (3) provides that "If a company refuses registration, the transferee or transferor may request a statement of the reasons for the refusal". In other words, that person can produce evidence and make a request. The company must send the person a statement of reasons within 28 days after receiving the request, stating the reasons for the refusal; otherwise, it will have to register the transfer for the person.

To companies with small capital or companies such as "April Fifth Action Limited", such requirement is very harsh. However, to big enterprises, this is just a trivial matter. As I have mentioned earlier, subsection (5) targets the offence committed under subsections (2) and (4). If the relevant company does not observe the requirements of subsection (1) — subsections (2) and (4) execute the requirement of subsection (1) — what is the requirement of subsection (5)? It reads, "If a company contravenes subsection (2) or (4), the company, and every responsible person of the company, commit an offence". What is the penalty? It reads, "Each is liable to a fine at level 4". The fine is cheap. "In the case of a continuing offence, to a further fine of $700 for each day during which the offence continues".

There is a problem here. If the owner of that company is a wealthy person, or his company is not an enterprise of the SMEs, this penalty really does not affect him at all. Why is that so? The relevant penalty is a matter of paying money only. Putting aside the fact that the amount of the fine is out-dated, the Administration is unable to increase the penalty, which gives him a chance to continue with the offence.

Thus, I think that the Bill should impose an obnoxious and shocking penalty on those who are aware of the loopholes of the legislation, breach the law wilfully, and can afford the fine. What is this penalty? It is a penalty that involves not only the payment of fine. When the fine has been paid for a period of time, the offender has to be imprisoned, or his enterprise will have to suffer losses. Otherwise, the situation will become ridiculous. Does it mean that a wealthy person can do whatever he likes?

However, to those without much money, for instance, the SMEs, or "April Fifth Action Company", or "League of Social Democrats Limited", this will pose a major problem for them. Why will this pose a major problem? If it is claimed that some things that belong to them have become obstacles for other people, and they are fined because of this, it will really pose a major problem. They will rather choose to be imprisoned. Take me as an example. My pay here is $2,000-odd per day. If I am fined $700 per day, a part of my pay is gone.

I hold that this is a problem of the entire legislative procedure. If the Administration really enacts the Bill in accordance with the consultation document — the document I read out just now — it should put in place a grading system. It is advisable for the Government to define the market first; and taking into account the economic situation of Hong Kong, provide an appropriate way for the SMEs to resolve the problems they face through the enactment of legislation.

Under the premise of regulating big enterprises, the Administration must not victimize the SMEs. I have talked about this many times before. Once a piece of legislation is implemented, those who can afford to employ legal representatives will certainly stand to benefit within a legal mechanism based on equality.

Hence the Bill should provide for a grading system and exemptions, specifying how small the company or how simple the organization of the company should be in order to qualify for exemption. Moreover, requirements of a reverse nature can be put in place to specify that if the company involves public interests, the penalty will be doubled, or there will be a leap in the level of fine. In other words, the price of crime cannot be paid by money; instead, it has to be paid by freedom.

Of course, I understand that under the common law, the sentence is handed down by the judge. The relevant responsible person may not necessarily be sentenced to imprisonment. He may be fined or sentenced to imprisonment. Thus, there is no need for the companies to be afraid. Probably from the perspective of the market, the sentence for the offence should not be imprisonment. But even if imprisonment is handed down by the judge, there is no need for the companies to get frightened. If we target the big enterprises, to a large extent, those large enterprises will be able to find a suitable legal representative to seek a reasonable defence within this mechanism, under which the responsible person of the enterprise will not be required to serve imprisonment term. On the contrary, the practice under the current Bill may be tantamount to killing an adult in order to make a child happy, which is unreasonable.

Chairman, why have I talked about clause 146 again? As a matter of fact, I am duty-bound to speak. A number of colleagues have openly spoken that they have to do something for the interests of the SMEs. It seems to be not acceptable if nothing has been done for the interests of the SMEs. If they genuinely wish to do that, I hope they will read the entire Companies Law and consider carefully. In my opinion, it will not be of much help to the SMEs if the grading system is not implemented, or if the wealthy people are not forbidden to use their money to pay for their errors.

Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR ALBERT CHAN (in Cantonese): Chairman, it would be better to do a headcount. Thank you.

CHAIRMAN (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

CHAIRMAN (in Cantonese): Mr Albert CHAN, please speak.

