OFFICIAL RECORD OF PROCEEDINGS

Thursday, 5 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 CHEUNG MAN-KWONG

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 LAU WONG-FAT, G.B.M., G.B.S., 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 AUDREY EU YUET-MEE, S.C., J.P.

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

THE HONOURABLE WONG KWOK-HING, M.H.

THE HONOURABLE LEE WING-TAT

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

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.

DR THE HONOURABLE LEUNG KA-LAU

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.

DR THE HONOURABLE SAMSON TAM WAI-HO, 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 LEUNG YIU-CHUNG

THE HONOURABLE ANDREW CHENG KAR-FOO

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

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

PUBLIC OFFICER ATTENDING:

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

CLERKS IN ATTENDANCE:

MR ANDY LAU KWOK-CHEONG, ASSISTANT SECRETARY GENERAL

MISS ODELIA LEUNG HING-YEE, ASSISTANT SECRETARY GENERAL

MRS JUSTINA LAM CHENG BO-LING, ASSISTANT SECRETARY GENERAL

MRS PERCY MA, ASSISTANT SECRETARY GENERAL

BILLS

Committee Stage

CHAIRMAN (in Cantonese): Good morning, Members. The Committee will now continue to examine the clauses of the Companies Bill to which no amendments have been proposed.

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

COMPANIES BILL

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

(Mr Albert CHAN stood up)

MR ALBERT CHAN (in Cantonese): Chairman, even though it is raining this morning, since there are not many Members present, I request a headcount.

CHAIRMAN (in Cantonese): Will the 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).

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

(Mr Albert CHAN stood up and indicated his wish to speak)

CHAIRMAN (in Cantonese): Mr Albert CHAN, speaking for the eighth time.

MR ALBERT CHAN (in Cantonese): Chairman, this debate is an aptitude test and a duel of will, and there are 12 days to go before 17 July.

Chairman, the Companies Bill has an extensive scope and it involves various responsibilities and interests. The Government seeks to stipulate its powers to regulate some commercial activities through this Bill, which is totally understable. Through the enactment of this Bill, many people expect improvements in the regulation of commercial activities, such that people's interests will not be compromised. However, we must discuss and monitor if the Government's powers can be infinitely expanded or retained in respect of some political matters or matters involving personal interests that are unrelated to economic or investment activities. Amendments can be made if possible.

Chairman, in making this preamble I mainly wish to discuss clause 104 — our discussion is proceeding very quickly; we were discussing clause 50 or so yesterday but we have come to clause 104 already. This Bill has more than 900 clauses and we have not yet discussed 800 of them. We will gradually express our views. What is clause 104 about? Clause 104 specifies that "Registrar may direct company to change misleading or offensive name etc". Chairman, there are two important points here; first, a name or designation is about a person's liking and disliking or values, and second, it is about a person's faith or belief. What kinds of names are misleading? To a certain extent, this depends on a person's value judgment or subjective preference. It can be said that the name of the Democratic Alliance for the Betterment and Progress of Hong Kong (DAB) is misleading for they totally ignore Hong Kong people's right to "dual universal suffrage". During the election, there were comments that the Liberal Party and the DAB were undemocratic, and people might consider the names of these organizations misleading. Some groups registered as charitable organizations are basically seeking profits and I would also say that their names are misleading. Some are now saying that certain social enterprises are social enterprises in name only and they are actually political tools controlled by some political parties. Can they call themselves social enterprises? Judging by the nature of organizations and the names and modes of registration of organizations or companies, from my personal contacts and experience, I can casually name hundreds of organizations that have misleading names.

Concerning offensive names, Chairman, people will find it offensive to talk about Andy TSANG and the violent acts of the Hong Kong Police Force.

Offensive feelings can be induced by many objective facts or some subjective conditions, and even a person's experience and feelings. Power is conferred on a person under this Bill. If my understanding is not wrong, the Registrar has the power to change names under the existing Companies Ordinance (CO) but an appeal can only be lodged to the Court. Sorry, Chairman; if the Registrar conversely asks a company to make the change — in the past, if the organization or company was not satisfied with a request for name change, it could appeal to the Court — the rule is now changed so that an appeal can be lodged to the Administrative Appeals Board (AAB) ……

MR WONG YUK-MAN (in Cantonese): Good morning, Chairman, a quorum is not present.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR ALBERT CHAN (in Cantonese): Chairman, I have just mentioned the powers of the Registrar. As clearly stated in clause 104(1)(a), "the Registrar is of the opinion that" — he personally has the opinion that — "the name gives so misleading an indication of the nature of the company's activities as to be likely to cause harm to the public". Chairman, the key lies in the relevant power and perception and the decision rests with the Registrar, and he considers according to his judgment that the relevant name is misleading insofar as the nature of the activities are concerned. We all know that these organizations organize many types of activities, so if he personally thinks that certain names are misleading he can give directions for name changes.

According to my understanding, Chairman, when appeals were lodged in the past, the aggrieved parties were often allowed to appeal within a one-month

period. Nevertheless, clause 104(3) expressly provides that "a company may, within 3 weeks after the date of a direction, appeal to …… against the direction". This period is relatively shorter than the notice period in the appeal process as we generally understood in the past.

In helping members of the public deal with their problems, we understood that it might take five to eight days for the letter to arrive after it had been sent, and it might be received a few days after the specified period. If the specified period is three weeks but the letter is received five to six days later, there will only be two weeks left to collect information in order to determine whether an appeal should be lodged or to seek legal advice. Sometimes, it may happen that the responsible persons are not in Hong Kong, and the letters sent are not received. I believe only smaller organizations have these problems, including organizations with political orientation, service groups or young people's arts groups. Such groups are relatively less professional in administration or organizational management. If there is only a three-week period, it is likely that the period would have expired before the letter has been read.

Moreover, it is also not specified that such an important notice must be sent by registered mail. Chairman, as you may recall, in the discussions on the amendments to many ordinances, especially the Fisheries Protection Ordinance, I suggested that it should be stipulated in law that the Government should send these important documents by registered mail, to ensure receipt of the letters by the parties concerned. That is an effective arrangement with legal effect.

Nevertheless, we can see that the Government has enormous powers and the notice period is not long enough. It is specified in the clauses that the person concerned can apply for an extension of the period; yet, the person concerned must be aware of this before he can do so. The deadline may sometimes have expired when the letter is received and the person's interests will be compromised, which is inappropriate. The person can certainly continue to appeal to the AAB, but it is very likely that his appeal will not be entertained because the legal deadline has expired. Also, it is not stated in any clause that the AAB has the discretion to accept an appeal lodged after the deadline.

Chairman, another material change is a substantial increase in the fine. We can notice from the clauses of the Bill that if a company engages in

misconduct and fails to comply with the regulations, it is generally liable to a fine at level 3 to level 4. A fine at level 3 is $10,000 while a fine at level 4 is $25,000. However, if it refuses compliance and declines to change its name, the fine is amended from a fine at level 4 to level 6, which is $100,000. That is just about names, and in connection with the articles and operation of the company and some requirements — I will later comment on other clauses, that is, other important notices in clauses 176 and 184 — if members are not notified according to the provisions of the CO, the fine is often at level 3; when the interests of members and investors are involved, non-compliant large companies will only be liable to a fine at level 3, that is, $10,000.

The fine will substantially increase to $100,000 only because the Registrar considers a name as misleading or offensive, and there is even a daily fine rather than a one-off fine. The original fine is $700 per day but it will substantially increase to $2,000 per day.

As I have just said, in general, such cases of company name change often involve young people's organizations and political groups or organizations. One day, the Government may suddenly think that Falun Gong is misleading ……

(Mr WONG Yuk-man stood up)

CHAIRMAN (in Cantonese): Mr WONG Yuk-man, what is your point?

MR WONG YUK-MAN (in Cantonese): Chairman, a quorum is not present.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR ALBERT CHAN (in Cantonese): Chairman, I have just talked about a substantial increase in the fines, which gives us a strong impression that political pressure and the Government's political control are further strengthened. I trust that this issue may partly involve commercial problems such as some names may be similar to the names of certain companies. But, I believe the most important point is that manipulation, punishment and political connection have relatively increased. This is particularly demonstrated by the acts of the Government, especially the continuous tightening of the political golden hoop after the reunification and the suppression of many political groups, marches and demonstrations, as well as the use of extra-large cylinders of pepper spray.

Of course, it is reasonable for people to hold such concerns and feelings about the acts of the Government and the spirit and principles demonstrated in this Ordinance. If possible, the People Power requests a separate vote be taken on clause 104, and we will not oppose joint voting on the remaining clauses on companies. Yet, clause 104, especially the part on a substantial increase in the fines, violates the personal rights of quite a few Hong Kong people. Besides, the difference in the fine level and the relative importance of the clause compared with other clauses are also inappropriate. While other clauses gently let the persons concerned go, the Registrar's despotism and autocracy is highlighted, which is offensive. We can declare our views on this point if we can separately vote on clause 104. Thank you, Chairman.

CHAIRMAN (in Cantonese): Mr Albert CHAN, are you requesting that clause 104 be taken out for a separate vote?

MR ALBERT CHAN (in Cantonese): Yes, I request that the clause be taken out for a separate vote. Thank you, Chairman.

CHAIRMAN (in Cantonese): As this Bill has a large number of clauses, joint voting on many clauses is necessary, so the Secretariat issued a notice on 22 June to consult Members whether they would wish to vote separately on some clauses, and they should notify the Secretariat before 25 June.

Since we cannot take out certain clauses for separate votes as requested by the Member, if we take out some clauses from over 900 clauses, we still have to examine clearly if the drawn clauses are related to other clauses and the impacts if the drawn clauses cannot be incorporated into the Bill. Thus, we should give the Secretariat time to deal with the matter before voting. I urge Members once again that they should notify the Secretariat early if they request that some clauses be taken out for separate votes.

MR ALBERT CHAN (in Cantonese): Chairman, I may withdraw my request if this involves complicated issues and affects other clauses. However, if the case is simpler and taking out the clause will not affect other clauses, I hope we can vote on the clause separately. I definitely do not want this request to considerably increase the workload of the Secretariat staff. I just wish them to briefly consider if complicated issues will arise; if so, I will withdraw my request. Thank you, Chairman.

CHAIRMAN (in Cantonese): I have heard the Member's opinion and I will ask the Secretariat to study it.

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

MR WONG YUK-MAN (in Cantonese): Good morning, Chairman. Today, I would like to discuss clause 16 in Division 5 under Part 1 to which no amendment is made by the Government.

Chairman, in clauses 16 to 18 in Division 5 on "Application of this Ordinance", reference is made to the sections 307 to 309 of the original CO. The heading of section 307 of the original CO is "Application of Ordinance to companies formed under former Companies Ordinance", which is now changed to "Application of this Ordinance". The Division comprises three clauses: the first clause is "Application to existing company", the second is "Application to unlimited company registered in pursuance of former Ordinance as limited

company" and the third is "Application to company registered, but not formed, under former Companies Ordinance".

Let me first discuss why the original provisions have to be changed to what they are today. Section 307 of the original CO specifies that, "this Ordinance shall apply (a) in the case of a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Ordinance as a company limited by shares; (b) in the case of a company limited by guarantee, as if the company had been formed and registered under this Ordinance as a company limited by guarantee; and (c) in the case of a company other than a limited company, as if the company had been formed and registered under this Ordinance as an unlimited company.".

Section 308 "Application of Ordinance to companies registered under former Companies Ordinances" carries reference to "shall apply …… in the same manner as it is ……". Why has it been changed to clause 16 on "Application to existing company"? It is specified that "this Ordinance applies to an existing company, in the same manner as if — (a) in the case of a company limited by guarantee, the company had been formed and registered under this Ordinance as a company limited by guarantee"; and the expression "in the same manner as if" is also used in subclauses (b) and (c). However, the expression in section 308 of the original CO is "apply …… in the same manner as"; the heading of clause 17 has become "Application to unlimited company registered in pursuance of former Ordinance as limited company" while the provision has become "(1) This Ordinance applies to an unlimited company registered as a limited company in pursuance of the predecessor Ordinance or section 58 of the Ordinance 1911 (58 of 1911), in the same manner as it applies to an unlimited company registered under this Ordinance as a limited company.".

First, I would like to discuss the two clauses on application in which the terms "as" and "as if" are respectively used. I may understand the English terms but I really do not quite understand their Chinese translations "猶如" and "一如". These are very important clauses in rewriting the CO and the transition from the existing system to the new under the Companies Bill (the Bill). Chairman, a legal vacuum will arise in case there is any omission. Therefore, application is a crucial part of the whole piece of legislation. All existing companies registered under the original CO or the Bill are incorporated into the scope of regulation of

the Bill. There are two major kinds of limited companies under the Bill, namely companies limited by guarantee and companies limited by shares.

Under clause 16(1)(a), "This Ordinance applies to an existing company, in the same manner as if in the case of a company limited by guarantee, the company had been formed and registered under this Ordinance as a company limited by guarantee". Under clause 16(1)(b), "This Ordinance applies to an existing company, in the same manner as if in the case of a limited company other than a company limited by guarantee, the company had been formed and registered under this Ordinance as a company limited by shares". Chairman, clauses 16(1)(a) and 16(1)(b) basically cover all limited companies. Under 16(1)(c), "This Ordinance applies to an existing company, in the same manner in the case of a company other than a limited company". As specified in the Bill, they are considered as unlimited companies formed and registered under the Bill, thus, I believe clause 16 has a sufficient scope of coverage.

Nevertheless, we really have doubts about the Chinese text of draft clause 16. The Chinese term "猶如" is used in clause 16(1) while the Chinese term "一如" is used in clauses 17(1) and 18(1). What is the difference? Can ordinary people see the difference between the two expressions? I think people may not be aware of the difference ……

(Mr Albert CHAN stood up)

CHAIRMAN (in Cantonese): Mr Albert CHAN, what is your point?

MR ALBERT CHAN (in Cantonese): Chairman, there are only a few Members in the Chamber.

CHAIRMAN (in Cantonese): Are you requesting a headcount?

MR ALBERT CHAN (in Cantonese): Yes, I request a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR WONG YUK-MAN (in Cantonese): I have talked about the Chinese terms "猶如" and "一如" (meaning as if) just now. The Chinese character "猶" has the same meaning as the Chinese terms "還是" and "仍然" (meaning still). What does the Chinese character "一" mean? It means "不二" while the Chinese character "如" means "不異"; that is, there is no discrepancy or difference. So, the Chinese character "一" (one) means "不二" (the one and only), and the Chinese term "不二之選" (the one and only choice) means "一" (one), right? Moreover, the Chinese character "如" means "不異" (no difference) but the Chinese character "猶" has the meaning of "仍然"and "還有" (meaning still). The expression "in the same manner as if" is translated into "猶如" while the Chinese term "一如" means "in the same manner as". In English grammar, "as if" denotes an assumption and an unreal past and the past tense should be used, right? "As" means the same, so we can see the difference in the English clause. The Chinese clause appears really strange, right? I really cannot figure out why it has been amended this way.

I do not quite understand if the Law Drafting Division thinks that the word "如" in the Chinese term "猶如" is "still like" and has the same meaning as the Chinese term "一如"? How are the expressions "in the same manner as" (meaning completely the same) differentiated from the expression "in the same manner as if" (meaning still the same)? I do not understand why these two Chinese expressions are separately used in the law drafting process. In the existing provisions …… staff of the Law Drafting Division are not present now but they attended the meetings of the Bills Committee. The original clause uses the Chinese words "須猶如" while the Chinese words "猶如" but not the Chinese word "須" are found in the Bill, right? It is very interesting for the Chinese expression "其適用方式如同……" in the clause to be amended so that the Chinese term "一如" is used. The Chinese proficiency of the staff of the

Law Drafting Division has somewhat improved because it is not easy for them to master the use of the Chinese term "一如". We often use the Chinese expression "一如舊觀"; do you know that the Chinese term "一如" is a Buddhist expression? Many people do not know that. Let us consider the Chinese expression "不二曰一，不異曰如，不二不異，謂之"一如"" (the one and only is called "one" while no difference is called "as"). The two Chinese homonyms "異" and "二" are confusing enough. This is a Buddhist expression, right? Staff of the Law Drafting Division responsible for drafting this clause may understand Buddhist language. As regards the Chinese character "猶", there is a Chinese saying that "天下事，了猶未了" (it seems as though things happening in the world have still not been settled after they have been settled), so the character has the meaning of "仍然" and "還" (meaning still). In another Chinese expression "臣之壯也，猶不如人，今老已，無能為也已" (I was not as well as others in the prime of life and I cannot do anything now that I am old), the Chinese character "猶" also has the meaning of "仍然" (still). Hence, there is no problem when the Chinese words "須猶如" are changed to "猶如", but I do not understand why the Chinese term "一如" is used. I wonder if the Chair understands that for you are definitely more proficient than me in the Chinese language, right?

The manner in which these clauses are drafted really makes the readers puzzled. You may say I am picky and nitpicking, and I just want to deliver talk and discourse, but I have identified this problem concerning the use of the terms "as" and "as if" and the use of the terms "猶如" and "一如" in the Chinese text. The Chinese words "須猶如" and "如同" were used in the past, right? I do not understand why nobody mentioned these word games in the meetings of the Bills Committee. If I were a member of the Bills Committee, I would have had a good talk and exchange poems and couplets with them. Members are asking why these two terms are so changed, right? There is actually a minor difference in the English text, Chairman. If you take a look at Division 5 on "Application of this Ordinance" in the English text, you will find that there is an obvious difference. Those who understand English will be able to identify the difference but I have just sensed it. If changes are made so that the meanings of the Chinese text are adopted, we will really feel confused; the amended provisions are really difficult to read.

So, despite the cumbersome discourse, I must raise this point. You like to quibble over the text; the use of the terms brightens our sight indeed. We like to use the Chinese expression "一如舊觀" (as in the old days) when writing

articles. The Chinese term "不二" (the one and only) is called "一" (one) while the Chinese term "不異" (no difference) is called "如" (as). I thought that staff of the Law Drafting Division were excellent for they knew how to use Buddhist expressions; but we will find on a closer look that they are meaningless.

There is another drafting problem in clause 17. The heading is "Application to unlimited company registered in pursuance of former Ordinance as limited company", but what is meant by "unlimited company registered …… as limited company"? The expression "unlimited company registered as limited company" is very strange. It is just literal translation, right? If we read on …… For example, I am going to establish a company and the accountant may ask me to check the CO first. In connection with application …… if I have established a company of this kind, what should be the scope of application for the original company and that for the limited company registered under the existing CO? Only the accountant can explain these provisions ― he may even not be able to explain them. Hence, people must be more careful and precise in drafting this kind of clauses. It will be dangerous if people regulated by the law do not understand the provisions or there are discrepancies.*(The buzzer sounded)*

This is the end of my discussion on Division 5 and I will speak on other clauses later. Thank you, Chairman.

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

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, after listening to Mr WONG Yuk-man's remarks, I think that what he said is really funny; he is saying that congee with peanuts is just like congee with ground beans (花生猶如地豆粥).

The remarks made by Mr WONG Yuk-man just now really highlighted a problem. I was previously involved in a lawsuit for I was charged with contempt of the Legislative Council, and I found that even the Judge needed to look up words in the dictionary. What is meant by "disturbance"? Even the Judge had no idea. I gave him two dictionaries. Words are important; if the words used are not clear enough, even the Judge needs to look them up in the dictionary ……

CHAIRMAN (in Cantonese): Mr LEUNG, you have spoken for many times, so please strictly observe the Rules of Procedure and speak on the details of the clauses of the Bill.

MR LEUNG KWOK-HUNG (in Cantonese): I understand that. You need not interrupt soon after I have begun to speak.

Chairman, we are now scrutinizing a piece of legislation. Mr WONG Yuk-man spent 15 minutes just now talking about minor matters such as the Chinese terms "猶如" and "一如", thus I am telling Members ……

CHAIRMAN (in Cantonese): Mr WONG Yuk-man has just discussed the contents of the clauses.

MR LEUNG KWOK-HUNG (in Cantonese): I understand that. All clauses are similarly unclear. I wish to explain why Members of the Legislative Council have to make speeches. According to my personal experience, the Judge explained a disturbance which interrupted the proceedings of the Legislative Council after consulting the dictionary. If the words are written wrong, the words chosen after the Judge has looked up the words in the dictionary should be taken as the right words; that is customary law. I am not joking; the Judge even gave the lawyers a good dressing down and asked why others had not ……

CHAIRMAN (in Cantonese): Mr LEUNG, please come to the details of the clauses right away.

MR LEUNG KWOK-HUNG (in Cantonese): I understand that. I tell you, I am very disappointed at your being biased. Do you think that I am talking nonsense because some Honourable colleagues have done so?

I am focusing my remarks on the clauses. You just like to pinpoint me and scold me. Fine, I will speak on the clauses slowly. Clause 214 ― I would

like to say that it is the 14th clause after clause 200. What is clause 214? Chairman, you can look it up slowly; have you found it?

CHAIRMAN (in Cantonese): Please go on.

MR LEUNG KWOK-HUNG (in Cantonese): This clause is about …… Chairman, is there anything wrong with the lights? It seems that I cannot see very well. Is there any problem? Is it because my vision has been affected after my eyes were hurt by the strong spray? Is there anything wrong with the lights here? I found that the lights were particularly dim when I came in this morning.

CHAIRMAN (in Cantonese): I will stop you from speaking if you continue to talk about many things that are unrelated to the clauses.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, honestly, Mr WONG Yuk-man said yesterday that there was something wrong with the air in the Chamber and you sought that out very soon. I cannot see very well. Please come over and take a look. The lights are really dim, and I ask you to sort that out. I am not lying; I suppose the spray was really too strong.