MR ALBERT CHAN (in Cantonese): Chairman, I wish to discuss clause 502 under Subdivision 3 of Division 2 in Part 11 in relation to "transaction entered into in ordinary course of business". This involves the arrangements and issues of loans. Chairman, clause 502 is in order, but it involves a historical factor which we cannot ignore. Some factors taken into account in the past may also merit our deliberation.

This provision essentially draws reference from or is modelled on the original Companies Ordinance. In general, clause 502 is similar to the arrangement under section 157 of the Companies Ordinance. It has made certain amendments, the most important of which is the deletion of the arrangement of fines from the original Companies Ordinance. Basically, subsections 157HA(9) and (11) of the original Companies Ordinance …… sorry, it has not deleted the fines, it has deleted the requirement of the borrowing limit. I will discuss the issue of deleting the fines later on when I discuss clause 514. Clause 502 is related to the deletion of the requirement of the borrowing limit.

Subsections 157HA(9) and (11) of the original Companies Ordinance provide for two limits, one of which is the borrowing limit of $750,000. Of course, according to the present standard of borrowing loans, basically a borrowing limit of $750,000 is not enough. When the legislation was enacted years ago, the target might probably be the SMEs. Back then, anything involving financial loans or banks was regulated by a separate banking legislation. A separate license would be required. Loan borrowing of

companies in general now and the requirement back then are based on this reason. The Government wishes to strengthen the role of the relevant companies — the 910 000 companies of the business sector — in aspects such as liquidity, borrowing and lending; or strengthen the borrowing and lending between companies. This may be the policy making approach of the Government. However, there has not been any discussion in this regard.

This is a significant change. Not only is there an abrupt deletion of the relevant limit in the provision, we are not aware of much discussion about this in the past. Will the deletion and relaxation in this regard bring about variables or fundamental changes in the operation of companies in Hong Kong? This is particularly so because many Mainland companies have come to Hong Kong for business operation. Very often, under some special circumstances, they wish to transfer some capital from the Mainland to Hong Kong. These companies may not be official finance companies, or companies with official banking license. The Bill has deleted the borrowing limit. Not only is the borrowing limit of $750,000 deleted, the requirement that the loan of the company should not exceed 5% of the company's net assets is also absent. I hold that the latter should be retained.

According to their business nature, companies established in general do not fall into the group of finance companies or banks. If they are banks or finance companies, they will be subject to the regulation of a separate license. If there is a sudden relaxation of the relevant regulation, I absolutely believe that many people will applause or happily welcome such a change. We all know that through providing loans or lending, there can be a lot of arrangements, such as A lends the money to B, B lends the money to C, or C lends the money to D. If one of the parties disappears or becomes bankrupt due to certain problems, certain responsibilities will no longer be borne by the party, which will facilitate the removal of traces of cash flows or legal liabilities. To put it crudely, it will be easier to engage in the act of legal "money laundering".

Thus, Chairman, with respect to this change, as I said yesterday, I have studied these provisions in-depth recently and have found this sudden change. This is particularly so as there is an absence of policy discussion and public discussion on the issue. Putting aside that this is abnormal, I think it is inappropriate as well. Back then, there must be reasons and needs for the stipulation of the borrowing limit at the time the legislation was enacted. Now,

all of a sudden, members of the public and the whole world are informed that the borrowing limit of the 910 000 companies in Hong Kong is removed. Previously it is provided that the borrowing limit of a company should not exceed 5% of the company's net assets, or $750,000. I hold that it is an inexpedient arrangement if such a requirement is removed.

Of course, giving a guarantee and providing security are required at the time of borrowing. However, we know that these guarantees and security can easily disappear and become invisible. There are varieties and changes of financial tactics all the time. Just one or two provisions will not be able to control these tactics, nor can they protect the interests of other shareholders. Just as I mentioned earlier, some people set up certain companies, and set up some other companies founded on funds from family members and friends. Soon the money of the companies has all gone. The present removal of the borrowing limit will facilitate people to transfer money away more easily by certain means. Thus, I hold that this is not necessarily a healthy phenomenon or a good change. I agree to certain changes of the provisions, but I insist that the complete removal of the borrowing limit is an inappropriate practice.

Moreover, Chairman, I wish to discussion clause 514 in relation to a "Person must not make payment for loss of office to director or former director in connection with transfer of shares resulting from takeover offer".

Chairman, please do a headcount.