Clause 214 is on "Inspection of special resolution and solvency statement". Why is inspection necessary? Inspection is necessary because people have the right to know, right? Copies are meant for inspection. Before buying a flat, we will visit the Land Tribunal to inspect the relevant documents to ascertain if the seller is the genuine owner, whether there are unauthorized building works, and whether the seller knows if there are unauthorized building works. Anyone can obtain a copy of the plans. That is the work of the Government; otherwise, how can it be accountable? Even though some have said that things have been checked, the person concerned will invite a professional to carry out an inspection even though the professional will not tell him how the inspection is carried out.

Today, we evidently wish to find out if officials or others have unauthorized building works ……

CHAIRMAN (in Cantonese): Mr LEUNG, you have strayed away from the question. Please do not digress from the question anymore.

MR LEUNG KWOK-HUNG (in Cantonese): How can I have digressed from the question? I am just talking about "inspection".

CHAIRMAN (in Cantonese): I will stop you from speaking if your remarks digress again from the contents of the clauses.

MR LEUNG KWOK-HUNG (in Cantonese): I am now discussing clauses 214. Are you disallowing me to speak?

CHAIRMAN (in Cantonese): Mr LEUNG, please do not refute me anymore.

MR LEUNG KWOK-HUNG (in Cantonese): I am not going to speak now and I will just let you speak.

CHAIRMAN (in Cantonese): If you wish to continue to speak, please speak on the details of the clauses.

(Mr Albert CHAN stood up)

CHAIRMAN (in Cantonese): Mr Albert CHAN, what is your point?

MR LEUNG KWOK-HUNG (in Cantonese): I now request a headcount. Chairman, I request a headcount under Rule 17 of the Rules of Procedure. You have gone too far!

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

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

CHAIRMAN (in Cantonese): Members should have heard that Mr LEUNG Kwok-hung blamed me just now for allowing another Member to talk nonsense when he spoke, and he even said that all Members are talking nonsense. For this reason, here I remind Members, especially those who have spoken many times, that they should not repeat themselves and digress from the question when they speak. Otherwise, I have to stop such Members from speaking.

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

(Mr Albert CHAN stood up and indicated his wish to speak)

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

(Mr LEUNG Kwok-hung stood up)

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, what is your point?

MR LEUNG KWOK-HUNG (in Cantonese): You mentioned my name just now. I complained about the lights in this Chamber. What's the problem with that?

CHAIRMAN (in Cantonese): Mr LEUNG, it is not your turn to speak, please sit down.

MR LEUNG KWOK-HUNG (in Cantonese): You mentioned my name just now.

CHAIRMAN (in Cantonese): If you violate the Rules of Procedure again and do not heed advice, I can only forbid you to come in.

MR LEUNG KWOK-HUNG (in Cantonese): Do you need to be so tensed?

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

MR ALBERT CHAN (in Cantonese): Chairman, when I spoke earlier, I said that the Registrar is empowered to instruct a company to change its misleading name and the fine imposed for not complying with his instruction has increased from level 4 to level 6.

Chairman, in many provisions of the Bill, such as clauses 139, 146, 168, 176, 184 and 215, the fine imposed is generally level 4. In other provisions of the original CO, the fine has nonetheless increased from level 3 to level 4, that is, from $10,000 to $25,000. Yet, the penalty concerned basically does not include a prison term.

Matters regulated by these clauses actually have strong implications on the overall operation of a company and the interests of its shareholders. Clause 139, for example, which is related to the issue of share certificate on allotment, requires that a company must complete the certificates for the shares and have the certificates ready for delivery within two months after an allotment of shares. Non-compliance will be liable to punishment.

Clause 146 is about the registration of transfer or refusal of registration. If I have not understood it wrongly, this is a new provision which provides that apart from transfer, a transferee may also lodge the transfer with the company.

If a company fails to comply with this provision, it is liable to a fine at level 4 or a fine of $700 for each day.

Clause 168 is related to the notice of redenomination. Under this clause, a company must deliver a notice in the specified form to the Registrar for registration in relation to the redenomination within one month after passing a resolution under section 167. Failure to comply with this provision is also liable to a fine at level 4 or a fine of $700 each day.

The heading of clause 176 is "Notifying class members of variation". Clause 176(1) states that: "If the rights attached to shares in any class of shares in a company are varied, the company must give written notice of the variation to each holder of shares in that class within 14 days after the date on which the variation is made." This provision is also about the contravention of ……

MR WONG YUK-MAN (in Cantonese): Chairman, sorry, a quorum is not present.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR ALBERT CHAN (in Cantonese): Chairman, I was talking about clause 176 earlier, which is also about a fine at level 4. Clause 184 is related to the notification of class members of variation. This involves the rights of any class of members of a company that does not have a share capital being varied, which is indeed a very important variation. All in all, a company must notify the

relevant class members of variation within 14 days and failure to comply with the provision is also liable to a fine at level 4.

Chairman, I think that the penalties for violation of these provisions are lighter than those imposed on other offences relating to company operation. Take clause 202 as an example, it is about offences regarding solvency statement, which states that: "A director who makes a solvency statement without having reasonable grounds for the opinion expressed in it commits an offence.". Failure to comply with this provision is liable to a fine of $150,000 and imprisonment for two years — the key is imprisonment for two years — or on summary conviction, it is liable to a fine at level 6 and "imprisonment for six months" as expressly provided.

Similarly, clause 223 is about an offence in connection with creditors list, which states that "An officer of a company must not intentionally or recklessly conceal the name of a creditor entitled to object to the reduction of share capital" …… I am not going to dwell on other details. All in all, failure to comply with this provision is liable to a fine of $150,000 and imprisonment for two years, or on summary conviction, to a fine at level 6 and imprisonment for six months.

Chairman, many clauses in the Bill carry penalty provisions, which are either concerned with the failure of a company's officer-in-charge to perform his duty or to act in compliance with the provisions. The majority of people — I dare not say all — who are affected are company members other than those at the management level. In other words, this is about the failure of the management to properly do something due to administrative negligence or omission. Nonetheless, I do not dismiss some special circumstances ……

(Mr LEUNG Kwok-hung stood up)

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, what is your point?

MR LEUNG KWOK-HUNG (in Cantonese): According to Rule 17(3) of the Rules of Procedure ……

CHAIRMAN (in Cantonese): Are you requesting a headcount?

MR LEUNG KWOK-HUNG (in Cantonese): If the attention of the Chairman is drawn to the fact that a quorum is not present ……

CHAIRMAN (in Cantonese): That will do, Mr LEUNG Kwok-hung, I know what your request is.

MR LEUNG KWOK-HUNG (in Cantonese): …… he shall direct the Members to be summoned. Please enforce the Rules of Procedure.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR ALBERT CHAN (in Cantonese): Chairman, I mentioned just now a number of penalty provisions on notification or administrative arrangements which are punishable by a fine at level 4. I consider that the penalty level is too low. Let us look again at some of the provisions which involve the issuance of notice after the rights of company members are varied. The examples are clauses 176 and 184. The heading of clause 176 is "Notifying class members of variation", which involves the rights attached to shares in any class of shares in a company being varied. Clause 184, on the other hand, involves the rights of any class of members of a company that does not have a share capital being varied. Variation of rights is an important issue, which may bring about either most minor or very serious implications.

Delay in notification of variation may be caused by special reasons or factors, or probably the procurement of advantages by administrative personnel or other staff. I am not familiar with the relevant economic activities and commercial operations, but as there are provisions requiring a company to give notice of such variation within a certain time limit, this is certainly very important. While the reason for the company's failure to comply with the relevant provision is complicated, I will not rule out the possibility of fraud. And yet, as Members may be aware, it is very difficult to adduce evidence in the business world. A company may argue that it has forgotten to give notice, or a notice was not issued due to the mistake of a staff member. We cannot rule out the possibility that there are other ulterior motives.

These provisions are actually as important as clauses 202 and 223. The only difference is that clauses 202 and 223 carry a prison term. The actual implication of a failure to comply with the notification requirement under clauses 176 and 184 is as serious as the offence relating to solvency statement as prescribed in clause 202. Clause 202 states that "A director who makes a solvency statement without having reasonable grounds for the opinion expressed in it commits an offence.". Comparing this with the abovementioned clauses, the damage done to or actual implication on the affected people is more serious under this provision. And yet, the penalties are significantly different. While clauses 202 and 223 carry a prison term, the clauses mentioned have not proposed any imprisonment term.

Chairman, you can see that the rest of the Bill is the same and so I am not going to go through them one by one. The clauses which I am going to talk about also involve dozens of similar scenarios. We can therefore see that the Government is usually more lenient towards mistakes explicable from an administrative perspective. Unless the mistakes genuinely involve deception or even fraud, or are made on purpose or with intent, administrative mistakes are not liable to imprisonment even if they have brought significant gains to the people concerned. The same is true of offences the gravity of which is actually greater than offences punishable by imprisonment. From this, we can see that the Government has been biased in formulating the penalty provisions of the Bill.

I nonetheless consider this the long-standing practice of the SAR Government, which imposes lighter penalties on white-collar offences. A member of the public may be imprisoned for stealing a bag of bread costing less

than $10, but offences that may lead to heavy losses of investors or shareholders are only liable to a fine at level 4. I wish to express my regret and strong dissatisfaction over the Government's biased attitude or special leniency given to white-collar offences, and I wish to put this on record.

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

(Mr LEUNG Kwok-hung stood up)

MR LEUNG KWOK-HUNG (in Cantonese): According to Rule 17(3) of the Rules of Procedure, I request a headcount.

CHAIRMAN (in Cantonese): I have heard your request. Will the Clerk please ring the bell to summon Members back 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.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I am going to talk about clause 214, which should have been discussed earlier on.

The Bill is largely divided into three parts, and this clause requires that a company, that is, an operating company, must ensure that "the special resolution for reduction of share capital and the solvency statement made in relation to it" are kept. These are the two most important points.

Will a company's solvency be reduced subsequent to the making of a special resolution for reduction of capital share? A statement must be made for this purpose. Without this statement, no one knows what has happened. What should the company do if someone wants to know about it? It should "keep the special resolution at its registered office".

What will be the company's repayment ability subsequent to the making of a resolution for reduction of capital share? Will it lose the ability to make subsequent arrangements for the reduction of capital share after making the relevant resolution? Is it still capable of doing so? The statement made by the company must be "kept at its registered office or at a place prescribed by regulations made under section 648 for the period — (a)" — the clause then provides for the timing — "beginning on the day on which the company — (i) publishes the notice under section 213(1); or (ii) if earlier," — that is "beginning on the day on which the company publishes the notice under section 213(1)" — "first publishes the notice or gives notice to creditors under section 213(2)". Three requirements are mentioned in this clause.

This so-called new clause is actually based on similar provisions in the original CO, namely sections 49M(5) to (7), which state that a private company can buy back its shares out of capital under sections 49K to 49O of the CO. To minority shareholders or investors, this is certainly a very important decision. It is impossible to understand the justification behind this provision if it is read out in this way.

A private company buying back its shares out of capital according to those two provisions of the original CO (which means buying back its own shares with its own money) is indeed a common practice in the stock market. We often learnt from television reports that some people had increased their shareholdings of their own company, and this is how they do it.

Chairman, if there is no way for other people to be informed of an incident with such far-reaching implications …… They may not necessarily be members of the public, but can be shareholders, that is, minority shareholders …… Therefore, both the Bill and the original CO have specifically provided for the way in which other people will be informed of the event, in clauses 214(1)(a)(i) and (ii) which I have mentioned earlier. Subclauses (i) and (ii) are the two provisions that specify the day on which a company should begin to keep the relevant information.

Clause 214(1)(b) also provides that the records should be kept "for the period ending 5 weeks after the date of the special resolution", which means that the company no longer needs to keep the records five weeks after the date of the

special resolution. This undoubtedly brings about another issue, that is, the length of the period.

What is the point for the companies to keep these records if they cannot be inspected by other people? Therefore, the provision also states that: "The company must permit a member or creditor of the company to inspect the special resolution and solvency statement without charge during business hours in that period." This is specified in the provision.

Of course, the provision is reasonable in that the day on which a company should begin to keep the relevant records is specified, and so is the ending date. However, it would not be justified if inspection is not permitted. This provision is targeted at two kinds of people: "The company must permit a member or creditor of the company" …… The information is actually not made public, but can only be inspected by the relevant parties, which is reasonable.

What will happen if a company fails to do so? Clause 214(3) specifies that, "If the company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.".

Chairman, this is the penalty. The entire period is a total of five weeks and five weeks means 35 days. How much is the fine if we multiply $1,000 by 35? This is simple arithmetic and the answer is $35,000. In other words, if a company insists on not to comply with the provision, it will be liable to a mere fine of $35,000 in the end. What is more, the fine at level 5 is not only light, but also one-off. Can Members tell me what purpose this clause 214 will serve?

When proposing amendments to clause 214, the Government did not …… The clauses under discussion do not have any proposed Committee stage amendments (CSAs). In my opinion, if a company contravenes clauses 214(1) and (2) by failing to keep the special resolution and the solvency statement, or enable a member or creditor of the company to inspect them within the time limit as specified in the law, it is serious non-compliance and may lead to very serious consequences in the modern business world. Therefore, the authorities should refrain from: firstly, not imposing a prison term, and secondly, imposing a daily

fine of $1,000 for continuous offence for the amount is really terribly low. Just as I have said, multiplying $1,000 by 35 only equals to $35,000, which means that a company can shirk its responsibility by paying only $35,000.

I think that if a company fails to act in accordance with the relevant provisions, it would be best to render the relevant special resolution invalid, which thus obviates the need for inspection. So long as a member or creditor of a company is not informed, the punishment for such non-compliance is the invalidation of the relevant resolution, regardless of what decision was made by the company. Once the resolution is invalidated, the solvency statement will also become meaningless. Why did the Government fail to understand such simple logic? This is tantamount to my delivery of speeches here. If it is not in order, the Chairman can throw me out of the Chamber. This is permitted and has deterrent effect. If the Chairman says, "No, Mr LEUNG, you may go on with your speech", there will be no deterrent effect at all. This is the point.

By rewriting the whole CO, the authorities have coped with changes by remaining unchanged or deemed the *status quo* as changes. Why? Because we raised a number of issues for discussion …… In fact, I have also read a government paper on rewriting the CO, which is called, the Second Phase Consultation of the draft Companies Bill, but there is no mention of this issue.

Our principle is that, if the non-compliance by a company affects other people, such as the company's member and creditor as stated in the provision, we should not stop it by simply imposing a fine or continuous fine. This is because in the business world, fines have already become a part of the cost. If the Government is genuinely mindful of resolving the problem, it should permit anyone to make an application for invalidation of the special resolution.

In other words, the authorities should establish an expedient and convenient mechanism to handle these cases. They may, for example, establish an independent committee similar to the Competition Commission, which can help save the need to bring proceedings to the Court. Or, they can establish a commission or assign a public officer from the Civil Service to take charge of the cases. This will obviate the need for litigation. Like the Summary Offences Ordinance, it provides that so long as a case has *prima facie* evidence and the

non-compliant company is unable to defend, the resolution will be automatically invalidated.

We have pointed out time and again that, regarding this issue, there are two important principles: Firstly, to do something as if nothing has been done; and secondly, to pay a heavy price for what has been done. Chairman, regarding this issue, I think what Secretary Prof K C CHAN should consider is: If it is not the genuine wish of the authorities to send the offenders to prison, or to put any businessman behind bars because of doing business, then the actions of businessmen should be ……

(Mr Albert CHAN stood up)

CHAIRMAN (in Cantonese): Mr Albert CHAN, what is your point? Are you requesting a headcount?

MR ALBERT CHAN (in Cantonese): Chairman, not many Members are listening to the speech of Mr LEUNG Kwok-hung. It will not be so quiet if more Members are present.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR LEUNG KWOK-HUNG (in Cantonese): Therefore, Chairman, in my opinion, the Government should establish a mechanism under which the special resolution and solvency statement will be automatically invalidated if a company fails to give notice or stops the relevant parties (members and creditors of the

company) from inspecting the records. Another approach is to adopt a tiered system: On first conviction, the relevant documents will be automatically invalidated. On second conviction, the company concerned should cease to exist. On third conviction, people who are involved cannot serve as directors. The punishment is very severe. Will anyone complain under strict laws and heavy penalties? I am sure you know the answer.

Therefore, Chairman, it is crazy for the authorities to enact legislation to impose a slight monetary penalty in an attempt to stop law offenders from grabbing hefty profits. Worse still, this is technically not viable. I hope that Secretary Prof K C CHAN will see my point. This is a long-overdue legislative amendment of the CO, so we should not miss the opportunity. Besides, the Government needs to improve the system by absorbing divergent public views, but not to absorb Members' views with a view to absorbing their votes. Thank you, Chairman.

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

(Mr WONG Yuk-man rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr WONG Yuk-man, speaking for the eighth time.

MR WONG YUK-MAN (in Cantonese): I talked about Part 2 earlier on, and now I am going to discuss Division 3 on companies register. This part contains three provisions from clauses 26 to 28 and amendments are being made to clause 26. I will speak again when the relevant amendments are discussed. Now, I will mainly focus on clause 27.

Clause 27 is an updated version of section 348B of the original CO, and subclause (1) is a change made in the light of technological advancements. At present, the Registrar may destroy or dispose of any document which has been microfilmed or recorded by the imaging method or any other method. As

Members may be aware, who will use microfilm nowadays? With technological breakthroughs, especially the integration of communication technology and television, we can now find whatever we want using our mobile phones. Nowadays, documents are no longer recorded in the form of microfilm alone. Therefore, in clause 27(1), the reference to microfilm has been removed and is changed as "The Registrar may destroy or dispose of any document delivered to the Registrar for registration under an Ordinance if the information contained in the document has been recorded by the Registrar in any other form for the purposes of section 26(1) or for the purpose of a register of companies under the predecessor Ordinance.".

Furthermore, subclause (2) provides for the "at least 7 years" requirement, which states that "If a document or certificate has been kept by the Registrar for at least 7 years for the purposes of section 26(1) or for the purpose of a register of companies under the predecessor Ordinance, the Registrar may destroy or dispose of the document or certificate.". Regarding this "at least 7 years" requirement, clause 27(2) and the original section 348B are similar. Both clauses 27(1) and (2) have clearly set out the purpose of keeping relevant records by the Registrar. Compared with section 348B(b) of the original CO, this is undoubtedly an improvement.

Contrarily, new clause 27(3) is more controversial. It states that "If the Registrar is required by section 46 not to make any information available for public inspection, the Registrar is not required to keep a record of the information for any longer than appears to the Registrar to be reasonably necessary for the purpose for which the information was delivered to the Registrar." In fact, this new provision has made reference to section 1087(3) of the Companies Act 2006 of the United Kingdom. This is not in the existing law. The CO is silent on how the Registrar should handle a record of information not required to be made available for public inspection. This clause adds a new provision to clarify that the Registrar is not required to keep such information for longer than necessary. This is the problem. Since section 46 mentioned therein only applies to information not required to be made available for public inspection, it is possible that the information can be inspected by other relevant parties (such as the Court). Will the scope of clause 27(3) be too wide then? Let us think about this, "……

the Registrar is not required to keep a record of the information for any longer than appears to the Registrar to be reasonably necessary for the purpose for which the information was delivered to the Registrar." In other words, it has a wider scope. Clause 27(3) has, in particular, empowered the Registrar to define the length of time. How should he define it? So long as the time is "reasonably necessary for the purpose". What is the yardstick for "reasonably necessary for the purpose"? Clause 27(3) has empowered the Registrar to define it.

Yet, is it possible to consider setting the shortest period for keeping a record of information where section 46 applies? There should at least be a yardstick, right? While the "at least 7 years" requirement is specified in the last subclause, how about in this subclause? The authorities should consider setting the shortest period for keeping a record of information and clearly specify what is meant by "reasonably necessary for the purpose". The present drafting is too ambiguous, right? At present, information is not required to be kept for any longer than the period which the Registrar deems reasonably necessary for the purpose — the "purpose" here refers to the requirement of section 46. The period reasonably necessary for the purpose as referred to in section 46 is determined by the Registrar, but this is ambiguous. Therefore, is it possible to consider setting the shortest period for keeping a record of information where section 46 applies and present clause 27(3) in a much clearer way? This is our views on clause 27.

Regrettably, I am not a member of the Bills Committee. I have some information on hand, from which Members can see that, strangely enough, when the Bills Committee discussed the part on the companies register, members did not express too many views. This is because up to this part, that is, Division 3 of Part 2, the provisions are like a prologue and involve principles, whereas those in the latter parts are more specific. Perhaps this is the reason.

Furthermore, when we discuss Part 2, we also have to discuss clause 28 concerning the companies register. Clause 28 has made reference to section 22C of the principal Ordinance, which requires the Registrar to keep an index of the names of every company. Section 22C of the principal Ordinance specifically requires that the names of companies must include companies

incorporated outside Hong Kong in compliance with section 333. Chairman, a quorum is not present.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR WONG YUK-MAN (in Cantonese): Chairman, let us come back to the register, which is very important.

Earlier, I said that clause 28 has made reference to section 22C of the principal Ordinance, which requires the Registrar to keep an index of the names of every company. Section 22C of the principal Ordinance specifically requires that the so-called Index of Company Names (the Index) must include company incorporated outside Hong Kong in compliance with section 333. However, as the Bill has streamlined the classification of companies, thus clause 28 only requires the Index to include all companies. The Index is certainly very important. What other advantages does it have apart from recording the names of companies registered in Hong Kong? It is a record or database from which different types of companies can be found. Apart from recording the names of companies registered in Hong Kong, it also serves as a guideline to companies to be set up.

Chairman, why did I say so? Because clause 95(1)(a) prohibits a newly set up company to use a name that is the same as that appearing in the Index. Just as I said yesterday, I intended to register a company as a limited company under the name of "Pan-democrats" before conducting a search. While this is governed by the original section 22C, we will have to search the Index in

pursuant to clause 28 after this new provision is enacted. In other words, I have to look up the Index. So, how will "Pan-democrats" be classified under the Index? This is a very interesting question. How about companies set up by political parties and registered as limited companies?

The Index issued by the Government must comply with clause 95(1)(a), which prohibits a newly set up company to use a name that is the same as that appearing in the Index. If I have registered a limited company by the name of "Pan-democrats", then no other company is allowed to register any limited company by the name of "Pan-democrats". The Index was compiled to facilitate people setting up new companies in conducting a search. This is the best guideline. When I taught my students how to write an academic article, I would first teach them how to compile an index, which is very important. Since computers were not widely used back then, cards were used instead. Even if a student was only required to write a simple article of about 5 000 words, we would teach them how to compile an index properly.

In that case, there is a need to improve the Index indeed. The original section 22C is too simple, which only requires the Registrar to keep an index of the names of every company. In view of the huge number of companies now, it is necessary to streamline the classification of companies to facilitate public inspection. This is very important.

Thank you, Chairman.

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

(Mr Albert CHAN rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr Albert CHAN, speaking for the tenth time.

MR ALBERT CHAN (in Cantonese): Chairman, I mentioned earlier that many penalty provisions are biased. Now I would like to switch to another topic and discuss the purchase of own shares out of capital, which is related to clause 254.

Chairman, our discussion has been making good progress and one third of the provisions has been examined.

Clause 254 comes under Subdivision 6 "Payment for Share Redemptions and Buy-backs", which is placed under Division 4 "Share Redemptions and Buy-backs". Division 4 has a lot of clauses, but I would like to talk in particular about clause 254, which is related to the need for a company's solvency to be verified in an auditor's report and the need for an independent assessment of a company's financial ability.

Chairman, as far as I understand it, under the existing CO, the general rule is that a company can buy back its shares only using distributable profits or proceeds of a fresh issue of shares. However, if my understanding is not incorrect, the new clause provides that all companies are permitted to buy back their shares out of capital so long as they comply with the solvency requirement. The question thus lies in the solvency statement. When the directors or board of directors make a certain decision, they will certainly claim that they have the solvency. Clause 254(1) also states that "All directors of the company must make a solvency statement that complies with Division 2 in relation to the payment out of capital.". Chairman, the key of this provision is the word "statement". When the directors make a statement, they must also produce certain information to substantiate the statement. Yet, the provision has not set out how detailed the relevant information or evidence should be and whether there is any special requirement.

According to the Government, a solvency statement does not require any verification by the auditors. I will now quote the justification given by the Government: "We consider that there is no need to impose the requirement of attaching the auditors' report to the solvency statement. Auditors would not be in a better position than the directors in ascertaining the company's solvency which involves forward-looking business judgments. Directors should be expected to have reasonable grounds in forming their opinion as to the company's solvency and judgment in deciding whether professional assistance is needed. Requiring an auditors' report in every case would add expense and cause delay for relatively little gain."

Chairman, obviously, the Government has made consideration from the interests of directors or companies. And yet, the Bill does uphold certain principles right from the beginning of the drafting process. The first principle is transparency, which we have mentioned time and again. The second principle is how the interests of directors and shareholders can be balanced, and the proper balance of interests is very important.

Nonetheless, as we can see, the explanation of the Government and clause 254 is obviously skewed. Just as I have criticized time and again, the penalty provisions were drafted hastily to carry a fine at either level 3 or level 4. As for the present arrangement, the Government has apparently considered that we should have trust in the directors, right? And yet, buy-back by payment out of capital does not mean the directors buy back the shares out of their own pockets. They are only required to make a solvency statement but not any other independent professional assessments. This is a biased arrangement.

In the past, there were very few problems relating to large corporations. However, in the United States, the United Kingdom and Europe, problems relating to the financial operation or information dissemination of large corporations are pretty common, especially in large-scale investment companies. In past debates on other Bills, I mentioned an organization in the United States similar to the Securities and Futures Commission. It can impose a heavy fine of as much as millions, tens of millions or even billions of dollars on non-compliant companies. Large-scale investment companies usually conceal their information or provide misleading information, and there was a similar scandal in the United Kingdom recently.

Therefore, we cannot entirely trust the directors' solvency statement. Just as the Government has said, the solvency statement involves forward-looking business judgments. Buddy, the phrase "forward-looking business judgments" is open to different interpretations. When the directors want to pay out of capital, they can say whatever they like, right? If the directors consider necessary or want to put forward certain proposals, they may trumpet for the prosperous development and rosy future of the company, which will inevitably involve a conflict of interest, right? The actual solvency, however, may not be as sound as the directors have claimed. We have noted many similar problems in some estate cases that happened sometime ago.

I think that it is unfair to the minority shareholders if the Bill does not provide for any mechanism for them to verify the solvency statement. Buying back shares out of capital will have a direct effect on the interests of investors and minority shareholders. And yet, just as the Government said, requesting a report for each statement would either cause delay or incur expensive fees. Having said that, are we not allowed to establish a special mechanism for this purpose? For "payment out of capital", for example, it can be specified that a company must accede to the request made by minority shareholders of a certain percentage or more. Of course, if the amount involved is negligible, the actual effect will also be minimal even if there is deception or fraud. However, if the payment out of capital involves a large sum of money, it would be reasonable to accede to the request made by a certain percentage of minority shareholders, whose interests might be affected by such payment. It would therefore be essential for the minority shareholders to verify what the directors' claim, as well as the financial information and solvency statement provided by the directors. Chairman, the greatest problem is that what the directors said may be empty words, and it is merely a statement of the company's solvency.

Chairman, in my opinion, it is very likely — I did not say certainly — that the provision is biased. Although the old saying "Nine out of ten businessmen are unscrupulous" may not necessarily be true, it applies pretty well in the investment or business market. Given that laws are made to balance the interests of various parties, the authorities should reasonably protect the interests of minority shareholders and accede to their requests under special circumstances or cases with serious implications. Let me cite an example. If the minority shareholders consider that this is a special circumstance and request an independent assessment report out of reasonable doubts, I think that there is no reason for the Government to turn them down.

Chairman, we can therefore see that the Bill is flawed. Just as I have said time and again, this Bill is very complicated and affects some 900 000 companies of different scales. Noting that there are provisions providing specifically for the financial operation of companies, omission and bias are therefore inevitable. As the Bills Committee has to complete the scrutiny work within a short period of time, it may not be able to take heed of different views, especially those of minority shareholders, who are not represented by any organization or interest group. I think that this is an imperfection of the Bill.

Chairman, I request a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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 to speak.

MR ALBERT CHAN (in Cantonese): Chairman, just now I was talking about the making of solvency statement in relation to payment out of capital, which was also mentioned in the subsequent chapters. I wish to mention in passing that a company must give notice of the relevant decisions. If it fails to give notice as required, it is liable to a fine at level 3. But this does not carry any imprisonment term. I wish to point out again that the penalty for these white-collar offences is too light.

Chairman, another special provision is clause 258. According to this clause, a creditor — including a member of the company — may apply to the Court of First Instance for this purpose. If the Bill is drafted in the way as suggested by me earlier, and that all companies are required to provide either clear independent financial assessments or independent auditors' recommendation reports, the relevant information should be more specific and the number of litigations would be reduced. Therefore, should there be good preparatory work and should reasonable requirements be imposed to enable the minority shareholders to verify a company's financial information and financial ability under special circumstances, I believe the number of litigations, doubts about information or damage of interests could be minimized.

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

(Mr LEUNG Kwok-hung rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, speaking for the seventh time.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, this time I am going to speak on clause 104 of the Bill. Clause 104 introduces an amendment which changes the past practice of making appeals only to the Court to appealing to the Administrative Appeals Board (AAB). Such an amendment has both pros and cons. If there is no need for the matter to be handled by the Court, the cost will certainly be lower. However, if it is only left to the AAB to handle, whether it can achieve the same effect of having the matter handled by the Court is considerably doubtful. Why? Clause 104 provides that the Registrar may direct a company to change a misleading or offensive name. The Registrar may give a direction if he is of the opinion that a certain company's name is misleading or offensive — there are two aspects in this point. The famous minibond incident is obviously misleading. Our Chief Executive "covetous Donald TSANG" has said in the Legislative Council that those are not bonds, which shows that the minibond incident is misleading. The CO does not apply to it because it is not a company. It is just a derivative product. Judging from this, the Registrar should be given the power to direct companies to change names which are deceptive or misleading.

What is meant by an "offensive name"? Different people will have different views on this. What is meant by "offensive"? In a commercial society, if the Registrar has the power to direct someone to change a certain name simply because he considers it offensive, I think it is not at all consistent with — not business reasons, but freedom of expression. That means what names I can use to present my company. Regarding the problem with registration of societies under the law, given the time needed for registration of societies and the numerous regulatory measures and restrictions or complicated procedures under the Societies Ordinance, for the sake of convenience, many political organizations or community groups will work in the same way as though it is a convention. Since there is so much trouble, it is better having it registered as a company because a registered company can also act as a body corporate to carry out activities. In that case, under clause 104 of the Bill or the existing CO, the future or incumbent Registrar may make an order on the grounds that a certain name is offensive …… such a practice can be regarded as a historical product. Originally, it is a society. Later, it turns out to operate as a company. The

purpose is not to manage the society in a more convenient way, or to handle the society's affairs and finance separately so as to be accountable to its members or the public. On the contrary, owing to special political circumstances, a society which originally does not involve financial or business operations turns out having to operate as a company. In other words, so long as this ordinance provides for regulation on names which contain offensive wording, the Registrar can, as a matter of course, order the person concerned to cease using a company name on the grounds that the name is offensive.

In that case, what will happen? According to clause 104, "The Registrar may by notice in writing direct a company to change a name by which the company is registered under this Ordinance or any former Companies Ordinance if —", and then it reads, "(a) the Registrar is of the opinion that the name gives so misleading an indication of the nature of the company's activities as to be likely to cause harm to the public; or (b) the name is a name by which, as at the time of the registration, the company must not be registered because of section 95(1)(c) or (d).". Regarding these two provisions, I find paragraph (a) reasonable. As I said earlier, this is reasonable if the nature of the company's activities is misleading. Yet another problem is, as I have just said, the way things work is compelled by the circumstances. When a lot of community groups, political bodies or organizations which do not do business at all are registered as companies in view of the problem with the Societies Ordinance, the Registrar can really give a direction for change by virtue of clause 104(1)(a) or the former CO. For example, the Democratic Party or the DAB — I do not know if they are registered as a society or a company — yet what they do is different from a company's operations but they may be requested to change their names to a company name or other names. This is a very big loophole.

I understand that we are not supposed to discuss this now. Let me talk about another problem. That is, the Registrar may exercise his statutory power merely to point out that the company name is offensive, rather than on the grounds that the company name falls short of the reality. Another problem is, in cases where some people, for historical and political reasons, register and name a company under the CO and thus obtain a legitimate legal personality to carry out activities, the Registrar may exercise his power to direct them to change the name. The situation is the same.

If there are such problems, what should be done? Clause 104(2) of the Companies Bill contains the relevant requirements. "The company must comply with a direction within the period of 6 weeks after the date of the direction or, if the period is extended under subsection (4), within the extended period." Then there is clause 104(3): "A company may, within 3 weeks after the date of a direction, appeal to the Administrative Appeals Board against the direction." This is the change I mentioned earlier. Under the former CO, the appeal can only be lodged with the Court, and there is no appeal board. Such a practice has both merits and demerits. The merit is that if the appeal is lodged with the AAB, there will be no need to go through the procedures in court. That means it may not be necessary to undergo the complicated litigation process, and there is no need to hire any legal representative to appeal against the Registrar in court either. In this way, the cost can be reduced and the workload of the Court can be relieved as well.

The question remains, what actually does the AAB do? What is the composition of the AAB? Is it credible? Is there a certain code of conduct which requires certain acts to be done or not to be done? I cannot see any at the moment. Maybe it is in black and white, but I do not know. The merit is that there is no need to go to court, so there is no need for people who fight for certain rights to spend money. Nevertheless, there is a disadvantage. If the AAB is biased, it will lose the independence from the political regime and the neutrality which the Court enjoys and it will be unable to perform the check and balance inherent in the separation of powers on administrative decisions. On this issue, to set up the AAB, the Administration must make certain stipulations on the composition, terms of reference and authority of the board during the legislative process. Otherwise, while a tiger is barred from entry at the front door, a wolf comes in through the back door; although the cost and time can be saved, we may lose the better mechanism which requires payment under the former ordinance.

Up to this point, what is the problem as a whole? The clause which I read out just now provides that when the period is about to expire, the Registrar may, before the end of the six-week period after the date of the direction, extend the period by notice in writing. This is reasonable. However, the problem is that the power to decide whether to extend the period or not rests with the Registrar,

and the law makes no provision for any rules in relation to the Registrar's conduct or decision. In the event of non-compliance with the Registrar's direction after all the procedures are completed, what will happen? "If a company contravenes subsection (2)", that means it does not comply with the Registrar's direction to change its name, "each is liable to a fine at level 6 and, in the case of a continuing offence, to a further fine of $2,000 for each day during which the offence continues." Chairman, this is back to the unique historical environment which I talked about at the start.

To a consortium or business organization, such costs are not too high and are predictable. If a certain degree of misleading presentation can enable someone to continue to gain advantages, a mere amount of $2,000 or a fine at level 6, which means an increase from $25,000 to $100,000, is insignificant. However, if the Democratic Party, April Fifth Action, League of Social Democrats, DAB — I do not know if that is the case for the DAB — these small operations have to register as companies owing to the tilt of the Societies Ordinance, it is really a big deal to property buyers.

It is very simple. Suppose when the election is drawing near, the Registrar suddenly says, how does the League of Social Democrats work for society and democracy? It cannot be seen from its political platform. This is misleading and offensive. Can democracy be championed by you? It is indeed offensive! He asks me to change it. I say I will not change it because an election is coming soon. If it is changed, there will be big trouble. A fine at level 6 is $100,000, coupled with a further fine of $2,000 for each day. How can I run in the election? Hence, the law is impartial. It is more impartial to the rich and less to the poor. How should the law be made? I always consider that everyone is equal before the law. The rich should pay more while the poor should pay less. There should not be any privilege in judicial proceedings. Instead, the punishment should be proportionate. Thank you, Chairman.

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

(Mr WONG Yuk-man rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr WONG Yuk-man, speaking for the ninth time.

MR WONG YUK-MAN (in Cantonese): As the saying goes, "No true man of genius would condescend to associate with imitators of cocks and dogs."[1] A leaflet which has just been published uses this as its heading. The whole team of LEUNG Chun-ying is loosely arranged and bankrupt of integrity. Paul, you are really lucky ……

CHAIRMAN (in Cantonese): Mr WONG, please do not stray away from the question.

MR WONG YUK-MAN (in Cantonese): …… Let us talk about the Registrar's powers under Division 4 of Part 2. Here it is mainly about the Registrar's refusal to accept ……

(Mr Albert CHAN stood up)

CHAIRMAN (in Cantonese): Mr WONG, please hold on. Mr Albert CHAN, are you requesting a headcount?

MR ALBERT CHAN (in Cantonese): The Registrar's powers is an important subject. It will be better if more Members can listen to him. Chairman, please do a headcount.

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

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

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1 <http://www.en84.com/article-2528-1.html>

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

MR WONG YUK-MAN (in Cantonese): I would like to talk about Subdivision 2 of Division 4 of Part 2, which is also about the Registrar's powers. Division 5 is "Registrar's Powers in Relation to Keeping Companies Register". This part is quite interesting. It concerns the Registrar's powers to refuse to accept and to register documents. The original provision is section 348.

We can note from clause 33 …… actually this part consists of three clauses, namely, clauses 33, 34 and 35 …… there is a relevant amendment to clause 33, so …… I was wrong. There are actually four clauses, which are clauses 33 to 36. Since there is a relevant amendment to clause 33, I shall leave the discussion on it until the debate on the amendment. As clause 33 of the Companies Bill is also about the arrangements in respect of the Registrar's powers to refuse to accept and to register documents, these three clauses should be discussed together. Nevertheless, it may be discussed again during the debate on the amendment.

Clauses 33 and 35 come from section 348 of the original CO. Section 348(1) provides for the justifications for the Registrar to refuse to register a document or refuse to accept a document for registration. The original provision reads (I quote): "The Registrar may refuse to register or accept for registration any document delivered to him under this Ordinance if it appears to him that —", there are three conditions, "(a) the document is manifestly unlawful or ineffective; (b) the document is incomplete or altered; or (c) any signature on the document, password included with the document, or digital signature accompanying the document, is incomplete or altered." This is section 30 of ordinance No. 12 of 2010.

This section becomes the present clause 33. Basically, there has been no big change in the process. Let us look at clause 33 again, that is "Registrar's Powers to Refuse to Accept and to Register Document" in Subdivision 2, which specifies the documents which the Registrar may refuse to accept or register and what such documents are. Compared with the three conditions mentioned just now, the requirement in clause 33 is more general, which has been rephrased as "unsatisfactory". In short, "unsatisfactory" should be deemed as not satisfying

the requirements of the CO. Otherwise, what requirements are not satisfied? Of course it refers to not satisfying the requirements of the CO.

Clause 34 is a new clause which empowers the Registrar, while waiting for further particulars …… regarding what is meant by "further particulars", let us go back to clauses 33(2) and 33(3). The Registrar may request that a fresh document be delivered to replace an unsatisfactory document. New clause 34 empowers the Registrar to withhold the registration of an unsatisfactory document pending such a condition and request the person submitting the document to adopt remedial measures within a specified period. Clause 34 also provides certain flexibility which enables the Registrar to play a more active role in dealing with registration of unsatisfactory documents. What does it mean? Apart from the existing power to refuse to register a document under section 348 of the CO, the Registrar may withhold the registration of the document and point out that the document fails to satisfy certain requirements. Yet there is one problem. Under the existing provision, that means under section 348 of the CO, it can be handled this way when a person's application for registration has been rejected. However, now section 348 provides that the aggrieved registrant can appeal to the Court only under sections 348(3) to 348(4). Section 348(3) clearly provides that "Any person aggrieved by a decision of the Registrar under subsection (1) or (2) may, within 42 days of the decision, appeal to the court against the decision and the court may, subject to subsection (4), make such order as it may deem just, including an order as to costs.".

In the Bill, the relevant contents are specified in clauses 35(1), 35(2) and 35(3) instead. Clause 35(1) provides, "If a person is aggrieved by a decision of the Registrar to refuse to register a document under section 33(2), the person may, within 42 days after the decision, appeal to the Court against the decision.".

Let us look at the original provisions again. If anyone feels aggrieved, he can appeal to the Court only under section 348, but the question is, sometimes the problem involved is relatively minor. Why lodge an appeal? What about the legal costs? In the end, it may add to the financial burden of the company concerned. It may also waste the resources of the Court in dealing with mere trifles.

As a result, in rewriting the Registrar's powers to refuse to accept and to register documents, clauses 33 and 34 provide certain flexibility. If an

aggrieved registrant wishes to file an appeal under section 348 for something minor, he may waste the resources of the Court. Hence, it is acceptable for clauses 33 to 34 of the Bill to provide certain flexible arrangements.

In the actual operation …… Chairman, a quorum is not present.

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

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

CHAIRMAN (in Cantonese): After Mr WONG Yuk-man has finished his speech, I will suspend the meeting to give Members a break. Please stay in the Chamber in the remaining few minutes to obviate the need to ring the summoning bell again, which will waste Members' time. Mr WONG Yuk-man, please continue.

MR WONG YUK-MAN (in Cantonese): Chairman, just now I was talking about the actual operation, saying that clause 34(b) brought up a question. What impact will the deadline set by the Registrar for the submission of supplementary information have on the registration period of the original document? Clause 34(b) empowers the Registrar to request the registrant to submit information within a period specified by the Registrar in his consideration to exercise the powers under section 33. Of course, the said "period specified by the Registrar" does not refer to the registration period of the original document, but will the "period specified by the Registrar" replace the registration period of the original document? This is a reasonable deduction. Thus I consider that the Bill should make a clearer stipulation in this regard.

Besides, clause 34(b)(iv) empowers the Registrar to request the registrant "to comply with other directions of the Registrar". The scope covered is very broad. Is there a need to confine the so-called "directions"? What do such directions refer to? Hence, it is necessary to confine such directions to those related to the registration of documents. At least it should be prescribed in the

provisions that such directions cannot exceed the Registrar's functions. Only then will it be a fair and more reasonable arrangement.

Let us look at clause 35 again — when I talked about the original provisions earlier, I briefly mentioned that there is a slight difference — clause 35 of the Bill provides that the aggrieved person may appeal to the Court of First Instance (the Court) within 42 days after the decision under clause 33 is made. This follows the approach in section 348(3) of the existing CO. As I said when I talked about the relevant provisions earlier, the right to appeal to court is the last safeguard which the CO must provide to the aggrieved persons. For this reason, we will support clause 35.

However, as the Court needs to deal with numerous cases, it will take quite a long time for a case to be set down for trial, and usually an ordinary case will take more than two months. Thus, it is indeed a bit unrealistic to rely on the practice to appeal to the Court of First Instance under clause 35. First, the legal costs are high and it is time-consuming. Second, it will add to the burden of the Court while the cost paid by society is also substantial.