CHAIRMAN (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

CHAIRMAN (in Cantonese): Mr Albert CHAN, please continue with your speech.

MR ALBERT CHAN (in Cantonese): Chairman, clause 514 involves the problem of making certain payments or inappropriate payments under the circumstances of certain takeover. I would like to raise questions concerning the deletion of some arrangements in relation to criminal liability or issues such as undertaking the payment responsibility in the original Ordinance.

Chairman, regarding the wordings of the provision, I am neither a legal professional nor someone who comes from the industrial and business sectors. I hope that the Government will use some wordings that are relatively easy to comprehend in the future. The Chinese heading is "任何人不得在與收購要約所導致的股份轉讓有關連的情況下，就失去職位而向董事或前董事作出付款". I do not understand what it means by "收購要約". Just now I asked Dr LAM Tai-fai and "Yuk-man". Neither do they understand the meaning just by reading the term. Finally, I read the original English text and found that the meaning is very clear. The English is "takeover offer" and the Chinese is "收購要約". This probably is a professional term in accounting. I am not sure. If members of the SMEs in general have to read this provision …… we discussed a number of problems with translation just now. These are probably professional wordings. But it would be best if all of us can comprehend the meaning after reading the provision. It is really difficult to understand "收購要約". We have to read the English original text in order to understand the meaning.

The problem of the "takeover offer" is secondary. Chairman, the important point in raising this question is that, if I have not misinterpreted, the Bill has deleted the requirements in the original Ordinance in connection with infringing those provisions or the penalty arrangements for committing such a crime. Section 163B of the original Companies Ordinance provided that section 163B(1) deals with the situation where the payment for loss of office to a company's directors is made by any person in connection with a transfer of shares as specified in section 163B(1) and imposes a duty on a director to take all reasonable steps to secure that particulars of the proposed payment are provided to members together with the notice of offer for shares, failing which the director is liable to a fine. The original provision imposed a penalty. But the new clause 514 has deleted the penalty provision. This is another example of the Government's proposal, which is "loud thunder but little rain", an act which I have to criticize. The entire Ordinance has also reflected the Government's policy and inclination of harbouring, protecting, or adopting a lenient approach in handling the breach of duty of the relevant person in a company. Prior to this,

there had been mentions of punishment by imposing fines only, such as the imposition of fines only for offences attracting a penalty at level 3 or 4. No mention of fines or punishment can be found in this provision now. A penalty was stipulated in the original Ordinance. The current Bill has deleted this penalty. The original Ordinance was already a "toothless tiger"; now the Bill has even become a "feeble cat", a "toothless feeble cat". The entire provision is biased and …… of course, the degree of freedom will be increasingly high. The Hong Kong Government has always claimed that Hong Kong is a city with a high degree of economic freedom. However, the more the number of ordinances, the less the number of penalties; the more the number of ordinances, the less the number of penalties of imprisonment; and there is an increasing number of ordinances which attract a penalty at level 3 or 4 only. The degree of freedom is so very high in Hong Kong. The richer the person, the more he can act barbarously. It does not matter, does it? It is only a fine of $10,000-odd or a maximum fine of $20,000 only.

The removal of this penalty demonstrates once again that with respect to handling and safeguarding business operation, the Government wishes to ensure a normal and compliant situation as much as possible. This mentality is sheer mockery and self-deception. I will talk about clause 520 in relation to the issue of civil consequences later on. I hold that this is a kind of regression. The provisions on monitoring and regulating these business conducts in the entire Ordinance, as well as the provisions on the director's handling of financial issues of a company, can be described as extremely inexpedient. Since the amounts and payments involving many takeovers can be very substantial, deleting the penalty is a very grave mistake. I will discuss the issues concerning clause 520 later on.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR WONG YUK-MAN (in Cantonese): Chairman, I will skip to a clause that is a bit far away. I have mostly talked about clauses within clause 100, and sometimes clauses falling between clause 100 and clause 200. I will now talk about clause 575.

Having read newspapers today, I note that some people still accuse us of wasting a lot of time by repeatedly requesting a headcount. Clause 575 is "Quorum at meeting". Even in a company, a quorum is required when it holds a general meeting, shareholders' meeting or board meeting, not to mention a legislature with merely 60 legislators. The Companies Ordinance also has provisions relating to quorum.