Hence, I think that the Secretary may as well consider adopting administrative measures to resolve this problem, that means handling it not through judicial proceedings. The aggrieved person may appeal within 42 days, but this kind of civil cases will last a long time and are quite disturbing. Therefore in this regard, the Government should consider …… many of those so-called aggrieved persons are not involved in any serious incidents. They are only involved in registration matters. Buddy, they simply want to register their documents, not that they have forgotten to pay the registration fee. If they have forgotten to pay the registration fee, they will be fined and have to appear in court. If you should ever try to delay paying your business registration fee, the authorities will keep demanding payment from you. Eventually you will be arrested, taken to court and fined.

Those so-called aggrieved persons wish to lodge an appeal simply because they are aggrieved by the fact that their registration has been refused or has not been accepted, and they find such refusal unreasonable. However, it is time-consuming and also a waste of money to appeal to the Court. If there is an administrative measure to put in place a simple adjudication mechanism to substitute appeal, it can share the workload of the Court in dealing with simple cases. I think the Government should consider this approach. For example, the

existing Control of Obscene and Indecent Articles Ordinance has mixed the administrative and judicial functions together, but in the present situation, we should separate the two. The Administration can adopt administrative measures to set up a simple adjudication mechanism to deal with these cases of appeal lodged by aggrieved persons.

Thank you, Chairman. It is lunchtime now.

CHAIRMAN (in Cantonese): I now suspend the meeting until 2 pm.

12.55 pm

Meeting suspended.

2.00 pm

Committee then resumed.

CHAIRMAN (in Cantonese): Committee continues to examine those clauses of the Companies Bill to which no amendment has been proposed.

(Mr Albert CHAN stood up)

MR ALBERT CHAN (in Cantonese): Chairman, with only four Members in the Chamber, it seems too lonely and quiet. This is not good to the Secretary either. It will be better if there are more Members to keep the Secretary company. I request a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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 Albert CHAN rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr Albert CHAN, speaking for the eleventh time.

MR ALBERT CHAN (in Cantonese): Chairman, there will only be the several of us speaking in these few days.

Chairman, I would like to look at clause 274 of the Bill, which is under Subdivision 3 "Exceptions from Prohibition". Subdivision 3 is a subdivision of Division 5. Division 5 is about "Financial Assistance for Acquisition of Own Shares".

The whole Division 5 concerns financial assistance for shares. Actually it is a highly technical and targeted issue. Why did I highlight the problem with clause 274 with particular interest? Chairman, actually there is no big problem, since Subdivision 3 is generally about "exceptions from prohibition". If you look at the whole piece of legislation carefully, you will find its wide coverage while you are reading it. Various kinds of behaviour are regulated by the ordinance. In fact, it is very comprehensive. Those who are not well-versed in economics will indeed learn a good lesson after reading the whole ordinance.

So, regarding "exceptions from prohibition", clause 273 has set out a series of common examples. I am not going to describe them in detail. However, in clause 274, the last sentence reads: "the assistance is given in good faith in the interests of the company". Chairman, this is important if you look at the preceding provisions, for example, clause 274: "Principal purpose exception: This Division does not prohibit a company from giving financial assistance for the purpose of the acquisition of a share in the company or its holding company". First, the provision of financial assistance for the purchase of shares is a very special arrangement, and it serves a particular purpose. It also involves the funds of a certain party, the interests of the company or shareholders, and so on. The following text of the same provision reads: "or for the purpose of reducing or

discharging a liability incurred for such an acquisition". If the purpose is to discharge or reduce a liability incurred, such financial assistance will definitely bring forth advantages and entail investment strategy considerations.

Hence, on the whole, I do not see any particular mechanism put in place to conduct monitoring work or ensure proper protection of shareholders' interests. Basically, we have to count on the fact that "the assistance is given in good faith in the interests of the company". The focus is to believe that the decision on the so-called financial assistance is made in good faith in the interests of the company. Chairman, recently, we have seen a series of scandals, especially that of our Chief Executive. When he bought the property, I believe, he considered in good faith that there were no unauthorized building works in his house. He has also said repeatedly that he neither hid anything nor deceived anyone. Every time he spoke, he seemed to believe himself in good faith. That means he had absolutely no idea that those six pieces of unauthorized building works were constructed illegally.

Thus, on the matter of being "in good faith", I really do not know how it can be proved in law. The Independent Commission Against Corruption cannot prosecute our Chief Executive, who is good at telling lies, on the grounds that it is not believed that he has acted "in good faith". Therefore, regarding the expression "given in good faith in the interests of the company", I find the phrase "in good faith" in this clause kind of laughable. It also gives us the impression that since no particular protection is accorded, a provision is put in there perfunctorily to show that the Government has seemingly made an effort to include a statutory safeguard in respect of arrangements for provision of financial assistance.

Nevertheless, I am not an expert on law. Perhaps only such an expert will consider that something can be done. In this regard, if it is necessary to go to court, I really have no idea how to argue the case. Maybe if you talk to 10 lawyers, nine of them will say there is a great chance of winning. It may be so. However, on the expression "the assistance is given in good faith in the interests of the company", I think the protection offered is extremely weak. Thus, having seen the recent series of political scandals, I find the so-called "good faith" ridiculous. I also find such protection tantamount to being non-existent.

Chairman, next, I would like to jump to clause 397. I am being very fast. Among the some 900 clauses, I have nearly jumped to clause 400. I believe it is possible for our discussion to come to clauses 600 to 700 today. Clause 397 comes under Subdivision 3, which involves the auditor's report. Chairman, the part concerning auditors in the whole Companies Bill is extremely important. Subdivision 3 is under Division 5. The overall coverage of Division 5 concerns "Auditor and Auditor's Report". I believe that regarding this part, after handling a basket of government proposals which require no amendment (that means these 400-odd clauses to which no amendment has been proposed), there will be bigger arguments over the coming clauses which require amendment, especially the amendments proposed by the other two Members.

There is no amendment to clause 397, but why did I particularly pick clause 397 for discussion and for pointing out certain problems? That is because, as we all know, the auditor's report is very important. In the past 10 years or so, many international scandals, collapses of big economies or closures of big companies, or emergence of serious economic problems, are related to auditors. The accounting scandal of WorldCom in the United States was about falsification of accounts which involved US$3.85 billion, and WorldCom ended up with a huge debt of US$30 billion. Another one is Enron's accounting scandal in the United States, which transpired into the biggest bankruptcy case in American history. The third one is the accounting scandal of Time Warner in the United States, which involved falsification of accounts by substantially exaggerating its revenue from advertisements. This kind of scandal actually involves endless exaggeration, and these scandals are indeed endless. Such scandals have emerged not only in the Unites States and other parts of the world, but also Hong Kong. In Hong Kong, the newly appointed Director of Audit has also encountered …… back then, Ernst & Young was sued for professional misconduct and it had to pay $1 billion in compensation. After Akai's liquidator had filed the claim for years, a settlement was eventually reached, but the settlement does not mean that the accounting firm had no problem or the accountant concerned had done nothing wrong. If you had done nothing wrong, you would not have agreed to a settlement. What is more, the amount of settlement was as large as $1 billion. Ridiculously, David SUN, the accountant concerned in the case — regardless of whether he was dismissed or he resigned of his own accord — who left Ernest & Young because of this, could unexpectedly assume the position of Director of Audit under the wings of the Chief Executive.

This is really absurd to the extreme, another political scandal in Hong Kong. Even the *Time Magazine* has placed our Chief Executive on its cover and asked if this man can be trusted ……

CHAIRMAN (in Cantonese): Mr CHAN, you have strayed away from the question.

MR ALBERT CHAN (in Cantonese): …… Chairman, it is related. Since the matter involves the auditor's financial report, I am just a little upset. Chairman, as it concerns whether the interests of 91 000 companies and those of the minority shareholders will be protected in the future, the auditor's financial report is closely related.

Chairman, regarding clause 397, I would like to talk about the part which I approve of first. Basically, I consider clause 397 positive because the clause points out that the auditor has the duty to state his opinion on the relevant issues, as mentioned in clause 397(2)(a). However, Chairman, the problem is that two reports are involved here. One is the auditor's financial report and the other one is the directors' report. The focus of these two reports is actually different. The directors' report will, of course, carry the directors' own interpretation and stance, especially when matters such as prospects are related to their own interests. Whether the prospects are good or not depends on their investment preference, or whether they will benefit or incur any loss from such information.

Therefore, very often, the directors' report inevitably has a direct relationship with the directors' interests, yet the directors' interests may not be in line with those of the minority shareholders. As we all know, sometimes they will increase their own shareholdings in the wake of some negative news. When good news is reported, they will then reduce their shareholdings. The bosses of a few big consortiums in Hong Kong are most adept at playing such games. When the stock market shows an overall downturn and there is negative news about their companies, they will acquire big lots of shares in quantities of millions. Then they will wait. When the trade in the stock market improves and the share price has risen higher, they will sell the shares. As a result, the directors' report often produces a considerable effect on their share price or image.

As regards the auditor's financial report, clause 397(1) provides that the auditor must state his opinion. There is not much problem with this. It is very clear. However, Chairman, subclause (2) is written as follows: "If a company's auditor is of the opinion that the information in a directors' report for a financial year is not consistent with the financial statements for the financial year". It simply refers to the situation where they are "not consistent". Chairman, this stipulation is quite narrow. There may be certain issues in the directors' report which are not entirely true and accurate, yet they may not be inconsistent with the financial statements. Of course, the incidence of inconsistency certainly requires professional advice. I think the auditor's opinion must be included in the annual report. However, if the auditor opines that there are some issues in the directors' report which may not be accurate, reasonable or appropriate, actually the auditor has the duty to point them out in his report.

Of course, I believe that those auditing and accounting professionals can expound on the reasons and problems. I find the provisions in clause 397(2) too narrow, which may not be able to protect all the shareholders' interests. If the auditor has conducted a thorough assessment on the whole annual report, considering that the relevant information is true and accurate in compliance with the aforesaid provisions, and reflecting the company's financial status and performance earnestly, truly and objectively, such an approach is appropriate. However, concerning the directors' report, opinions can also be reflected truly and objectively in accordance with the other provisions *(The buzzer sounded)* …… I will elaborate on my opinion on this aspect later.

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

(Mr LEUNG Kwok-hung rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, speaking for the eighth time.

MR ALBERT CHAN (in Cantonese): Chairman, I hope more Members will listen to Long Hair's speech. Please do a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, this time I am going to speak on clause 215 of the Bill. Of course, clause 215 is the provision after clause 214, which I talked about this morning. Clause 215 is of course related to clause 214 in a certain manner, right?

What is clause 215 about? It is about "Application to Court by members or creditors". Clause 214 has already stipulated "inspection of special resolution and solvency statement". That is to say, after inspection, what can be done? After inspection, as mentioned here, members or creditors may file a claim or application with the Court of First Instance (the Court). What is the purpose of this piece of legislation? It enables the applicant to hand over the application to the company concerned and require that company to give the Registrar notice in the specified form of the application within seven days after the day on which the application is served on the company. That is it.

This clause …… Chairman, sorry. I need to read a version with a bigger font size. This provision does not exist in the original CO. It is based on similar provisions in the CO, which means section 49N of the CO, except for section 49N(3)(b). In my speech later on, there are also other exceptions in relation to this clause. What is prescribed in the former Companies Ordinance? That is, under sections 49K to 49O of the CO, a private company may make payment out of its capital to buy back its shares. That is what I am talking about. Such an act will of course affect the shareholders. If they pass such a special resolution to make payment out of members' capital to buy back the shares, it will certainly involve a lot of issues. For example, how many percent of the capital is used to buy back how many shares? Or, are the shares bought back at an appropriate price? Is there any residual profit? That is, has a large amount of the company's capital been used to buy back shares the price of which

is unreasonable, too high or too low? In a commercial society, this is certainly of the utmost importance. Such questions as at what time the price is offered, what the price is and how many percent of the capital is used to purchase the shares are great concerns to every shareholder. Thus, it is necessary to provide that the person making the notice may lodge an application with the Court. Clause 214 states that such announcement has to be made within five weeks. Here it also states one of the exceptions: A member who consented to or voted in favour of the special resolution is not entitled to apply. That is to say, if you have voted for making payment out of capital to buy back the shares, that means you gave your support at the time, so you cannot lodge an application with the Court. That is reasonable. If you have given your support, why change your mind and cause unnecessary trouble? This stipulation is reasonable and relieves the burden of the court.

However, in case you did not do that, there is another provision which provides that any creditor or member of the company who does not support the special resolution may apply to the Court within five weeks upon the passage of the special resolution for cancellation of such a resolution. This is the issue I raised in speaking on clause 214 earlier. If there is no automatic judgment, someone will need to make an application. If an application is made to the Court to request cancellation of the resolution, the applicant must serve the application on the company. This warrants no explanation. What is the company required to do? The company must, within seven days after the application is served — the wording in the original provision of the CO is "forthwith". What is meant by "forthwith"? No idea. Hence, the current change which requires the notice to be given within seven days after the application is served is better and more stringent in law, since "forthwith" may refer to the following day, two days or 30 minutes.

What has to be done within seven days? It is to give the Companies Registry notice of the application, and it is an offence not to give such notice. Why is it necessary to do that? Because, first of all, the Companies Registry should be informed of the application, for members of the public may go to the Companies Registry to look up the information. Suppose some people hold a meeting and pass a resolution to make payment out of their capital to buy back some of the shares. Members of the public have the right to know, but they will not go to the Court to find out what is happening. They will not be so stupid as to go to the Court to see if there is any litigation. If the company does not carry

out the work properly to announce that its resolution has met with opposition, as it is stated there and mentioned by me in my last speech, it will be fined. Yet a fine is no big deal. The fine for each day is tiny. It is just $1,000 a day. Even if it is fined for five weeks, it will be $35,000 only. Nevertheless, if it does not do so, what will happen? No one will know about it. Hence, here the company is required to give the Companies Registry notice of the application within seven days after the application is served, so that the Companies Registry will be informed.

After being informed, the Companies Registry may exercise its power to facilitate the people's right to know. If the company does not act in such a way, what will happen? The clause provides that it is an offence — that means a violation of this ordinance — not to give such notice, and the company and every responsible person of the company commit an offence and each is liable to a fine of $10,000, which is a heavier fine. $10,000 is a five-digit figure. In the case of a continuing offence, each of them is liable to a further fine of $300 for each day during which the offence continues. All in all, if the situation fits my description just now, that payment is to be made out of capital to buy back the shares, and the price may be too high, too low or inappropriate, and if there is an objection, people will certainly have reasons for raising objection. After those who raised objection have served you a notice, you may ignore it, or you may work in accordance with the law and pass the notice to the Companies Registry. Such an act will protect the interests of the people involved in the decision to make payment out of their capital to buy back the shares. Of course, a meeting has been held. Some people supported it while some others opposed it. Those who have expressed support cannot oppose it afterwards. So only those who have objected to it will request cancellation. This piece of information is very important to the other people. If you do nothing, there will be profound consequences because although "making payment out of capital to buy back the shares" consists of only 10 words, it may involve as much as $1 billion. Therefore, if it is a mandatory — mandatory again — mandatory provision that it is an offence for the company and every responsible person of the company, what is the penalty? A fine of $10,000. Frankly speaking, what deterrent effect will it achieve? Knowing very well that by doing so, fewer people or no one will know about the incident of making payment out of capital to buy back the shares, they will find it worthwhile to act in such a way in business. Knowing very well that there is this Ordinance and that someone has already applied to the Court for cancellation, they will continue to hide the truth.

Chairman, according to Rule 17(3) of the Rules of Procedure, in the Committee of the whole Council, if the number of Members is less than one half ……

CHAIRMAN (in Cantonese): Mr LEUNG has requested a headcount. Will the Clerk please ring the bell to summon Members back 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.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, so, it is wrong for those companies and responsible persons to hide the situation in such a way, since the law has already given them five weeks, which is a rather long period. There should be enough time to effect compliance. It is also not an unreasonable requirement for the issue of notice within seven days. Thus my view is: first, if they are even unwilling to do that, the Court should probably rule that they lose the case. Of course, this rests with the judge. I consider that the penalties should be increased because if we do not raise the level of penalties ― be it in arithmetical or geometrical progression ― on the basis of the amount of capital out of which payment is made to buy back the shares, there will be no way to stop the persons-in-charge of these companies from deliberately hiding the information that other people have initiated a lawsuit to require them to cancel such a decision.

In conclusion, whether it be a one-off fine of $10,000 or $300 for each day ― the amount of $300 a day is all the more unacceptable. The present amount of $300 a day is like charging the minimum wage. Even the most pitiable person will earn some $200 a day. How will $300 produce any deterrent effect? Hence, as I have clearly stated, *(The buzzer sounded)* …… the spirit behind clauses 214 and 215 is the same. We should impose heavier penalties on the rich for their fault or deliberate violation of the law. Thank you, Chairman.

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

(Mr WONG Yuk-man rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr WONG Yuk-man, speaking for the 10th time.

MR WONG YUK-MAN (in Cantonese): Chairman, I would like to talk about Division 5 of Part 2, which concerns the Registrar's powers.

Before lunch today, I spoke on the part about "Registrar's Powers to Refuse to Accept and to Register Document". To avoid troublesome lawsuits, we propose to resolve the appeals lodged by those whose document has been rejected for registration through an adjudication mechanism established by the executive authorities.

Clauses 37 to 42 are also related to the Registrar's powers. The whole Division 5 of the Bill consists of new clauses, and reference has been drawn from laws in other jurisdictions. That means reference has been taken from the practice in other places. Since the Government has proposed amendments to clauses 37 to 39, we will leave our further discussion until we deal with those amendments.

As regards clauses 40 to 42, we would like to talk about these three clauses here. However, before I speak on these three clauses, I must first make a brief account of clauses 37 to 39 because they are related.

Clauses 37 to 39 empower the Registrar to examine and demand further information as well as rectifying the information in the Companies Register. The Registrar may examine the information with a view to checking whether there is any inconsistency. So let us look at clause 37 …… Of course, the use of the character "抵" (dae2) in the word "抵觸" (dae2 tsuk7; meaning contradicting) is actually an error accepted as correct through repeated usage. The character "抵" should not have been used in the first place. I believe that the Chairman also knows the meaning of "抵觸" very well. It means a cow and sheep lock horns. That is known as "牴觸" ("抵觸" written in another form). The character should carry the radical "角" (gok8; meaning horn). As written in

GUO Moruo's Fei Geng Ji • Yang (《沸羹集 • 羊》): "你用角來牴觸我一下，我用角來牴觸你一下。" (You butt me with your horns and I butt you with mine.) This is from GUO Moruo's poem. I roughly remember it is something like that. Therefore "抵觸" carries the meaning of conflict and contradiction.

In clause 37 of the Bill, the word "抵觸" appears several times, using the wrong character in our view. Nevertheless, now the error has been accepted as correct through repeated usage, because even the Basic Law is written in this way. Chairman, Article 11 of the Basic Law clearly states …… in fact, that is the case with legislation all over the world. As far as the legal position is concerned, the constitution is above all other laws. Any law which contradicts the constitution will be regarded as void. Thus Article 11 of the Basic Law says the same thing. If any law enacted by the legislature contradicts the Basic Law, it is void.

Hence, why does Mr LEUNG Kwok-hung apply for judicial reviews time and again? Recently, he has applied for a judicial review, considering the provisions on election in the Legislative Council Ordinance contradictory to the Basic Law and the Bills of Rights. That is what it means. So the Court ruled that he won the case and needs not be jailed. Otherwise, if he wants to run for the Legislative Council Election this year, he would have to serve the prison term first.

That is what "抵觸" is about. The laws in every country in the world are the same, including the constitution of the Republic of China and that of the People's Republic of China. There is definitely such a provision stating that any law which contravenes its own constitution will be void. Some are put in a more direct way while some are put in a more indirect way. A direct formulation is like the one in the Basic Law: "No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.".

Hence, the word "抵觸" means there is conflict and contradiction. However, I very much dislike the use of the character "抵" in "抵觸". "抵" is the character used in "抵達" (meaning arrive), "抵押" (meaning pawn) and "抵補" (meaning compensate for). "抵" should not be used in the word "抵觸". Strictly speaking, even the Basic Law is wrong. Article 11 of the Basic Law also uses the character "抵" with the radical of "hand" (that means "扌").

As a matter of fact, many of the Chinese characters on the Mainland, currently known as "disfigured" or simplified characters, actually violate the original spirit of word coinage. Using a couple of wrong characters is no big deal. Nonetheless, the Chinese text of the Hong Kong Basic Law uses the traditional Chinese characters.

Back to clause 37 of the Bill, which mainly empowers the Registrar to require a company to resolve inconsistency with the Companies Register. This is his power. If the information in the Companies Register is inconsistent with the actual situation of the company currently, the Registrar may impose such a requirement.

Clause 37(1) provides: "If it appears to the Registrar that the information contained in a document registered by the Registrar" — including the name, address or shareholding of the company — "is inconsistent with other information on the Companies Register" — that means there is conflict or contradiction — "the Registrar may give notice" — "give notice" (給予通知) is also a stupid expression. Putting the word "notify" (通知) in front will do, then there will be no need to use the word "give" (給予). Buddy, again, this is the biggest defect in law drafting. "Notify" is fine enough. In the phrase "give notice", it becomes a noun — "to the company to which the document relates" — such an expression is redundant. Simply change it to the company submitting the document, and that will do. The text that follows it reads "stating in what respect the information contained in it appears to be" — that means appearing to the Registrar — "inconsistent with other information on the Companies Register;" — that is to be determined by the Registrar — or "requiring the company to take steps to resolve the inconsistency".

In clause 37(2), actually the word "抵觸" has appeared many times. "抵觸" is used seven times in total, illustrating its importance. "Information required to resolve the inconsistency" — I am referring to clause 37(2). "For the purposes of subsection (1)(b), the Registrar may require the company to deliver to the Registrar within the period specified in the notice …… (a) information required to resolve the inconsistency; or (b) evidence that proceedings have been commenced by the company in the Court for the purpose of resolving the inconsistency and that the proceedings are being conducted diligently.".

That is to say, if you are engaged in legal proceedings to resolve such inconsistency, you will have to submit such evidence to the Registrar. That is what clause 37 means. However, there is an amendment to this clause.

Well, let us go to clause 40 of the Bill. Its heading is "Registrar must rectify information on Companies Register on order of Court". Clause 40 of the Bill is a very practical provision. It empowers the Court of First Instance (the Court) to, on application by any person, by order direct the Registrar to rectify any information on the Companies Register or to remove any information from it. This is the practice relating to rectification of information under clause 40.

The Court must be satisfied that such information on the Companies Register: first, "derives from anything that is invalid or ineffective"; second, "has been done without the company's authority"; third, "is factually inaccurate"; or fourth, "derives from anything that is factually inaccurate or forged". These several conditions with which the Court shall be satisfied are set down in detail in clause 40(1) of the Bill.

We hold that clause 40 lacks clear guidance. Chairman, why did I say so? Before making an application, does the person concerned need to raise the relevant request with the Registrar first? This is the first point. If the person concerned may skip this step, that means applying to the Court direct without putting the relevant request to the Registrar, the problem we mentioned before will arise. That is, the workload of the Court will substantially increase.

Besides, there is this point in clause 40(4) of the Bill which is related to the Court: "The Court must not order the removal of any information from the Companies Register under subsection (1) unless it is satisfied that" — here it is divided into two paragraphs — "(a) even if a document showing the rectification in question is registered, the continuing presence of the information on the Companies Register will cause material damage to the company;" and "(b) the company's interest in removing the information outweighs the interest of other persons in the information continuing to appear on the Companies Register.".

Chairman, here comes a problem, that is, how does the Court define "material damage"? For this reason, my concern is, if an application is made under clause 40 of the Bill, will the application be handled in a fair way, particularly when clause 40(4)(b) requires the Court to compare the interests?

Since clause 40(1) already imposes such a stringent requirement, it renders the requirement that "the company's interest in removing the information outweighs the interest of other persons" under clause 40(4)(b) unnecessary, right? This seems illogical. Clause 40(4)(b) seems unnecessary.

Besides, clause 41 of the Bill is "Registrar may appear in proceedings for rectification". Clause 41 provides that the Registrar may appear before the Court when it is processing an application under clause 40. Arrangements for the Registrar's appearance shall be determined by the Registrar himself, or he will appear in court in response to a court order. We approve of the flexible arrangement in clause 41(2), which gives the Registrar discretion. Even if there is not any court order, he may submit to the Court a statement in writing instead of appearing in court. In this way, the Registrar's time will not be wasted from regularly. Suppose we have to appear in court, but then we have to attend a Legislative Council meeting. What should we do? The court allows me to make a written statement, but the Council does not allow delivering a speech in written form. We must deliver the speech verbally. With two less Members present, the meeting will be cancelled owing to a lack of quorum. Thus the Legislative Council is given the first priority. We would rather be wanted by court.

The flexible arrangement in clause 41(2) allows the Registrar to submit a statement in writing instead of appearing in court, while clause 42 empowers the Registrar to annotate the Companies Register.

Chairman, a quorum is not present.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR WONG YUK-MAN (in Cantonese): Just now I was speaking on clause 41 of the Bill, the heading of which is "Registrar may appear in proceedings for rectification". This clause provides that the Registrar may appear in proceedings for rectification, and he may submit a statement in writing as well.

Clause 42 of the Bill empowers the Registrar to annotate the Companies Register. However, such annotation must be made in the light of rectification conducted under the Bill, that means "a rectification of an error contained in any information on the Companies Register under section 39", "a rectification of any information on the Companies Register under section 40", and "a removal of any information from the Companies Register under section 40".

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

(Mr Albert CHAN rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr Albert CHAN, speaking for the 12th time.

MR ALBERT CHAN (in Cantonese): Chairman, earlier on, I was talking about the auditor's duties. Clause 397(2) of the Bill provides that the auditor must state his opinion in the auditor's report only if he considers the financial statements for a financial year to be inconsistent with the directors' report for that year.

I find it inappropriate to present it in such a manner because there may be problems in the directors' report which do not amount to inconsistency with the financial statements, but they may involve interest or information which is of great significance to minority or ordinary shareholders. Or there is certain information in the directors' report which may not involve the financial statements, but if the auditor considers that there is a problem, he should give a comment or state his opinion as well.

The formulation of clause 397(2) of the Bill indicates to a certain extent that unless there is inconsistency, the auditor may not be able to state his opinion

on the other aspects in the financial statements for that year. Where there is inconsistency, the problem may be rather obvious. As for some hidden or underlying problems or information which is not available in the financial statements, the auditor may not be able to offer his opinion. I find this inappropriate.

Besides, Chairman, as we can see, clause 397(2)(a) of the Bill is different from clause 397(2)(b). In paragraph (a), the word "must" is used in "must state that opinion in the auditor's report", whereas in paragraph (b), the word "may" is used in "may bring that opinion to the members' attention at a general meeting". Chairman, should there be such a serious problem of inconsistency, how come paragraph (b) does not adopt the drafting approach of paragraph (a) to provide that apart from stating such an opinion in the auditor's report, the auditor must also bring that opinion to the members' attention at a general meeting?

In this kind of general meetings, have all the relevant parties and shareholders actually read these reports? As everyone knows, it may not be necessarily so. Therefore, it is very important to require the auditor to state the problem verbally at a general meeting. As in many meetings of the Legislative Council, apart from the submission of documents, the Government will also give an oral report, and sometimes it will use PowerPoint or play a video to introduce certain important issues.

If the auditor points out the presence of inconsistency between the directors' report and the financial statements, that is definitely a significant issue which involves the interests of the interested parties or shareholders. Hence, why is paragraph (b) suddenly formulated with such laxity? The auditor may speak as he pleases and refrain from talking if he does not wish to, as though the auditor's report already carries the relevant opinion, so it is fine not to mention it.

Such an arrangement of the Government is obviously biased in favour of the directors. In other words, regarding things which are unfavourable to the directors but which can protect the minority shareholders, this clause allows the auditor to act freely. He may speak as he pleases and refrain from talking if he does not wish to. What kind of attitude is that? What standard of values is that? Towards what class interests is such an approach tilted? Apparently, the arrangement in the clause does not give sufficient protection to minority shareholders.

Chairman, this is just another illustration. In the different parts and paragraphs of the Bill, ranging from the penalties, requirements in various aspects to the minor issues in this respect, the mere difference of a single word can reveal the Government's stance on classes and its protection for and tilt towards interest groups.

Thus, I told "Yuk-man" that after completing the examination of this Bill, I could write a thesis on the CO for a master's degree, since the CO reveals the Government's class preference, and it proves the Government's tilt towards and bias for the consortiums. The CO also proves the Government's lack of protection for the general public. The basis of the political theories for these suppositions can be discussed from the angle of conservatism. It can also be discussed from the angle of liberalism, or presented and commented from the perspective of Marxism. Judging the Government in the context of the CO, I can write a comprehensive thesis for a master's degree.

Chairman, next, I will speak on issues relating to the auditor, which come clause 398 of the Bill. Chairman, in short, clause 398 is a new part which I regard as important. Basically, I support the new part.

Clause 398 of the Bill — the original provisions are sections 141(4) and 141(6) of the CO — states that it shall be the duty of the auditor to carry out such investigations that will enable him to form an opinion as to whether proper books of account have been kept by the company and whether the books of account are in agreement with the accounting records. This point is crucial. If they are not in agreement, there is clearly a problem. The auditor will form an opinion as to whether the books of account are in agreement with the accounting records as mentioned by me just now. If his opinion is negative, or the auditor fails to obtain all the necessary information or explanations, the auditor will have to state such facts in his report. The original provisions have set out such a need.

Besides, the auditor has the duty to include in the report such details as the directors' salaries, pensions, loans and other transactions conducted with the directors.

Chairman, the Bill makes an important amendment which sets out the prerequisite for the auditor to state his opinion, that is, "the financial statements

are not in agreement with the accounting records in any material respect", which is carried in clause 398(2)(b). If the auditor fails to obtain all the information or explanations that, to the best of the auditor's knowledge and belief, are necessary and material for the purpose of the audit, the auditor must state such a fact in the auditor's report. This is extremely important. So I commend and concur with the amendment and the new part in this regard.

Chairman, the opinion in this respect will certainly be included in the auditor's report, yet my biggest worry is that in these reports, very often the favourable information is enlarged, whereas information unfavourable to the company or directors is presented as tiny as the size of mosquitoes, which denies clear ready. In fact, taking reference from the Residential Properties (First-hand Sales) Ordinance, although we do not have the opportunity to do something about it now, if we later discover that these companies play a trick — of course they will print these reports — if the auditor prints those pieces of information and opinions which are unfavourable to the company in a font size so tiny to make the elderly unable to read them, it will be most inappropriate. Should such a situation arise in the future, in amending the ordinance, it will be necessary to apply the requirement for the sales brochures of first-hand residential properties, specifying the font size for printing. Of course, that is not how it works now, but it is most likely that this kind of adjustment is needed if such problems arise in the future.

Besides, clause 400 of the Bill is a new clause, too. Chairman, as I have come to clause 400, I will finish very soon because among the 900-odd clauses, I have already reached clause 400. Mr WONG Yuk-man seems to have talked about only a few dozen clauses. My speed is faster than his.

Chairman, clause 400 of the Bill is a new clause. Its heading is "Auditor's reports to be signed". One of the important parts is "An auditor's report must state the auditor's name", which I consider important because sometimes we can only see the signature and the name of the audit firm but not the auditor's name in these reports. If we can see the auditor's name in the report, it will help to enhance the transparency.

Another part is about clause 403 of the Bill. Chairman, the whole clause 403 is very long. My focus is on the word "reasonably". The word "reasonably" appears a number of times in the relevant provisions of clause 403, for example, clause 403(2): "An auditor of a company may require a person that

is a related entity of the company, or was a related entity of the company at the time to which the information or explanation relates, to provide the auditor with any information or explanation that the auditor reasonably requires for the performance of the duties as auditor of the company." There is a "reasonably" here. Then in clause 403(6): "If an auditor has required a company to obtain any information or explanation from a person under subsection (4), the company must take all reasonable steps to obtain the information or explanation as soon as practicable after being required.".

Chairman, I am a bit doubtful about putting the word "reasonably" here, and I think it may not be appropriate. It is because very often, when we seek information from the Government, the Government will turn us down simply by saying that it is not reasonable. So, the auditor is a professional, and the law has empowered him to obtain information. If he seeks information from you, how can you still ask him to prove that the request made by him is reasonable? This is his professional judgment and request. Hence, the fact that the word "reasonably" is put here, Chairman, makes me think of another conspiracy theory and come up with a logical deduction, that is, the Government is using such specious and ambiguous wording to provide the companies and directors with an umbrella of protection. In this way, it can stall on the pretext of whether it is a reasonable judgment, and it can also reject the request made by him on the excuse that the request is unreasonable. As such, what can the auditor do? Does he really need to initiate proceedings? To sue the company on the grounds that it has unreasonably failed to provide the relevant information?

Thus, I find it extremely inappropriate to put the word "reasonably" in this clause, because as we know very well, someone who is appointed as auditor definitely has the support of the vast majority of the directors. You will not appoint your enemy as your auditor. To a bigger or smaller extent *(The buzzer sounded) ……*

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

(Mr LEUNG Kwok-hung rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, speaking for the ninth time.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, under Rule 17(3) of the Rules of Procedure ……

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summons Members back 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.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, as the saying goes, "In ancient times, there was no such office as that of Censor."[2] As Members of the Legislative Council, we also perform the role of Censor.

I have to put on record my views on clauses 167 and 168, which should naturally be discussed together. What is the provision in clause 167? It is about redenomination of share capital, that is, a company may, by resolution of the company — the resolution must of course be passed by voting, or have gone through specific meeting procedures or lawful procedures — convert its share capital or any class of shares from one currency to another currency. By the current standard, this provision should be appropriate because ……

CHAIRMAN (in Cantonese): Mr LEUNG, you should know that given that the Government has proposed amendments to clause 167, the Committee will consider that clause as part of the next group of clauses.

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2 Reference: <http://blog.sina.com.cn/s/blog_6f58baf00102dt5h.html>

MR LEUNG KWOK-HUNG (in Cantonese): In other words, I cannot discuss that provision now. In that case, I can only talk about clause 168. But those two provisions should be discussed together.

CHAIRMAN (in Cantonese): Of course, if you consider that the two clauses are related, you can discuss them together.

MR LEUNG KWOK-HUNG (in Cantonese): Please listen to me. As I see it, clauses 168 and 167 are related. Otherwise, Members can hardly understand what I am talking about. Let me explain it briefly. Clause 167 provides that a company can convert its shares from one currency to another after a meeting has been convened. This then leads to clause 168 which specifies the penalty. The redenomination of shares carries realistic significance in present-day Hong Kong because the conversion between Renminbi and Hong Kong dollar is very common nowadays, while Hong Kong dollar was pegged to US dollar in the past. If a company resolves after a meeting to proceed with redenomination of shares — for example, just to illustrate my point — originally, the shares worth HK$10 billion, but if the currency is converted to Renminbi, the value is of course less than $10 billion. It is as simple as that.

Then what is the impact of a redenomination of share capital? Of course, it will create certain impact because the depreciation of Hong Kong dollar is known to all; the value of Hong Kong has depreciated a lot already. Of course, in the immediate term, a conversion standard should be adopted for the sake of fairness. Otherwise, the company might be prosecuted if it is done in a totally unfair manner. Nonetheless, in the long term, the situation is similar to that of oil prices — while some people consider that oil prices have already increased, if calculated in US dollar, oil prices have not increased at all as a result of the depreciated US dollar. Hence, it is a very important decision which affects those people who hold the same shares as to whether their shares will appreciate or depreciate over a certain period of time. Hence, the decision will certainly have some long-term impact.

Therefore, clause 169 …… Sorry, it should be clause 168. I cannot see clearly. There is a new provision under clause 168, which did not exist before. I think the Administration may have also noticed that the relevant persons should

be informed about certain things as soon as possible. The title of clause 168 sets down clearly: "Notice of redenomination". I am not talking about clause 167 now, but the consequences as set out in clause 168. What is the provision about? The provision reads, "(1) Within one month after passing a resolution under section 167," — as I have just said — "a company must deliver a notice in the specified form to the Registrar for registration in relation to the redenomination." The specified form is set out not in this provision, but elsewhere in the Bill. We will not discuss the form. Actually, why should the period be "within one month", but not a shorter period? As I was not a member of the Bills Committee, I do not know whether members have discussed it or not. I consider that in a modern society, once there is a redenomination of share capital, it does not take one month to deliver the relevant notice to the Registrar for registration. No explanation has been given. Does it mean that the company can monitor the currency trend, say, whether it is going up or down, within one month before making the decision? Is that the case? It seems not so because the provision only specifies "within one month". In other words, it can be done in two days. This is incomprehensible. Hence, in my view, the provision is only intended to facilitate the persons who make the decision at the meeting. They can decide whether to proceed with the redenomination after considering whether such a move is beneficial; if not, they can abort the move. Buddy, nobody would know about the matter. Other people will have no knowledge about the matter because the requirement is simply that the company must deliver the notice of redenomination to the Registrar within one month. There is another requirement about the inclusion of a statement of capital. Subsection (2) reads as follows, "The notice must include a statement of capital as at the date of the redenomination that complies with section 196.". We will not discuss section 196 because that would be too much trouble. But what does it mean? It will be much better if that requirement is stipulated first. The meaning is that, in addition to the requirement under section 168 of delivering a notice of the redenomination provided for under section 167 to the Registrar, there must be a statement of capital as at the date of the redenomination. In other words, if a company determines a specific date for the redenomination, it must state clearly the amount of share capital as calculated in the redenominated currency on that day. That is of course the requirement under section 196. What is the complete picture then? When a company — of course, the meeting is not attended by all members of the company; this provision refers to officers of the company or perhaps directors, and so on — makes such an important decision at the meeting, it should inform the Registrar within one month of this important

decision in accordance with specific requirements which include stating the value of share capital as determined in a different currency, or calculating the share capital of the company (that is, who owns what kind of shares and how many).

The question here is that: Firstly, the period is too long and meaningless. Nonetheless, let us consider subsection (3) which is on penalty — of all the provisions, this is the one I am most interested about. The provision provides that, " If a company contravenes this section, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 ……" — what is meant by "a fine at level 4"? It just means a fine of $25,000. Assuming that the company has 10 persons, the fine is only $250,000. Furthermore, in order to ensure that the offence will not be ignored and continued, the provision also provides for another penalty, namely that "…… in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.".

Chairman, the subject matter is redenomination of share capital which has far-reaching impact. Some people may disagree with the company's decision to calculate share capital in Renminbi, and they prefer US dollar. Yet they will only know about it one month later. If the offenders, that is, the company and the responsible persons refuse to change the decision — if the share capital is $1 million, it means an investment of $1 million. If 10 persons have committed the offence, the fine will be $250,000. In addition, a further fine of $700 for each day for 10 persons would mean $7,000. When will the penalty end? What will it turn out to be?

When an offence has resulted in full-blown impact …… For example, if a person foresees the devaluation of Renminbi, which is hardly surprising now, he may do something without disclosing it to others. When adverse impact is created as a result, the Registrar can do nothing other than imposing a fine on the offenders. This is similar to what I have said previously. For some wealthy people, they have absolutely no concern about the so-called Summary Offences Ordinance. They can park their cars willfully on the streets in Central so long as they have the money because they know very well that even if they receive a parking ticket within two hours, it will only cost them some $400. They can just park their cars there. That is what they can do!

Hence, insofar as this question is concerned, why does the Government adopt a lenient approach even though it is aware that sections 167, 168 and 196 are new provisions? The Government knows clearly that it will be very difficult to amend these new provisions again because the Government has taken so long to amend the CO that even the future Deputy Financial Secretary has already given you instructions on what to do by saying that the Government should not adopt the same approach in law drafting next time as it is a waste of time and effort because it is tantamount to "catching the head but loosening the bun". That has been stated clearly, Secretary. Are you in a hurry to finish work or is there another reason? Why do you "pick up a sesame grain and then throw away a melon" whenever I raise a point? You pick up a sesame grain when we have identified these loopholes. Yet when you hold the sesame grain in your hand, the melon has fallen onto the ground and burst open with a bang because you have not imposed penalties commensurate with the new situations or new loopholes that you see, so as to avoid the happening of unlawful acts which you want to deter in the first place. Is yours a case of "can't see the wood for the trees"? It is quite simple as the reason is just the same: The Government is also in a hurry to finish work because it will be a major setback if the legislative amendment exercise cannot be completed within this term, having to start all over again in the next term.

Chairman, I have identified many problems throughout the entire Bill. But the Secretary's attitude now is that, "there are always more difficulties than problems". After seeing the problems, he feels that there are too many difficulties. Why? Any legislation passed by the Legislative Council must be agreed by all parties. It is inappropriate to impose excessively harsh penalties, which is mercantilism. I hope the Government can understand this point. I have no idea what you can do to rectify the situation. The Bill must be passed eventually, and one can only choose to eat or not to eat this "chicken rib". I hope that when giving your reply later, you can also tell us what is your consideration in terms of penalties. After the enactment of the legislation, what will the Government do accordingly to change the unreasonable situations identified by us? Thank you, Chairman.

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

(Mr WONG Yuk-man rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr WONG Yuk-man, speaking for the 11th time.

MR WONG YUK-MAN (in Cantonese): Chairman, I mentioned clause 42 earlier. We have already discussed clause 41, but not clause 42. Clause 42 is about annotations in the Companies Register. Any amendment of such annotations must be made in accordance with the Bill. We agree with such an arrangement. Nonetheless, I have a question relating to section 42(1)(d), *viz.* "any other information on the Companies Register", that is, annotations to be made by the Registrar of Companies (the Registrar) include any other information on the Companies Register ……

(Mr Albert CHAN stood up)

CHAIRMAN (in Cantonese): Mr Albert CHAN, are you requesting a headcount?

MR ALBERT CHAN (in Cantonese): Mr WONG Yuk-man is questioning the said provision. I hope more Members can come back to gain some understanding of his reasons. Please do a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR WONG YUK-MAN (in Cantonese): Chairman, I will continue to discuss clause 42 in relation to annotations. Just as I said earlier about clauses 39 and 40, we agree that the Registrar's annotations can be amended in accordance with the Bill. Nonetheless, regarding the rationale for the provision in section 42(1)(d), why can he make annotations about any other information on

the Companies Register? In this regard, I consider that this may give rise to abuse. In other words, it is possible for the authorities to unreasonably interfere with the operation of the companies registration system. More importantly, no regulation has been imposed in the relevant provisions on the annotations made by the Registrar, as a result he can make annotations willfully according to this provision.

Lastly, in Division 5 of Part 2 of the Bill on "Registrar's Powers in relation to Keeping Companies Register", there is no requirement for the Registrar to maintain records when making amendments under sections 40 to 42 and allow public inspection of such records when necessary. Given the Registrar's powers in keeping the Companies Register, he can in fact maintain the relevant records to allow public inspection when necessary. It is also very important to maintain the records.

Next, I wish to talk about clause 46 in Division 7 of Part 2 of the Bill. The provision is about "Information excluded from public inspection by law or court order", that is, information not allowed to be inspected by members of the public. This provision, which is modelled on sections 1087(1)(g) and (k) of the Companies Act 2006 of the United Kingdom, is also a new provision which specifies that, "The Registrar must not make available for public inspection …… any information excluded from public inspection by or under an Ordinance or by an order of the court."