When I was a teacher conducting a tutorial class for freshmen in a university, I must teach them the prevailing rules of procedure, because procedure at meetings is the first thing to be learnt when learning democracy. Certainly, I have now become a negative example for often contravening the Rules of Procedure. The rules of procedure are actually universal rules that can be found in societies, benevolent associations or clansmen associations, or even at the board meetings or shareholders' meetings of a company, or the meetings of a school.

One person can have "solitary reflection", two persons can have "dialogue", and three persons or more can, in accordance with certain rules, hold "meetings" to study logic and resolve problems. One person can have "monologue" or "solitary reflection", two persons can have "dialogue", and three persons or more can, in accordance with certain rules, hold "meetings" to study logic and resolve problems.

Therefore, there is something special about clause 575. Some companies may have only one person. In fact, many, even limited companies, among the over 900 000 companies in Hong Kong, probably have only one or two members. As such, usually …… Members who are accountants are all absent, and a quorum is not present. Chairman, please summon them back to the meeting.

CHAIRMAN (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

CHAIRMAN (in Cantonese): Mr WONG Yuk-man, please go on.

MR WONG YUK-MAN (in Cantonese): I would like to speak on clause 575, "Quorum at meeting", but I hope Members will not mistakenly believe that I have finished speaking on the clauses before clause 575. This is only because I note that a headcount is frequently requested these days and I have therefore taken a look at the Companies Bill. I realize that there is a provision relating to quorum.

Part 12 of the Bill is also related to procedure at meetings. Certainly, when it comes to procedure, Chairman, you are an expert, and some other Members like Dr Margaret NG are also experts. We are certainly not, and we are only persons who often contravene the Rules of Procedure, right? That said, I am now exercising rights conferred to me under the Rules of Procedure: I am vigorously speaking on the relevant clauses at the Committee stage. I think I am being normal at present, and I do not know why some people accuse us of filibustering. Since there are hundreds of clauses in the Bill, am I not allowed to discuss them? Am I not allowed to speak on each of the clauses? Is this filibustering? This is weird. Those who do not speak accuse those who speak as filibustering. What kind of legislature is this?

Chairman, you are an expert when it comes to procedure, and a good chairman will chair the meeting in accordance with the Rules of Procedure. Certainly, for matters which are not provided in the Rules of Procedure, you cannot do whatever you like, right? Regarding some ambiguous provisions under the Rules of Procedure, you may exercise your discretion. However, you must after all act in accordance with a set of rules, the Rules of Procedure, and your personal opinion shall not be taken into account. Certainly, you can make judgments in accordance with your interpretation of the Rules of Procedure, but this may give rise to controversies. Nevertheless, if Members have the same interpretation of the relevant provisions, and they have the same impression, controversies will not arise. If your interpretation of section 92 of the Rules of Procedure is the same as that of ours, and your interpretation of section 91 of the Rules of Procedure is the same as that of ours, there will be no controversies. Therefore ……

CHAIRMAN (in Cantonese): Mr WONG, please speak on the contents of the provisions under discussion.

MR WONG YUK-MAN (in Cantonese): …… Members of a company must have the same interpretation on clause 575 relating to the quorum requirement on general meetings. There will be troubles if they have different interpretations, right? A general meeting or shareholders' meeting of a limited company represents the company's ultimate or highest authority, at which various resolutions can be passed and significant matters dealt with.

The significant matters of a company include the appointment and removal of directors, the engagement of an auditor, the passage of the auditor's report, the issuance of new shares and the change of share capital. Mr Paul CHAN is an accountant, and he should have dealt with many matters of this kind. Should the Rules of Procedure then be of great importance to accountants? However, what should be the quorum at meetings for mini companies or limited companies with only one or two members? Limited companies usually engage an accountant to prepare minutes for them. They only need to sign to indicate whom they have engaged as accountant and whom as company secretary. They only need to sign their names, and all documents can be prepared. But, has any meeting been held? No meeting seems to have been held, right?

Therefore, a problem has arisen. Has any meeting been held? No, but why are there minutes? In addition, such minutes are legally binding, and many matters must be dealt with in accordance with the minutes. Even when we open an account at a bank, we need to provide minutes of our company, and such minutes must comply with the requirement on quorum at meetings.

The title of section 114A of the original Companies Ordinance (Cap. 32) is "General provisions as to meetings and votes", and the title of the corresponding part of the Bill is much clearer: Subdivision 7, "Procedure at Meetings", under Division 1 of Part 12.