Of course, it is necessary for this new provision to specify "any information excluded from public inspection by or under an Ordinance or by an order of the court". Traditionally, who are the people under the term "public"? "The public" means shareholders, invisible investors as well as totally unrelated members of the public. One of the advantages with allowing public inspection of a company's information is that it can facilitate monitoring and in turn promote corporate governance. That is exactly the case when we monitor certain incidents through the news media by finding out the background information about certain companies. That is what we commonly call "dirt digging". At present, "dirt digging" is most rampant in online discussion forums. For example, one can easily find out whether MAK Chai-kwong has any other misdemeanors, or whether LEUNG Chun-ying has told lies in other matters, or even uncover all the relatives and friends of a certain person. That is terrible. Hence, "information excluded from public inspection" must be referring to those

as specified by or under an Ordinance, or by an order of the Court. As for other information of a company, members of the public can still access the same conveniently, which indirectly serves to monitor the company's operation and promote corporate governance. Nonetheless, with society's heightening awareness of the protection of personal data privacy, conflicts often occur. The Council was still discussing the Personal Data (Privacy) Ordinance a few days ago, right? Yet we are discussing now the CO requirement that unless otherwise provided, all information should be made available for public inspection.

Hence, when striking a balance, there is the protection of personal data privacy on the one hand, and the obligation to inform on the other. The Government should have the obligation to inform, which is commonly referred to as "the right to know" by the press. But the right to know must be complemented by the obligation to inform, that is, the Government has the obligation to inform towards different people and some statutory bodies and public organizations also have the obligation to inform, while the people have the right to know. The right to know is relative. If other people do not inform you, what is the use of the right to know despite your claim? Press freedom is a key element to allow members of the public to be kept well-informed, and information flow should not be impeded in any way, either administratively or legally. That is the meaning of the right to know. Unfortunately, Hong Kong does not have a free flow of information law. But, on the contrary, there is the Official Secrets Ordinance. Regarding this question as well as the issue of personal data privacy, what should the Government do to strike a balance?

For this reason, we must consider reviewing the arrangement for disclosure of certain information. The CO only provides for the disclosure of information as required actually, and in case of dispute, a judgment should be made by the Court. Hence, the provision under section 46, *viz.* "any information excluded from public inspection by or under an Ordinance or by an order of the court", is the precondition for maintaining the balance I just mentioned — in case of dispute, a judgment would be made by the Court so that the Court will make an order on the information excluded from public inspection. However, from another angle, it means the Court has impeded the free flow of information. This dilemma happens all the time — on the one hand, there is the protection of privacy, and on the other, the laws must protect the Court's power to exclude

certain information from public inspection. However, we also hope that our right to know can be better satisfied. Ultimately, it is a question of striking the right balance.

Clause 46 of the Bill provides that, "The Registrar must not make available for public inspection under section 43 any information excluded from public inspection by or under an Ordinance or by an order of the court.". Just now, I have already raised some of my concerns about clause 46. Moreover, I also feel concerned about the excessive powers of the Court. For example, the Bill has neither specified the meaning of "an order of the court", nor set out the principles to be considered by the Court when making an order to protect the relevant information. In addition, the word "or" is used in clause 46, *viz.* "by law or court" — there is the word "or" before "court order". Hence, the order made by the Court may not be limited to "any information excluded from public inspection by …… an Ordinance", such that the order may go beyond this requirement. Therefore, we are concerned about clause 46 which does not require the Court to consider the matters as stated in section 40(7) before it when making the order.

Section 40(7) provides that when handling an application under sections 40(1) or 40(6) in relation to the rectification of information, the Court must consider the following matters. The precondition is that, "any of the following may cause damage to the company". The matters to be considered include "the presence on the Companies Register of the note or an unrestricted note"; secondly, "the availability for public inspection of the order", or "and the company's interest in non-disclosure outweighs the interest of other persons in disclosure". In other words, our concern about clause 46 is the same as the situation under section 40.

On the other hand, we feel concerned that clause 46 has neither provided an opportunity for persons who may be affected by an order under clause 46 to participate in the relevant hearings, nor an appropriate procedure for relevant persons or "aggrieved persons" as stated previously to seek review of an order after it has been made under clause 46. This is a question that warrants our attention in discussing clause 46.

Moreover, clauses 46 and 27 are related. As I said this morning, excessive powers are vested in the Registrar under clause 27. In the most extreme case, an aggrieved person has no avenue for redress because all

information — Chairman, please look at clause 27(3) — will have been destroyed according to this provision. Hence, if we read all these provisions together, we can see that some requirements are indeed contradictory — those are the contradictions we have talked about.

Lastly, I wish to say something about some textual problems of the Bill. As the Companies Bill is drafted according to the principles or concept of modernizing law drafting, the drafting of the Bill is more concise when compared with other Bills. As the Bill is drafted according to the standard of modernizing law drafting, the new CO is more concise and clear. Nonetheless, in the Chinese text of the Bill, we can see that there is still the question of rigid translation from the English text.

For example, the Chinese text of clause 46 reads as follows, "如任何資料屬獲某條例或某法院命令免除讓公眾查閱的資料，或屬根據某條例獲免除讓公眾查閱的資料，處長不得根據第43條提供該資料讓公眾查閱" ("The Registrar must not make available for public inspection under section 43 any information excluded from public inspection by or under an Ordinance or by an order of the court.") Strictly speaking, in this quotation of just one sentence, a phrase is repeated. What is it? That is "免除讓公眾查閱的資料" ("excluded from public inspection") which has appeared twice in the provision, including "如任何資料屬獲某條例或某法院命令免除讓公眾查閱的資料" and "或屬根據某條例獲免除讓公眾查閱的資料". What is the difference between these two parts of the sentence? The first part is also about "根據某條例" (by an Ordinance). The phrase is repeated once in just one short sentence. What is the reason for such drafting?*(The buzzer sounded)* …… In fact, if this sentence is rewritten, at least 15 characters can be deleted. That is my view on clause 46. Thank you, Chairman.

CHAIRMAN (in Cantonese): Mr WONG, your speaking time is up. Mr WONG, you are right. In respect of clause 46 you just mentioned, why is the sentence divided into two parts? Because the first part of the sentence does not contain the term "根據" (by), while the second part contains the term "根據". If Members refer to the English text, the provision is more concise with no repetition.

MR WONG YUK-MAN (in Cantonese): That is it. In other words, Chairman, you agree that I am right. Thank you for your verdict.

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

(Mr Albert CHAN rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr Albert CHAN, speaking for the 13th time.

MR ALBERT CHAN (in Cantonese): Chairman, the People Power has made a lot of preparations for the Companies Bill. Given the excellent command of "Yuk-man" of the Chinese language, we have indeed made contribution in the views we expressed on various amendments to the Bill. Hence, we should not be criticized as filibustering for the sake of filibustering. We are different from some Members who merely want the Bill passed and choose not to speak at all; they are completely silent, merely waiting to vote. In fact, it is the hope of many operators of small and medium enterprises that benefits will be brought by the Ordinance after this rewrite, yet ……

MR WONG YUK-MAN (in Cantonese): Chairman, a quorum is lacking in the Chamber. Thank you.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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 13th speech.

MR ALBERT CHAN (in Cantonese): Chairman, just now, I was talking about the requirement in clause 403, *viz.* "reasonably requires", that is, an accountant or auditor can demand information or records from the relevant parties. The provisions under subdivision 4 all seek to enhance the responsibilities and rights of auditors, which is helpful in some measure to obtaining the relevant information.

Nonetheless, the only imperfection is the impact created by the restriction of "reasonably requires". Moreover, there is another provision in section 403(3), *viz.* "If an auditor has required a person to provide any information or explanation under subsection (2) ……"; given that subsection (2) has already provided for the restriction of "reasonably requires", subsection (3) goes on to state that, "…… the person must provide the information or explanation as soon as practicable after being required.".

The expression "as soon as practicable" is another hurdle, reason or excuse. I reckon that lawyers and professionals are experts in using this requirement as an excuse to turn down requests for information as being not reasonable or practicable. These two hurdles are good enough excuses for companies, their directors or the relevant persons to decline or obstruct requests for information, such that it might be more difficult to bring prosecution in future. I will discuss the issue of prosecution later.

Chairman, the Bills Committee has also set out clearly in details its view on this issue in its report on the deliberations of the Bill. I quote as follows, "It is important for an auditor to have access to relevant information regarding the state of affairs of the company to ensure that he can perform his oversight functions in an effective manner. Noting the restricted right of auditor to obtain information under the CO, clause 403 empowers auditors to require information and explanations they may reasonably require for the performance of their duties from a wider range of persons, including a person holding or accountable for any accounting records of the company, any such person or former officer of the company at a time to which the information and explanation relates, as well as those persons in the company's Hong Kong and non-Hong Kong incorporated subsidiaries.". Failure to comply with the requirement will be subject to criminal sanctions.

In fact, the Bills Committee was also gravely concerned about this issue, and hoped that power in this regard can be conferred on auditors through clause 403. However, as I have just said, the Bill has provided for the restriction of "reasonably requires", which I consider inappropriate. For example, if we have questions about the Government in the Legislative Council, the Government must answer the questions asked by Members on account of the relationship between the executive and the legislature and that the executive should be accountable to the legislature, and there is no restriction of "reasonably requires" whatsoever.

Hence, if a person requests certain information on account of his professional duties in order to conduct the relevant work in accordance with his functions as vested by the law, the requirement of proving the element of "reasonably requires" is — in the words of "the Condor" — absurd. When an auditor seeks information or proof from certain persons in carrying out an audit, it should be a professional requirement for him to identify himself as an accountant to these persons. But does it mean that he must prove himself to be reasonable when making any professional request in future in respect of his professional duties? Because the question of reasonableness often involves an accountant's professional judgment and perspective, which is not the same standard of reasonableness as perceived by ordinary persons. Sometimes, my doctor would ask me to take certain medication, which I also consider to be unreasonable. Some 23 years ago, I was told by my doctor that I should stop playing football because my knees could no longer bear the strain, and I should stop playing that sport. But I have continued to play football for 23 years since then. Of course, the doctor's then advice that I should stop playing football was made out of professional reasons. He pointed out that there were signs that the tendon in my knees was hardening and the gel under my kneecaps was depleting. Hence, I should stop playing football if I still wanted to be able to walk in old age. Certainly, I understand his professional advice, yet in many cases, there is dispute over whether a professional opinion is reasonable or not.

If somebody suddenly asks me to provide certain information, while I may not doubt his intention, I can always ignore the request if I consider it unreasonable. But, Chairman, this will give rise to two problems. Firstly, this increases the difficulty faced by the professionals and auditors in requesting information; and secondly, on account of the restriction of "reasonably requires", the person concerned may argue that he has ignored the request for information

because he considers it unreasonable. If he ignores the request because he considers it unreasonable, he will be placed in a very disadvantageous position if he is prosecuted in future because he indeed considers it unreasonable.

Of course, the person concerned may not seek legal advice on each occasion. Moreover, it may be necessary to accumulate some precedents on the new Ordinance. While it may take some years before the relevant persons take their appeal cases to the Court of Final Appeal, they may be aggrieved in the meantime.

In respect of penalty, it is provided for in clause 404. If an auditor considers it necessary to request information, and the person concerned refuses to provide such information, he may be liable for the offences relating to section 403 as provided for under section 404. If an auditor requests a relevant person to provide information in respect of some financial questions, and the person concerned eventually refuses to provide such information, that person will be prosecuted. On conviction, he is likewise liable to a fine at level 4. The penalty is merely a fine.

That then brings forth another major question. When a request for information, proof or financial records is made on professional reasons, it will certainly involve important information. Such important information may be related to the company's reports or annual reports, or problems identified in the audit, or deliberate acts of cover-up. Hundreds of millions of dollars may be at stake. A previous case involving investment loss incurred by CITIC Pacific in Australia is a clear example. In the three examples of the United States I quoted earlier in the debate, billions of US dollars is involved in each case. Besides, as I have also said, the incumbent Director of Audit was involved in an out-of-court settlement as much as HK$1 billion due to past mistakes that saw his involvement.

Hence, the relevant information and records may involve large sums of money. I consider that when dealing with these "white-collar crimes", the Government only imposes a penalty such as a fine of thousands or tens of thousands of dollars, or even just a maximum fine of $15,000, which obviously lacks any deterrent effect. Chairman, let me cite the case of Ernst & Young again where the liquidators of Akai Holdings made a claim of unprofessional conduct against Ernst & Young, and the case was settled eventually with compensation amounting to $1 billion. Had this Ordinance been enacted at that

time, how would the responsible person of Ernst & Young — that is, the incumbent Director of Audit David SUN — handle the case if under the provision, a person who refused to provide information on request would only be fined tens of thousands of dollars?

Firstly, even if prosecution is instituted, it will be a protracted process; and secondly, given the two hurdles — namely that the defendant can use the ground of unreasonableness as a defence, or claim that it is not practicable to provide the information immediately — and even running the legal risk of being convicted if prosecuted, the penalty is merely a fine at level 4, would it deter somebody as clever as David SUN? Of course not, given that his company was willing to pay compensation amounting to $1 billion in settlement, how could it be deterred by such a petty fine?

Hence, these provisions all point to the same conclusion. Chairman, you may say that I have repeated myself for making the same conclusion, yet that is indeed the conclusion that can be deduced from the relevant provisions, or arising from the issues and penalty relating to auditors. Instead of "relating to auditors", perhaps I should say that the question is about such lenient sanction being imposed for the relevant person's refusal to provide information in connection with the discharge of an auditor's duties, which neither achieves any deterrent effect nor provides any assistance to the discharge of an auditor's duties.

Of course, I think the Government will definitely provide a lot of data and information in due course to show that many companies will provide information after the implementation of the new Ordinance. Yet 99% of them are small and medium enterprises (SMEs). It is definitely a heavy burden for the SMEs if they are fined $10,000 or $25,000; likewise, the daily fine of $700 will definitely be detrimental. But for some "big predators", state enterprises or quasi-state enterprises, or companies which represent financial hegemony or real estate hegemony or even their subsidiaries, they will not even frown.

Hence, this provision only serves to create enormous pressures on the SMEs generally but has no impact at all on *bona fide* large corporations. Therefore, we come to the same conclusion again, that is, this Bill should in fact be divided into different pieces of legislation so as to deal with the operation of SMEs and large corporations specifically, such that commensurate punitive provisions can be made accordingly.

Chairman, in this connection, the authorities can in fact consider accepting my earlier proposal of imposing penalties according to a specific percentage of the company's assets. For example, if the company in question has assets totalling $1 million, a fine of 2% is equivalent to $20,000. But if the company's assets amount to $100 million, a 2% fine is equivalent to $2 million. Hence, it is a relatively fair practice to impose financial penalty according to a specific percentage of the company's assets. Irrespective of their scale, all companies will be liable to a fine at 2% of its assets. In that case, the fine imposed will neither be exceedingly high and hence unfair for SMEs, nor exceedingly low for large corporations such that they consider it insignificant, minimal or even negligible. Therefore, this piece of legislation is actually class-biased and partial. This is not empty talk. After careful analysis, we can see the naked facts.

Chairman, before I comment on another provision, I would like to report a matter to you first. Regarding my earlier request that clause 104 be put to the vote separately, I have discussed the matter with the Secretariat. After study, the Secretariat advises that the matter is complicated because other provisions as well as their related Schedules are involved. If the provision is put to the vote separately, it may incur a lot of additional work for the Secretariat. Therefore, Chairman, please note that I now withdraw my earlier request. Thank you.

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

MR ALBERT CHAN (in Cantonese): Chairman, please do a headcount first so that more Members can listen to the speech of "Brother Long Hair".

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

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

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

(Mr LEUNG Kwok-hung stood up to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, please speak.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I will now speak on Subdivision 2 of Division 4 of Part 2 of the Bill (Subdivision 2) with the focus mainly on clause 35 in relation to "Appeal against Registrar's decision to refuse registration". Clause 35 is in fact related to clauses 33 and 34 in Subdivision 2.

Members must have known that the filing of documents is a very important part of the CO, and it is an offence to breach the filing obligations thereunder. Hence, if a company fails to file documents, it means that the company cannot operate in accordance with the Ordinance. Hence, given that the Registrar of Companies (the Registrar) is appointed by the Chief Executive, and he will then appoint other people to discharge his functions, should the Registrar make unfair decisions arbitrarily, it will certainly incur losses to any person or company failing to file documents because the company in question can no longer operate legally under the CO. In this connection, the provision in Subdivision 2 in relation to "Registrar may refuse to accept or register document" is about the registration of documents accepted by the Registrar, that is, the registration process of acceptable documents after vetting. Regarding the matters thereafter in relation to the keeping of documents, I have already discussed them previously and so I will not repeat myself.

Under clause 33, if the Registrar is of the opinion that a document delivered to him is unsatisfactory, he may refuse to accept the document or, after receipt of the document, return it to the person who delivered it — the latter being the provision under section 33(2). Section 33(3) specifies that the Registrar may also advise the person who delivered the document to submit further information or amend the document, which can then be delivered either together or separately. Actually, the translation of this provision is very clumsy. The question is that if the Registrar refuses to accept the document under section 33(2), or has not received the document, or refuses to register the document and returns it to the

person who delivered it under section 33(2), that person is in trouble because he has acted against the law.

The Registrar even has the power to require further information from the relevant person before deciding whether or not any document should be accepted or registered. That is provided for under section 34 of Subdivision 2, *viz.* "Registrar may withhold registration of document pending further particulars etc." But this is not the provision I wish to discuss. I would like to go to section 35 direct and discuss the scenario after a decision has been made by the Registrar, regardless of whether he handles the matter under section 34 or quickly refuses to accept the document under section 33 as it does not comply with the relevant requirements.

Section 35 which is about "Appeal against Registrar's decision to refuse registration" is problematic because no appeal board has been provided for thereunder. Earlier, I praised the Government for establishing the appeal board as it can save a lot of time and costs, as well as work for the Court. However, no avenue of appeal is provided against the Registrar's decision in this regard. Just like the case of the Chief Executive who is not bound by the Prevention of Bribery Ordinance because there is nobody to monitor him, who is then responsible for monitoring the Registrar? The answer is "No". Hence, an aggrieved person must lodge an appeal to the Court. Here lies the crux of the problem. If a person is aggrieved by a decision of the Registrar under clauses 33 and 34 of the Bill, the person may, within 42 days after the decision, appeal to the Court against the decision. The problem lies in this time limit.

In the discussion on the entire Companies Bill, time is of course a very sensitive issue. To a big consortium, a period of 42 days is not a matter of grave concern because if a company within the consortium cannot register as a company successfully, the consortium can mobilize its large team of lawyers to work according to its established "production line" protocol by seeking advice from its in-house lawyers as to whether the matter can be resolved; whether the Registrar's decision is reasonable; whether the matter can be resolved under sections 33 and 34, and if not, whether an appeal to the Court should be lodged. However, Chairman, please consider this. Not every company has employed a legal advisor or can have the matter studied or resolved by simply flipping through a name list.

If an application for registration by a SME is actually declined because the Registrar considered the information provided inadequate, or it fails to provide additional information as requested under section 34, or its application was refused right away, does a period of 42 days give the SME enough time to lodge an appeal to the Court? As a matter of fact, given the actual situation of SMEs, this period is inadequate because, first of all, does the SME have the financial resources to institute proceedings? If it does not have the requisite financial resources to institute proceedings, there comes another question ……

(A member requested a headcount)

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, just now, I was talking about the plight of SMEs. In terms of the implementation of section 35, large corporations can most certainly respond quickly. But for SMEs, their consideration of whether or not to lodge an appeal must firstly involve consideration of the troublesome issue of costs and then the need to engage lawyers. If worst comes to worst, they decide not to engage a lawyer because they cannot find a suitable one due to the possibility of astronomical costs, they must then handle the appeal themselves.

It will bring bigger problems to the SMEs if they must handle the appeal themselves because with "inconsiderate officials and ignorant rulers", even we as Members of the Legislative Council sometimes will find the legislative provisions confusing. How can the SMEs handle the matter themselves? Moreover, there are only about 30-odd working days in a period of 42 days if the intervening holidays are deducted. As I see it, if the Government is really mindful of

protecting SMEs, the latter should be given more time to appeal against the Registrar's decision to refuse registration. In other words, they should not be required to lodge an appeal within 42 days because a period of 42 days only means about seven weeks.

As a matter of fact, section 35(2) has already specified that, "The Court may make any order that it thinks fit, including an order as to costs.". In subsection (3), it is provided that, "If the Court makes an order as to costs against the Registrar under subsection (2), the costs are payable out of the general revenue, and the Registrar is not personally liable for the costs.". Of course, I understand that there is no reason why civil servants or public officers should be required to make use of their personal resources in the exercise of their powers. But, on the contrary, what is the position of those persons, especially SMEs, who cannot operate legally because they cannot register in accordance with the CO as a result of mistakes made by the Registrar in exercising his powers? One party has infinite resources and legal assistance to handle the relevant problem, while the other party has no means to obtain commensurate legal assistance.

Hence, in my opinion, either the Government resolves the matter through special means as I have mentioned previously such that an appellant who considers himself to be aggrieved is not required to bear substantial costs in order to fight for the rights he has been deprived of, or sets up an appeal board or a similar organization, or appoints a person or a group of public officers to handle the appeals. Otherwise, it will definitely give rise to a situation where justice is only available to the rich but not the poor.

Therefore, I hope the Secretary can explain in his reply later when the appeal board system will be introduced so that in the appeal process, an aggrieved person needs not, firstly, waste any money; and secondly, take his case to court. It is the most fundamental and basic right, that is, whether his application will eventually be accepted after delivering the document, or whether the Registrar will allow him to exercise his rights under the Basic Law and enjoy the freedom of business operation in accordance with law after delivering the document.

In fact, this issue should be handled more carefully. Given that so many Members have invariably claimed the need to take care of SMEs whenever any legislative proposal is discussed, should further consideration be given to the

matter? Can consideration be given to allowing SMEs to deal with the wrong decisions that may be made by the Registrar through a practicable mechanism that does not involve large amounts of costs? Can a bylaw be made at the same time to provide that an aggrieved party may apply for legal aid under specific circumstances?

Chairman, the Bill confers enormous powers on the Registrar as he can determine the documents to be disclosed or withhold the address of directors or registered persons. However, in respect of situations where a person is aggrieved by mistakes he may make in the process, why are there no checks and balances in the law? I do not mean to penalize the Registrar because if he is required to pay legal costs, nobody would be willing to take up the job as he is often required to face the possibility of litigations and compensation claims. Just like our lawsuit with Henry CHENG, who will fight against him if we are liable to making compensations? The problem is that the Registrar must deal with these questions frequently and hence, I hope that in his reply later, the Secretary can explain to us the relevant principles for introducing a statutory appeal board system such that suitable relief can be provided to persons who would probably be affected by the Registrar's decisions in order to allay our concern. Thank you, Chairman.

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

(Mr WONG Yuk-man rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr WONG Yuk-man, speaking for the 12th time.

MR WONG YUK-MAN (in Cantonese): Chairman, I am going to speak on clause 49. The heading of clause 49 of the Bill reads "Registrar must not make residential address and identification number available for public inspection". This is a new provision modelled on sections 242(1) and 242(2) of the Companies Act 2006 of the United Kingdom.

Clause 49 of the Bill specifies some so-called statutory exemptions for clause 43(1), that is, Division 6 of Part 2 of the Bill (Division 6) in relation to "Inspection of Companies Register". The heading of clause 43 reads "Registrar must make Companies Register available for public inspection", whereas clause 49 specifies statutory exemptions in respect of clause 43(1). Under clause 43, the Registrar must make the Companies Register available for public inspection at all reasonable times. Under the statutory exemptions provided for under clause 49 in respect of clause 43(1), the Registrar must not make available for public inspection any document delivered to the Registrar for registration in respect of a company which contains the usual residential address of a director of the company or the full number of the identity card or passport of any person.

In the course of the Bills Committee's deliberations, some members held that the disclosure of protected information (which includes the identity, identification number and address of a director of a company) might be required for preparation of legal documents or conducting legal proceedings. Hence, procedures should be put in place to enable access to protected information under specific circumstances or procedures. While agreeing that this arrangement is valid to in some measure, I consider that except under specific legal procedures, shareholders of a company, particularly minority shareholders, should also be provided with the relevant information in order to protect their interests.

Under the CO, many so-called arrangements for protection of shareholders require joint action by minority shareholders, and some even require the support or co-operation of the directors. As the Bill has not provided for the requirement that the relevant information of directors of a company must be made available to the shareholders, minority shareholders are often at a loss in this regard. If the relevant information of directors of a company is made accessible to the shareholders so that they can contact the directors, it can help enhance corporate governance, which is a positive practice. Hence, we hope that the Secretary will consider our views when formulating the relevant subsidiary legislation.

Besides, the Government has previously stated that the subsidiary legislation to be made in future will prescribe the entities to which the protected information could be made available, and that fees must be paid by the prescribed entities. I hope that the subsidiary legislation will explain clearly what these

so-called entities are, including the definition of minority shareholders as well as the fee-charging standard. The definition of "entities" must be specified first, right? Even if the subsidiary legislation to be made in future will prescribe the entitles to which the protected information can be made available to, what are these entities? We hope that a relatively clear definition as well as the fee-charging standard can be given.

We note that there may be conflicts between the power under clause 49 of the Bill and other ordinances. Let me cite section 14A proposed under the Personal Data (Privacy) (Amendment) Bill 2011 in relation to "Verification of data user returns" as an example. Of the five parts of the provision, subsection (3) provides that, "A person on whom a notice is served under subsection (1) may refuse to provide any document, record, information or thing, or any response to any question, specified in the notice, if the person is entitled or obliged under this or any other Ordinance to do so.". That is section 14A in relation to verification of data user returns provided under the Personal Data (Privacy) (Amendment) Bill 2011 we have just enacted. This provision already specifies clearly that the Commissioner may, by written notice, require any of the persons to provide any document for the purpose of verifying the accuracy of information in a data user return submitted under section 14. However, section 14A(3) which I just read out has created much controversy. During our debate on the Personal Data (Privacy) (Amendment) Bill 2011, some Members queried the rationale for section 14A(3) and requested the Government to clearly specify the meaning of "any other Ordinance". Does the Registrar of Companies have the power under section 49 of the Companies Ordinance to refuse the Privacy Commissioner for Personal Data's request for documents as stated in the written notice? There is no answer in the Personal Data (Privacy) (Amendment) Bill 2011. Even when asked by Members in the course of scrutiny of the Bill, the Government's reply was evasive. Hence, there is a conflict between the power under clause 49 and other ordinances. As shown in the example of section 14A of the Personal Data (Privacy) (Amendment) Bill 2011, there is basically a conflict between the two provisions, which highlights the inadequacy of the relevant legislation.

Chairman, a quorum is lacking.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR WONG YUK-MAN (in Cantonese): Chairman, clause 49 of the Bill provides that the Registrar may withhold residential address and identification number from public inspection. As I mentioned just now, this is a new provision and we are gravely concerned about the Personal Data (Privacy) (Amendment) Bill 2011 not clearly explaining the meaning of "any other Ordinance", which is related to the present Bill. We note from the report of the Bills Committee that the Office of the Privacy Commissioner for Personal Data has neither given any views on the relevant issue nor dealt with it actively. However, why has the Financial Services and the Treasury Bureau not conducted any consultation on this provision? Obviously, "Protection of Residential Address and Identification Number Contained in Certain Documents" is related to the Personal Data (Privacy) Ordinance and the Office of the Privacy Commissioner for Personal Data. Why has the Government not consulted their opinion? That is a question.

Moreover, I wish to talk about Division 2 of Part 3 of the Bill, which shall stand part of the Bill without amendment, namely clause 59 in relation to the Registrar of Companies. Clause 59 is also a new provision modelled on section 1107(2) of the Companies Act 2006 of the United Kingdom. In fact, the current rewrite of the CO is largely modelled on the Companies Act of the United Kingdom. This is a new provision in relation to translated documents on the Register. Regarding the translation of documents, section 59 on "Discrepancy between document and certified translation" provides that, "(1) This section applies if — (a) a certified translation of a document is delivered by a company to the Registrar for the purposes of section 29(1)(b) to accompany the document in a language other than English or Chinese; and (b) there is a discrepancy between the document in that language and the certified translation of the document.". While we support in principle this new provision with regard to the so-called

issue of "discrepancy", we do not agree with the Government's stance as stated in some papers that clause 59 of the Bill can actually promote the accuracy of translations submitted by companies.

Insofar as accuracy is concerned, the Government should improve the mechanism under clause 4 of the Bill first. As I mentioned earlier when I spoke on clause 4, the Government should improve this provision first, namely our suggestion that the "person specified" under section 4 should be certified first. If section 4 is not improved in this manner, that is, the mechanism I have just mentioned, the function of this new provision will only be limited.

Clause 50 of the Bill provides that when a certified translation of a document is delivered by a company to the Registrar to accompany the document in a language other than English or Chinese, and if there is a discrepancy between the document and the certified translation, the company and a third party may not rely on that translation, in so far as it relates to the discrepancy, as against each other.

Section 59(3) also provides that the above requirement does not apply if the third party has no knowledge of the actual contents of the original document but has actually relied on the certified translation of the document.

First of all, we noted the problems in the drafting of these provisions. As far as I know, clauses 59(1) and (2) of the Bill are related to the discrepancy between the original document and the certified translation. The English text of clauses 59(1) and (2) is relatively clear, while the Chinese text is quite ambiguous. Hence, when reviewing the relevant legislation, the Chinese text of clauses 59(1) and (2) should be improved, yet the Bills Committee has not done so. The meaning of the expression "rely on that translation, in so far as it relates to the discrepancy" is ambiguous.

In addition, clause 59 seeks to protect members of the public from being misled by any discrepancy in a translated document on the Register. I consider that clause 59 has basically provided a relatively fair arrangement to deal with any discrepancy in translated documents.

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

(Mr Albert CHAN rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr Albert CHAN, speaking for the 14th time.

MR ALBERT CHAN (in Cantonese): Chairman, the three of us will make a fortune if the remuneration of Members is pegged with the number of times we speak.

CHAIRMAN (in Cantonese): Quality also counts.

MR ALBERT CHAN (in Cantonese): Chairman, you also commended Mr WONG Yuk-man just now; only that you have not sung any praises of me.

MR WONG YUK-MAN (in Cantonese): Quality is not very important, and it is quantity that counts. A quorum is lacking now. Chairman, please do a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR ALBERT CHAN (in Cantonese): Chairman, according to your "quality theory", I think many Members could actually be negative equity assets. Chairman, Members who do not know what is a point of order should be fired.

Chairman, insofar as the clauses in this Bill are concerned, I notice a very strange phenomenon. Overall speaking, many of them involve penalty or adjustment of penalty, yet there is something very strange about clause 304. In this clause, the penalty of $50,000 under the original provision has been reduced to $25,000, that is, by as much as 50%. This penalty is related to the register of debenture holders. I have raised this point because provisions related to the register of debenture holders are mostly concerned with large corporations, yet I find it strange that the penalty for non-compliance has been reduced from $50,000 under the original provision to $25,000.

Chairman, taking this opportunity, I would also like to discuss another clause, *viz.* clause 388 which involves the use of difficult and obscure expressions. Chairman, given your good command of the Chinese language, please see if you can give some advice to the Government. Clause 388 is about "Appointment to fill casual vacancy". I have no idea how to read out the Chinese text of clause 388(1), which runs as follows, "如公司的核數師職位出現期中空缺，則董事可委任一人填補該空缺。" ("The directors may appoint a person to fill a casual vacancy in the office of auditor of the company.") The difficulty lies in the obscure expression "出現期中空缺" ("a casual vacancy in the office"). "Yuk-man" also says my Chinese is not good, which is probably true. But it is really quite difficult to understand these terms and expressions. What is the sensible grouping in the expression "出現期中空缺", and what does it mean actually? Should the expression be divided into the term "出現期" (time of appearance) and then "中空缺" (interim vacancy)? Or is it "出現" (appear), to be followed by "期中" (during the term) and "空缺" (vacancy)? Or is it "出現" (appear), to be followed by "期中空缺" (vacancy during the term)?

When I read the expression used in the English text …… I always refer to the English text when I fail to understand the Chinese text. But I think this is quite sarcastic in Hong Kong where legislation is enacted bilingually with the Chinese text having its unique status officially. Moreover, it has been 15 years since the reunification, and it is really a joke that I still need to do so. This situation is unreasonable and inappropriate.

In the English text, it reads, "a casual vacancy in the office". The English equivalent of "出現期中空缺" is "a casual vacancy in the office". Chairman, I have looked up the expression "casual vacancy" in the laws. The term "casual

vacancy" appears in paragraph 14 of the Schedule to the Tung Wah Group of Hospitals Ordinance (Cap. 1051) and the Chinese equivalent is "臨時空缺". If the term "臨時空缺" is used in clause 388(1) so that the provision reads as follows, "如公司的核數師職位出現臨時空缺", I think the meaning will be more readily comprehensible. As this term is more idiomatic, members of the general public can understand it more clearly. Of course, with the original Chinese text, we can still understand the provision as the words *per se* still convey certain meaning, but there are in fact many questions and uncertainties which can cause misunderstanding.

Chairman, please do a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

(Mr Albert CHAN flipped through his materials)

MR ALBERT CHAN (in Cantonese): Chairman, I need to organize my materials because I was saying just now ……

CHAIRMAN (in Cantonese): Do you wish to continue the discussion on clause 388?

MR ALBERT CHAN (in Cantonese): I am going to move on to the next clause, but the materials are a bit confusing.

Chairman, I was earlier pointing out the problem with the Chinese text of clause 388. The English text is very clear, but it takes a person with the

Chairman's wisdom to understand the Chinese text, or perhaps "Yuk-man" can give some advice to the Government as to how it can be amended. Nonetheless, I consider that a clearer meaning is conveyed by the term used in the Tung Wah Group of Hospitals Ordinance, even though the Law Draftsman or the experts may not concur with my view in terms of the use of jargons or the modern use of language. I wonder whether members of the Bills Committee unanimously accepted and understood the term "出現期中空缺".

Chairman, there is another clause which I want to talk about, that is, clause 412. This provision on "Resigning auditor may requisition meeting" provides that, "If a person gives under section 408(1) a notice of resignation that is accompanied by a statement of circumstances given under section 415(a), the person may, by another notice given to the company with the notice of resignation, require the directors to convene a general meeting of the company for receiving and considering the explanation of the circumstances connected with the resignation that the person places before the meeting."

As we all know, the resignation of an auditor is a major issue. The clause provides that, "A person may resign from the office of auditor by giving the company a notice in writing that is accompanied by a statement required to be given under section 415." Section 415 entitled "Duty of resigning auditor to give statement" reads as follows, "A person who resigns from office under section 408(1) must, on the resignation, give the company — (a) if the person considers that there are circumstances connected with the resignation that should be brought to the attention of the company's members or creditors, a statement of those circumstances; or (b) if the person considers that there are no such circumstances, a statement to that effect.".

Chairman, I think the procedure or arrangement for re-confirmation set out in the relevant clause is excellent and only marred by the inappropriate use of the word "may" in the title of clause 412, *viz.* "Resigning auditor may requisition meeting".

In past cases involving the resignation of an auditor of a company, all parties would invariably have all sorts of speculations and suspicions about the company such as financial problems, creative accounting and falsifying records. Moreover, an accounting firm may sometimes develop a complicated relationship with a company if it has acted as the company's auditor for a long time. There

are many past cases where the auditor was prosecuted or had to pay compensation amounting to hundreds of millions of dollars in order to reach a settlement. Hence, the use of the word "may" in the clause in respect of convening a general meeting may not be stringent enough in terms of supervision. We can consider amending the clause to read as "Resigning auditor 'must' requisition meeting". In the meantime, another clause can be made to specify the exceptions where there is no need to convene a general meeting. For example, there is no need to convene a general meeting when the auditor resigns due to health reasons (such as terminal illness) or reasonable grounds commonly found in the accounting industry or during business operation.

As the resignation of auditors is not normal, it may be unfair to shareholders or the public if the initiative to convene a general meeting is vested in their hands. While it is usual for a resigning auditor to submit a report, the relevant persons, particularly aggrieved persons, may not learn about his reasons for resignation, the information he may hold or other relevant problems.

Given that all the clauses in this Division are related to auditors, I think the focus of this Division is to protect members of the public. Hence, I consider that the provisions should specify that resigning auditors must convene a general meeting so that they can clearly account for and explain the relevant matters concerning their resignation at the meeting. At the same time, the relevant persons (particularly minority shareholders and other persons who may probably feel aggrieved or be affected by the resignation) can gain a clear understanding of the matter at the meeting. This will also create a good opportunity for interaction as directors of the company can account for and explain the resignation of the auditor.

One of the objectives of the Bill is to enhance transparency. If no general meeting is convened after the auditor's resignation, rumours will fly around and the public will have no way to find out who is at fault because the auditor may resign simply because of his own professional misconduct or his conspiracy with individual directors to default. It may not necessarily involve the management or the board of directors as a whole. Hence, it will be more desirable to establish a mechanism so that all relevant persons can have a clear understanding of the full picture through the general meeting.

I think a good arrangement has been made under one clause, that is, upon an auditor's resignation, a notification of the specified fact must be delivered to

the Registrar for registration. Chairman, while I do not know the specific purpose to be served by such registration, the Registrar should have the right to ascertain the relevant facts in the event of an auditor's resignation. Very often, a registration is merely a formality and the relevant records will be forgotten afterwards. In respect of the notification of the specified fact, if the relevant party can *(The buzzer sounded) ……* I will briefly explain this matter later.

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

(Mr LEUNG Kwok-hung rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, speaking for the 11th time.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, there is no hard and fast rule when it comes to quality. As the Chinese saying goes, "In ancient times, there was no such office as that of Censor. From the highest chamberlain of Court down to the humblest workman of the people, all were free alike to offer their advice to the Throne."[3] In other words, every person has the right to speak.

Let us talk about another issue. I wish to discuss clause 176 now. What is clause 176 about? This is a new provision, that is, it did not exist in the existing CO. Clause 176, entitled "Notifying class members of variation", imposes a duty on a company such that if the rights attached to shares in any class of shares in the company are varied, it must give written notice of the variation to holders of shares in that class within 14 days after the date on which the variation is made. In case of contravention, the company is liable to a fine of $25,000 and a daily fine of $700 for continuing offence. The clause is generally drawn up like this.

In my view, a serious offence is committed by a company if it does not notify the relevant persons of the variation of their rights after 14 days, yet the penalty is very lenient. A period of 14 days means two weeks. In modern-day

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[3] Reference: <http://blog.sina.com.cn/s/blog_6f58baf00102dt5h.html>

Hong Kong, 14 hours would suffice for notifying all the people. For example, the Legislative Council Secretariat often notifies Members through SMS messages of matters such as lack of quorum or changes in meeting times so that we can be informed immediately. As explained by the Administration, this new clause is modelled on the relevant legislation in the United Kingdom and hence, the requirement of 14 days, that is, a fortnight. But is it possible to set a period of seven days?

During our previous discussion on another piece of legislation, I questioned whether a period of 42 days would be too short. For minority shareholders, a period of 42 days is by no means enough for them to decide whether or not to engage a lawyer or to appear *pro se*. However, in the present provision, a company has decided on its own to vary the rights attached to shares in a class of shares of the company and as a result, many persons (including existing and potential shareholders) are affected. Yet it can notify the relevant persons within 14 days. I consider that this requirement utterly inconsistent with the spirit of making the new provision in the first place. It could be acceptable if this is an old provision. But as this is a new provision, why is the time limit set at 14 days but not longer or shorter? I think a shorter period should be set because under clause 177 — I will talk about clause 177 again later — this provision with the title "Disallowance or confirmation of variation by Court" provides that if any person considers that the variation is inappropriate, illegal or prejudicial to his interest, he may apply to the Court to have the variation disallowed so long as he holds 10% of the voting rights. That is the relief and remedy provided by the law. Why is the company allowed to notify the relevant persons 14 days after the variation, but not sooner? What is the rationale? The company concerned should give the notice earlier so that shareholders and stakeholders in the market can seek the Court's assistance sooner.

A period of 28 days is likewise too short for the purpose because when a person makes an application to the Court, he must first undergo a lot of legal procedures and consider the consequence in case his application to the Court is disallowed. The Government has only given these persons 28 days to make an application to the Court, while companies which have varied the rights attached to any class of shares are given 14 days to give notice, is it reasonable? These persons have to seek legal relief only because the companies concerned have made the variation, yet the Government has only given them 28 days to make an

application to the Court, while the companies which have made the variation after careful consideration are allowed 14 days to stall the process.

Hence, I consider that the legislative process is tainted with mercantilism as the legislation is heavily biased in favour of the big businesses and against the small businesses. At least, there should be some kind of standard, right? If there is no standard, how can Members consider the pros and cons of the Bill tabled before the Council? It is tantamount to asking God on which principles He made man, which has no answer at all, right? Why is one period exactly twice the other?

On the other hand, the Government has told these persons to bring their objection to the Court, which requires financial resources. It is immensely difficult if not impossible for them to obtain relief in civil cases. I have had similar experiences before. Whenever I asked the lawyer, he would say that no monetary compensation would be awarded. Even if monetary compensation is awarded, part of it will be withheld. What is the fine for this offence? Let me read it out to Members. "A person contravening the requirement commits an offence and may be liable to a fine of $25,000." That is it. It needs more than $25,000 just to engage a lawyer to study the case. This is really a case of a "Long March of $25,000" ……

CHAIRMAN (in Cantonese): Mr LEUNG, Mr Albert CHAN already discussed the penalty under clause 176 yesterday. You can speak more concisely now.

MR LEUNG KWOK-HUNG (in Cantonese): I did not hear his speech.

CHAIRMAN (in Cantonese): Mr Albert CHAN has already discussed the matter. The point is not about whether you have heard it or not.

MR LEUNG KWOK-HUNG (in Cantonese): Yes, I got it. I have no idea what Mr Albert CHAN's view is. Does he consider the penalty too lenient or too harsh?

I consider that …… If you do not want me to go on, I will not go on. I will talk about something else.

You are right. Let me find some inspiration first. Chairman, I want you to proceed under Rule 17(3) of the Rules of Procedure. Please perform your duty when there is less than half of the Members present in a Committee of the whole Council.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I will not repeat Mr Albert CHAN's remarks. I do not know whether Mr Albert CHAN has talked about the clauses that follow, that is, the several clauses after clause 176 which I just talked about up to clause 179 (Notifying Registrar of variation). Those are the most interesting provisions. Has he talked about those provisions?

CHAIRMAN (in Cantonese): Mr Albert CHAN has not talked about those provisions because clauses 177, 178 and 179 will be dealt with in the next part as they do not belong to the present group of clauses under discussion.

MR LEUNG KWOK-HUNG (in Cantonese): Then nothing can be done about it. Let me explain briefly why ……

CHAIRMAN (in Cantonese): According to Mr Albert CHAN, he has provided you with the materials for your speeches. I do not know whether what he has

said is true or not. But it seems that you should be better prepared so as not to confuse things.