At this juncture, Chairman, I am not repeating, but I must praise the Financial Services and the Treasury Bureau. The new legislation has been drafted in accordance with the criteria of modernizing drafting, and the title of the relevant part is much clearer than the original one. You will know that it is about procedure at meetings as soon as you see the title, and details such as place of meeting, quorum at meeting, the election of chairperson or whether resolution passed at adjourned meeting has retrospective effect are clearly listed under the title.

As for the section of the former ordinance — sorry, I mean the section of the original ordinance, as the Bill has not been passed — the section entitled "General provisions as to meetings and votes" therein is not too much different from the revised and rewritten one in terms of contents. As I remarked just now, at shareholders' meetings or general meetings mentioned in the provision, some very important matters must be dealt with. As such, small companies need not convene general meetings or the alike, because they need not deal with such matters as the appointment or removal of directors, the appointment of an auditor and the preparation of the auditor's report. However, for a company, members' meetings, general meetings or shareholders' meetings are actually as solemn as Legislative Council meetings.

Therefore, we must be relatively careful in examining the clauses relating to procedure under the Bill, particularly clauses 574, 575, 576 and 577. The importance of the four clauses is obvious. Furthermore, regarding voting at meetings, we will discuss it later since it is also related.

Clause 575(1) provides that "If a company has only one member, that member present in person or by proxy is a quorum of a general meeting of the company." This clause has been modeled on section 114A of the original Companies Ordinance, which requires a limited company to have at least two members. With the reform of the company law in recent years, however, the requirement has been lowered to one member. In fact, a lot of private limited companies have only one member, and quorum at a general meeting of such a company is actually equal to the number of its member. Such a private limited company has only one member, and if a quorum is required, there is certainly only one member available. That a quorum is not present means no member is present, and no meeting shall thus be assumed to have been convened. Clause 575(1) has thus been drafted in response to such a scenario.

Chairman, a quorum is not present in the Chamber.

CHAIRMAN (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

CHAIRMAN (in Cantonese): If clause 574(1) can be added into the Rules of Procedure, we will not have to ring the summoning bell time and again. Mr WONG Yuk-man, please go on.

MR WONG YUK-MAN (in Cantonese): Chairman, clause 575(1) provides that "If a company has only one member", "that member" may be "present in person" or "by proxy", and thus is "a quorum of a general meeting". Since many companies have only one member nowadays, such a provision has been stipulated correspondingly. Two members are required to form a limited company in the past.

In addition, as the original Companies Ordinance does not provide for the scenario that the only member is a body corporate, clause 575(2) supplements and perfects the legislation. Clause 575(2) provides that "If that member of the company is a body corporate" — a body corporate implies its corporate representative — that member may be "present by its corporate representative". It provides that "If that member of the company is a body corporate, that member present by its corporate representative is also a quorum of a general meeting of the company".

Chairman, this is a very important provision. Companies cannot, for business need or taxation convenience, establish several subsidiaries with only one member. Therefore, clause 575(2) stipulates an appropriate requirement. Compared with the original Companies Ordinance, the Bill has made progress in terms of the provisions on procedure at meetings.

As for companies with two or more members, the arrangement under the original Companies Ordinance is a bit complicated by providing for different categories of companies under section 114A(1). However, since the Bill has simplified and reclassified the categories of companies, section 114A under the existing Companies Ordinance is no longer needed. Clause 575(3) of the Companies Bill therefore provides that "Subject to subsection (1) and the provisions of a company's articles, two members present in person or by proxy is a quorum of a general meeting of the company."

Proxy voting in political groups is just like this. That said, clause 575(3) applies to all companies, including public limited companies, or even listed

companies. Therefore, it is relatively fair for clause 575(3) to stipulate that the relevant requirement is subject to the provisions of the articles of the company. If members of a company believe that a quorum at a general meeting should be half of the number of members, they can *(The buzzer sounded)* …… include such a requirement into its articles, and all members must abide by this requirement.

CHAIRMAN (in Cantonese): Mr WONG, please stop speaking.

MR ALBERT CHAN (in Cantonese): Chairman, Mr WONG Yuk-man and I seem to be "walking in pairs".

Chairman, I talked about clause 514 just now. Under the existing ordinance, a penalty will be imposed if the law is contravened. Under the Bill, however, such a penalty is cancelled, and clause 520, "Civil consequences of contravention of section 514", is added.

In accordance with clause 520(1), "This section applies if a payment is made in connection with a transfer of shares in a company, or a subsidiary of a company, resulting from a takeover offer in contravention of section 514." In other words, once such a payment is found to be made in connection with a takeover or transfer of shares, civil legal action can be initiated against the person concerned. This reflects the Government's governance mindset, or its attitude when handling such issues ― basically they have nothing to do with it. Such contravention is not allowed, but in the event of such contravention, no regard will be given despite the penalty in the past. The Government is not to be bothered as it does not want to bear its responsibility. If one party believes that it has suffered losses due to the other party's wrongdoing, it can initiate legal action against the other party. Not only justice can be done for itself, a fair decision can also be made through the law.

However, as I have said many times, if civil litigations are initiated readily for resolving disputes between companies, there will be the problem of the strong ones overwhelming the weak ones. Certainly, two sides are involved, one being former directors of the company, and the other being the company acquired. Under such circumstances, the relations between the relevant persons are complicated, and the party affected or aggrieved may not have strong and

powerful financial support. Not every lawsuit involves two large property developers, or the Government and a big consortium. There must be cases — although I do not know the number of such cases — where the party in contravention of the law, during a transfer of shares, loosens its grip and benefits some of its friends on the strength of its financial power, in the belief that the party being aggrieved, if bold enough, can file a lawsuit.

However, first, the party aggrieved may not know it; second, the party in contravention of the law may make the payment through certain means. He can resort to tens of millions of financial skills or administrative methods to conceal the payment. I believe Mr CHAN Kin-por can provide over 90 million lawful, partially lawful or grey-area methods for making the payment. Even if the party aggrieved knows that there must be something wrong, it is not that easy to obtain legal evidence. However, if criminal investigation is conducted, the Registrar or the person concerned may request the party in contravention of the law to provide certain information. The party can certainly remain silent, but once criminal investigation is initiated, he can be arrested and his company be searched. The authorities can go to his company to take away his computer, or obtain his bank account information. Therefore, as compared to civil lawsuit, the investigation power related to criminal lawsuit is much bigger, and more information can be obtained.

In addition, the initiation of criminal prosecution does not mean that civil lawsuit cannot be filed. We have seen such examples in the districts. For example, if a member of the public is injured in an accident when travelling by taxi, we will first ask him whether the police have prosecuted anyone. If so, we generally advise him to record on his own all losses incurred from the accident, and retain evidence and information such as medical certificate, particularly receipts relating to all his expenditure, including taxi fare. When the outcome of the prosecution by the police against the driver for careless driving causing accident is available, civil claims can be lodged. This is relatively more reasonable. If the injured person can produce evidence of the driver's careless driving, the civil lawsuit filed by him is more likely to succeed. He only needs to provide the relevant percentage and the evidence of losses at most.

Coming back to clause 520, regarding the making or improper making of payment, criminal lawsuit could be filed in the past, but such a right has been relinquished. Chairman, the amount of payments made to directors is generally

estimated to be quite significant. If a director loses his office due to a transfer of shares of a company to round up the "distribution of benefits", the amount of payment made to him is estimated to be quite significant. For acts that were unlawful in the past, civil claims are now lodged in place of criminal prosecution. In this connection, I think the Government is further conniving at commercial malpractice. Such cases are more likely to be found in companies. Therefore, Chairman, I am dissatisfied with such a change.

Moreover, Chairman, there are similar problems with clauses 512 and 513. Clause 512 reads, "Company must not make payment for loss of office to director or former director", and clause 513 reads, "Person must not make payment for loss of office to director or former director in connection with transfer of company's undertaking or property". If a company makes payment in contravention of clause 512, civil claims can be made in accordance with clause 518; if clause 513 is contravened, civil claims can be made in accordance with clause 519.

Chairman, do you think the Government is being irresponsible? The Government is proceeding to enact a law stipulating that certain payments cannot be made, but, in the event of improper making of payments, the Government will not give any regard to it. Chairman, the Government is now making it clear that despite the stipulation in a law that certain payments cannot be made by companies, the Government will not give any regard to the companies' contravention of the law. In addition, the law stipulates that if one party believes that it has suffered losses, it can file a lawsuit. Does this make sense?

If I had not spent the past two weeks examining the Bill and identified the problems, I would think the Bill is very desirable. We started to request the Government to make a review in the 1970s. The authorities subsequently engaged consultants, and completed a very authoritative and, I think, outstanding, consultancy report in 1997. The report incorporated the opinions of many authoritative experts and legal talents. The Government even specifically engaged an expert from Canada to work full time to co-ordinate preparation of the report.

That said, at the final stage of the enactment of the legislation, the Government of the Hong Kong Special Administrative Region can be so irresponsible when it comes to the handling of commercial malpractices. Should

this, in Members' opinion, not be condemned? However, we have had discussions for so long, and not too many Members in the Chamber are paying attention to such problems. Only the three of us are making our remarks. The Bill involves the interests of some 910 000 companies, 90% of which are small and medium enterprises, as well as the interests of their shareholders. At such a stage, however, not too many Members are expressing their views, and some of them even accuse us of wasting time by requesting a headcount.

Will not Ms Starry LEE, a member of the Executive Council, be present at Executive Council meetings? She accused us of wasting time at Legislative Council meetings, making her unable to stay with her family. Having been a Member over the past 20 years, I am often unable to stay with my family, too. Since she is so busy, why did she accept the appointment as a member of the Executive Council? Need she attend Legislative Council meetings? This is so preposterous. Why does not she try to be absent at Executive Council meetings? As many Members are company directors, will they often be absent at board meetings? Therefore, her accusation is preposterous. While they themselves are being irresponsible, they are shirking their responsibilities by smearing us and distorting the fact.

CHAIRMAN (in Cantonese): Mr Albert CHAN, you have deviated from the subject.

MR ALBERT CHAN (in Cantonese): Chairman, I am only expressing my own views by making use of the subject. I am irritated as soon as I talk about this, since the Government and some Members are being so irresponsible. Excuse me, Chairman, I request a headcount.

CHAIRMAN (in Cantonese): Clerk, please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

CHAIRMAN (in Cantonese): Mr Albert CHAN, please go on.

MR ALBERT CHAN (in Cantonese): Chairman, upon the unlawful payment made by one party, the other party may initiate civil claims. In this regard, we must criticize the Government for being irresponsible. Let me give you a simple example. If a person has committed theft and stolen your money, you tell him that the Government will not prosecute him, and the one to initiate the prosecution is you, for he has stolen your money. The situation now is like stealing money. Is there any difference? Is it not tantamount to stealing money for the person concerned to accept payment that should, according to the law, not be accepted? There is no difference between the two. The Government should tighten the provisions of the law, so that the party making payment and the party accepting payment are likewise subject to criminal liability. For example, the law should provide that in connection with a transfer of shares or a takeover, a company shall not make payment to its directors, and the directors cannot accept payment either. This is like the acceptance of commission. The acceptance of commission in contravention of law constitutes a crime.

If Hong Kong is to be trusted by the international community as a reliable and good place for company registration, we must enact good laws to convince people that, for their investments and companies registered here, the government of Hong Kong will conscientiously play its regulatory role. Otherwise, how can people have confidence if they need to file lawsuits on their own when their investments are in trouble? If every government department and Policy Bureau is like Secretary Prof K C CHAN's Policy Bureau, Hong Kong will really be a place where rich people own most powers, and we will return to the days of social Darwinism — the survival of the fittest. Those who are strong will win, and those who are rich will have the upper hand. People can file lawsuits as long as they are rich enough. If civil lawsuits are incessantly filed, experts and lawyers will benefit financially, and the Court will be extremely busy.

I do not know how many lawsuits will be created for the Court under the proposed provisions. Chairman, the most important thing is that many unfair cases will be created under such circumstances. In Hong Kong, many underprivileged and small investors, who have not too much money, have

invested in different companies, but the said methods unfortunately …… In the case of a company with a stock code of 0008, many investors of the former Cable and Wireless deemed their investments in that company as their pensions. However, even their "money reserved for their coffins" has been lost as the stock of that company dropped to become a "penny stock".

Therefore, the Government shall play its regulatory role to ensure that boards of directors operate in compliance with the law and those which contravene the law must be held accountable. How can the Government shirk its responsibility in such a manner? As such, Chairman, I am deeply dissatisfied with these provisions.

SUSPENSION OF MEETING

CHAIRMAN (in Cantonese): I now suspend the meeting until 9 am of the following Monday, 9 July.

Suspended accordingly at ten minutes past Twelve o'clock.