MR LEUNG KWOK-HUNG (in Cantonese): No. After reading the materials prepared by Mr Albert CHAN, I make my own speeches. Now, I am going to talk about the conflict between clauses 176 and 179. Under clause 179, if a company has not notified the Registrar after one month, it may also be liable to a fine of ……

CHAIRMAN (in Cantonese): Mr LEUNG, please leave your discussion on clause 179 to the next part. As we are now dealing with clauses to which no amendments have been proposed, so clause 179 is not included.

MR LEUNG KWOK-HUNG (in Cantonese): I see, but I am presenting my case that clause 176 is unfair. You will see my point after listening to my speech. Under clause 179, if a company does not notify the Registrar, it may also be liable to a fine at level 4. If the company still does not notify the Registrar after one month, it is alright so long as it continues to pay a fine. The company can withhold notification to the Registrar for one month so that he has no knowledge of the matter; the company can also withhold notification to the affected persons so long as it is prepared to pay the fine. The affected persons as well as the Registrar have no knowledge of the matter because the Registrar only knows about it after one month and hence, he cannot notify the group of uninformed persons. The situation with these ignorant persons is even worse for they must wait 14 days before they can receive the relevant notice. Even if the company still refuses to give the relevant notice after 14 days, it will not be caught by the law so only as it has the money to pay the fine.

Hence, the entire penalty regime under clauses 176 to 179 is ultimately based on money. A company with money can withhold notification to the shareholders so that the latter cannot proceed with litigation. In case the shareholders want to proceed with litigation after being notified, there is a time limit. The company can even withhold notification to the Registrar for an extended period of time.

The Registrar must be notified of such matters. Clause 176 specifies that each person must be notified — each shareholder affected by the variation of the rights of shares. However, even if the company does not notify any person, the fine is fixed, that is, the fine is not imposed in such a manner that the company will be fined $10,000 if it does not notify one person, and $100,000 for 10 persons. What sort of a law is this? Overall speaking, the entire Bill …… In fact, I do not mean to digress too far. Regardless of whether a fine is imposed or not, I really have no idea what is the pros and cons of this penalty. I have not studied the matter in detail. But the question is that firstly, a company which has failed to notify each person who should have been notified will only be subject to a fixed penalty of $25,000, as well as a daily fine of $700 for continuing offence, regardless of the number of persons involved; and secondly, while the Registrar should be notified of the matter, the company in question can delay notification to the Registrar. When the Registrar becomes aware of the matter, he can then investigate the case. He should not consider that such information is to be withheld from the public, right? What is in fact the effect of this Bill?

What is the entire Bill all about? The answer is that people with money are free to break the law. The Bill, even after enactment, will have no real impact. Firstly, nobody in the company concerned is liable to imprisonment as a result of contravening these regulations. Secondly, the company will not be penalized for its outrageous acts such as hurting others with money, being rich and hateful, being overbearing, and so on, because the law has not provided for penalties such as suspending its operation, or having its decision overruled by the Court.

Does the Companies Bill seek to protect the companies and the large corporations, or the minority shareholders of the companies? The answer is plain to see. While shareholders are only given 28 days to seek legal relief, the companies can withhold notification to the Registrar for one month. Would you say that the Bill is …… Chairman, you are right in saying that we should not only focus on how many words have been used, or whether the meaning of the English text has been translated accurately; the crux is the absence of justice in law.

What is the basis of the rule of law? That is to provide a fair platform to deal with the interests of different sectors in society. Under this Bill, the rich can disregard or ignore the law, or even the Registrar. They are safe until the case is brought to the Court.

Chairman, I consider that there is no way we can gain a thorough understanding of these clauses if they are not examined in a holistic manner. While I may find a clause alright on its own, I feel extremely angry when I read the requirement in relation to notification to the Registrar. Of course, you may say that, "Mr LEUNG, that is what life is about. You see the head, but not the tail. That is why when you speak, you can only talk about the head or the tail." But that is not how my brain works. As the Chinese saying goes, "When they were in high positions at court, they are concerned about people"[4]. I do not know whether you are a case of "When they were in remote places, they were concerned about their emperor". Now, I am "positioned high at court and concerned about the people", but they are the opposite, "they worried when they got promoted or when they were sent into exile". It is time for me to "go into exile" and stop speaking. Otherwise, I will be reprimanded by the Chairman again.

Next Member. Thank you, Chairman.

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

(Mr WONG Yuk-man rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr WONG Yuk-man, speaking for the 13th time.

MR WONG YUK-MAN (in Cantonese): I did not yet finish expounding on clause 59 in my last speech. Clause 59 is related to the way the Registrar of Companies handles certified translation of documents, and its objective is to prevent the public from being misled by the discrepancy between the document listed on the Companies Register and its translation. In my view, clause 59 does offer a comparatively fairer way to deal with the discrepancies between a document and its translation.

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4 Reference: 羅經國譯文, <http://bhygz2008.blog.163.com/blog/static/120185466201131215912426/>

Clause 59 seeks to ensure that no relevant company or any third party may make use of the so-called discrepancies between a document and its certified translation to direct against a third party. This is clearly stated in clause 59(3). This principle is in line with the so-called rule of equity in common law, which prevents any unfair and unreasonable outcome from occurring. In other words, the relevant company may not use the discrepancy between an original and its so-called certified translation to direct against a third party in lawsuits. In line with the same principle, clause 59 also prohibits a third party from using any discrepancy in translation to direct against the company concerned. On the surface, this arrangement seems to be very fair. But the point is that as the third party is not involved in the preparation, drafting, translation and processing of the relevant document, it is definitely possible for the third party to face an unfair situation.

Hence, clause 59(3) specifically introduces a rather new principle, pointing out that if the third party had no knowledge of the contents of the document in its original language, which means the third party should have no idea of the discrepancy, and had actually relied on the translation with discrepancy, the third party would be exempted from the aforesaid restriction. This principle is in line with the so-called rule of equity. Hence, we will not allow the third party which has knowledge of such discrepancy to gain any advantage through the loophole.

Another point about clause 59 that is worth mentioning is the definition of "third party" specified in clause 59(4). According to the said definition, "third party" means a person other than the company. But then, does that cover shareholders and directors? Under the Companies Act, a limited company enjoys the status of an independent legal person, and the relevant principle was established 120 years ago by a case heard by the House of Lords — the "Salomon vs Salomon" case in 1897 — company, its directors and shareholders are separate entities. That being the case, does "third party" cover also the Court and the Registrar? This remains an answered question. As such, I really do not quite understand the legislative intent of clause 59(4). I hope the Secretary will explain that in his reply.

But now, Chairman, I would like to request a headcount. Thank you.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR WONG YUK-MAN (in Cantonese): I would also like to speak on Division 4 of Part 2, namely clause 29, the provision related to "Registration of Document". This clause is one of the clauses to which no amendments have been proposed.

Clause 29 is modelled on sections 346(1)(a) and (b), sections 348(1)(a) and (c) of the original CO. The entire Bill has also made reference to section 1274(8) of the Australia Corporations Act. In addition to provisions that are modelled on the ones under the existing legislation, the Bill has also introduced a number of new provisions. Under the CO, the justifications for the Registrar to refuse to register a certain document are in fact rather ambiguous. For example, it is not sure whether the relevant justifications cover also situations where the information contained in the document is internally inconsistent or inconsistent with other information on the Companies Register. Clause 29 consolidates and clarifies the relevant justifications in the light of the requirements for document registration.

The objective of this provision is mainly to provide a statutory definition for "unsatisfactory document" referred to in the Bill. According to clause 33 of Part 2 — Division 4, the Registrar may refuse to register an unsatisfactory document. Under the original CO, the requirements and mechanism for handling documents delivered to the Registrar for registration are rather scattered, some are found in sections 346(1)(a) and (b), and some are found in sections 348(1)(a) and (c). As a result, both the law-enforcement agency and the company seeking registration of documents have to suffer all kinds of inconvenience when the various issues are being dealt with by the authorities.

All these relevant justifications are consolidated under clause 29 of the Companies Bill to enable the company seeking registration to review on its own whether the document concerned is satisfactory, thereby minimizing the mistakes caused minor negligence. That way, both the Companies Registry and the company seeking registration will stand to benefit.

Another area that warrants improvement is the wording of the provision. The wording of the provision …… Chairman, a quorum is not present.

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

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

CHAIRMAN (in Cantonese): I will suspend the meeting and give Members a break after Mr WONG Yuk-man has finished his current speech. Hence, I urge Members once again to stay in the Chamber until Mr WONG has finished speaking.

Mr WONG, please continue.

MR WONG YUK-MAN (in Cantonese): Thank you, Chairman. Even though I am not in a very good condition and have fallen sick, I will still finish my work.

Just now I mentioned the wording of clause 29. Section 346(1)(b) of the original CO says "be capable of being reproduced in a legible form", and it is indeed very hard to understand what the Chinese version of word "reproduced" ("重現") really means. In rewriting the provision, clause 29(1)(a) of the Bill changed the wording to "the information contained in the document is not capable of being reproduced in legible form", and "重現" is replaced by "複製" as the Chinese version of word "reproduced". Another example is the phrase "unlawful or ineffective" used in section 348(1)(a) of the original CO, as this may mislead readers into thinking that the provision is referring to some illegal document. Under clause 29(1) of the Bill, the phrase "unlawful or ineffective"

document is replaced by "anything that has been done without the company's authority". Such a change gives the content of the provision greater clarity.

With regard to the two examples referred to just now, which is to replace "重現" with "複製" and to change "unlawful or ineffective" into "anything that has been done without the company's authority", I must point out that clause 29(1) of the Bill uses "negative description" to define the term "unsatisfactory document". As such, it is inevitable that "double negative" construction is found in clause 29(1), with the double negatives cancelling one another to produce an affirmative meaning. For example, a document "not capable of being reproduced in legible form" is an "unsatisfactory document"; a document "neither in English nor in Chinese and not accompanied by a certified translation of it in English or Chinese" is an "unsatisfactory document"; and a document "not accompanied by the fee payable for the registration" is also an "unsatisfactory document".

As "double negative" construction is used in clause 29 of the Bill, readers may find the clause relatively hard to comprehend. On the contrary, section 346 of the original CO is constructed in a direct and affirmative manner, thereby enabling the provision to be more readily comprehensible than the said clause's double negative construction.

Further, clause 29(1)(h)(ii) is an additional provision, which is absent in the original CO. Clause 29(1)(h) stipulates that if the information contained in the document is "internally inconsistent" or "inconsistent with other information on the Companies Register or other information contained in another document delivered to the Registrar", the relevant document is also an unsatisfactory document. There have been views within the Bills Committee that the phrase "internally inconsistent" is rather ambiguous, and a member of the Bills Committee has queried whether two charges of a company inconsistent with each other should be considered "inconsistent" information. If so considered, can both charges be registered? According to the Government's reply, the term "inconsistent" covers all kinds of situation where obvious discrepancy is found between the information contained in a document and the other information on the Companies Registrar. As far as instrument of charge is concerned, its legal effect has to be decided by the Court eventually. Such an ambiguous reply from

the Government can by no means help to dispel worries. I just hope the Secretary can give us a more concrete reply in this respect.

That concludes my elaboration on clause 29. Thank you, Chairman.

CHAIRMAN (in Cantonese): I now suspend the meeting until 8.00 pm.

7.00 pm

Meeting suspended.

8.00 pm

Committee then resumed.

(Mr Albert CHAN stood up)

CHAIRMAN (in Cantonese): Mr Albert CHAN, do you wish to speak?

MR ALBERT CHAN (in Cantonese): Chairman, as usual, I request you to summon Members to the meeting.

CHAIRMAN (in Cantonese): Will the 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)

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

(Mr Albert CHAN rose to indicate his wish to speak)

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

MR ALBERT CHAN (in Cantonese): Chairman, Members have just come back from a lunch break, so probably some of us may fall asleep because of a full stomach. Let us see whether Mr WONG Ting-kwong or Mr WONG Yung-kan will fall asleep first …… He seems to have fallen asleep already. Mr WONG Ting-kwong has fallen asleep …… no, not yet ……

CHAIRMAN (in Cantonese): Mr Albert CHAN, please speak on the relevant clauses.

MR ALBERT CHAN (in Cantonese): Chairman, I am just trying to ease up the tension. Since we came back here in the morning, this is already the third session …… fourth session of the meeting. Just now when I spoke on clause 412 of the Bill, which is related to the resignation of an auditor, I mentioned the need to "requisition meeting" should be specified in the Bill. That means a resigning auditor needs to "requisition meeting", so that the queries raised by both parties (including the auditor) could be presented at the meeting …… This is because the resignation of an auditor may sometimes involve the attitude and method adopted by an individual to resolve problems. We believe that in most cases, auditors choose to resign because there is something wrong with the relevant companies' financial position or other information. From a professional point of view, the resignation of a company's auditor may reflect that there is something wrong with the relevant company. On the other hand, we cannot rule out the possibility that under certain circumstances, the auditors choose to resign on account of their own personal issues. In the past, there were a number of scandals involving the accounting profession like fabricating accounts for large corporations, and so on, and such incidents are all related to the relevant accountants' practice or the relevant companies' financial operation. Nevertheless, no matter what we are talking about, there are always exceptional and peculiar situations.

In some cases, the crux of the matter is the accountant's character or the fact that he or she is experiencing climacterium — I believe many accountants have reached the age of climacterium, and both genders alike have to go through

certain stages in their lives — in some cases, factors like emotions, work pressure or other personal issues in life may lead to certain circumstances and cause the accountant concerned to handle matters in an abnormal, unscrupulous or unreasonable manner. In the end, the accountant can no longer work with the relevant company and has to resign as a result. If the resignation is attributable to some incorrect or malicious accusations, and no meeting is convened to enable the relevant parties to clarify or deal with the matter before the resignation is tendered, such resignation — possibly a malicious one — may probably impact gravely on the company in question, and it is unfair, inappropriate and unreasonable for the company to suffer such impact.

As a matter of fact, I very seldom speak for large corporations. But then, in examining a certain clause, consideration must be given to all the possible factors that may affect the various parties concerned, so that the provision can address the various situations that may arise. As such, I believe the way of thinking or direction of this clause should be further modified to require a resigning auditor to requisition meeting — unless the accounting profession or the business sector unanimously considers the resignation tendered is reasonable and specifies clearly that resignation of such kind is acceptable and no meeting is required. However, the company may still need to issue a notice to inform other shareholders or creditors of the rationale or explanation. Besides, a copy of the relevant decision or notice should be submitted to the Registrar to ensure that the issue is properly recorded and the relevant situation will be followed up, so that nobody can cover it up deliberately.

I believe the authorities should make reference to the aforesaid factors in proposing amendments to the clause. Even though no major amendments can be made to the Bill today, we may still exchange views on the conceptual or theoretical aspects of the provisions, and put the views exchanged on record …… I think the Bill will be passed in a few days. After it has come into operation for sometime, the authorities may review the Bill along this path when such need arises.

Compared to the entire Bill as a whole, the punitive provision under clause 412 is a rather uncommon one whereby the party concerned is liable to imprisonment on conviction. From this we can see that this clause is rather unique and comparatively more stringent.

It is a serious matter if a resigning auditor requires the directors to convene a meeting or the directors refuse to convene the meeting, because surely some major incidents must have happened if an auditor chooses to resign. When an auditor sees some major incidents and requires the directors to convene a meeting, it is absolutely appropriate to impose some comparatively more stringent penalties if the company concerned refuses to convene such a meeting. In my many speeches, I keep advocating that the relevant clauses under the Companies Bill should not merely subject the responsible parties failing to comply with the Bill's provisions to a fine at level 3 or level 4 — and at level 6 for some serious cases. In addition to a fine, the convicted parties should also be liable to both a fine and imprisonment, just like the penalties specified under clause 412.

Clause 412(3) stipulates that if the directors of a company contravene subsection (2) …… subsection (2) stipulates that "within 21 days beginning on the date on which the company receives that other notice, the directors must convene a general meeting for a date falling within 28 days after the date on which the notice convening the meeting is given".

If a company refuses to do so, it is "liable on conviction on indictment to a fine of $150,000 and to imprisonment for 2 years". It is also liable on summary conviction to "a fine at level 5 and to imprisonment for 6 months". In my view, imprisonment does have a deterring effect on the parties concerned. As many Members have said …… Just now Mr LEUNG Kwok-hung also concurred with the point I have raised many times in my previous speeches, that a mere fine is nothing more than an itch to the business owners. On the other hand, imprisonment takes away their personal freedom, as they will not be able to ride their Mercedes-Benz, enjoy sumptuous meals or premium red wine. The loss of personal freedom really pains them. To the tycoons, a fine at level 6 is but several hundred thousand dollars. Even if the sum should exceed a million dollars, it is still not enough to pay for the tour they went with the Chief Executive or to enjoy good food on a cruise with our "Covetous TSANG". Hence, I believe the deterrent effect of a mere fine is hardly enough.

Chairman, now I would like to speak on clause 328. Clause 328 is part of Part 7 — Division 5, which deals with debenture-related issues. Division 5 is one of the divisions under Part 7 and comprises "Miscellaneous Provisions",

encompassing a wide spectrum of issues. Clause 328 is one of the clauses on debentures, and its subject is "Court of First Instance may order meeting of debenture holders".

Clause 328 stipulates that any person who holds "any debentures that form part of a series issued by a company and rank equally with the other debentures of that series" or "any debenture stock of a company" may require the company to convene such a meeting. If the debenture holders hold the specified percentage of the value of the company's debentures, say 10% or higher, may, in accordance with the provisions under the Bill, apply to the Court of First Instance for an order to convene the meeting.

Chairman, I request a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR ALBERT CHAN (in Cantonese): Chairman, just now I was speaking on clause 328, which stipulates that the Court of First Instance may order meeting of debenture holders. According to the explanation given by the Government at the meeting of the Bills Committee, clause 328 is drafted with reference to the provisions under the Australian Corporations Act, and the specified percentage of the value of a company's debentures is also set at 10% or higher in Australia. This is slightly different from the relevant provisions in the United Kingdom. In the United Kingdom, the relevant matter is subject to provisions on deed of trust, and the relevant legislation does not empower the persons concerned to apply to the Court for such a meeting. Having said that, I believe the provision before us now is more appropriate and desirable.

On the other hand, the persons concerned have to apply to the Court to commence such procedures …… As I have pointed out many times in my previous speeches, the Government has all along stressed the importance of resolving problems through mediation. The request for a meeting in this respect does not necessarily require a court order, as the whole matter can be dealt with through a mediator. Besides, reference can also be made to the provisions on Owners' Corporation (OC) meetings under the Building Management Ordinance (Cap. 344). Members know Cap. 344 very well, and the Ordinance stipulates that if no less than 5% of the owners jointly made a request to their OC, the OC have to convene an owners' meeting.

By the same token, as debenture holders do have a certain need to request a meeting, the relevant provision may stipulate that the request should be entertained if a specified percentage of debenture holders is reached — the percentage may be set at a level higher than 10%, say 20% of the debenture holders. It should also specify that under certain conditions, such as a joint request made by debenture holders, the company has to convene the meeting within a specified period, say 28 days or 21 days. In addition, this arrangement does not need to go through any legal proceedings. If this arrangement should go through any legal proceedings, some people would certainly raise objection. And if any objection is raised …… As we all know, large corporations, large companies and large consortia are most adopt at manipulating the legal and court proceedings. I was once accused of libel by a large consortium, and I had thought that libel cases were usually dealt with in public, but the consortium played with the legal proceedings to have the case dealt with behind closed doors by turning it into a procedural and technical issue. A case handled this way can be a real nightmare.

Hence, if everything including the request for a meeting has to be dealt with through legal proceedings, the debenture holders will be put under pressure. Certainly, things will be a lot simpler if the debenture holder is another large consortium, and particularly so if it is a bank, a financial company or an investment company. But the problem remains that minority shareholders just do not have such capacity.

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

(Mr LEUNG Kwok-hung rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, speaking for the 12th time.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, the provision I wish to discuss this time around is clause 274 of the Bill.

CHAIRMAN (in Cantonese): Which clause do you wish to speak on?

MR LEUNG KWOK-HUNG (in Cantonese): Clause 274. Has any other Member spoken on this clause already?

CHAIRMAN (in Cantonese): Please go on.

MR LEUNG KWOK-HUNG (in Cantonese): Yes. The heading of clause 274 is "Principal purpose exception". What does principle purpose really mean?

(Mr WONG Yuk-man stood up)

MR WONG YUK-MAN (in Cantonese): Chairman, a quorum is not present.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I would like to discuss clauses 273 and 274, which are interrelated. Clause 273 is about "general exceptions", while clause 274 is about "principal purpose exception".

Subdivision 3 of this part of the Bill deals with "Exceptions from Prohibition", and it specifies that certain transactions are not prohibited, such as distribution of assets. Certainly, clause 273 also sets out some relevant provisions, such as the distribution of assets by way of dividend lawfully made or in the course of winding up the company, the allotment of bonus shares, things done in accordance with Division 4, or anything done under an arrangement made under section 237 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32). As a general practice, creditors may also reclaim their money in accordance with the aforesaid arrangement.

The clause 274 I wish to speak on is related to "principal purpose exception" and encompasses two conditions. The first one is: "the company's principal purpose in giving the assistance is not to give it for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for such an acquisition". This is understandable. If the purpose of the acquisition of a company's share or the share of its holding company is to reduce or discharge a liability incurred for such an acquisition, the acquisition is in effect an act of financial maneuvre. As such, the clause has to stipulate that such an act is undesirable. The second condition is: "the giving of the assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for such an acquisition is only an incidental part of some larger purpose of the company". Obviously, this is also reasonable.

However, the third point does not seem quite right, and this is set out under subsection (b) which reads: "the assistance is given in good faith in the interests of the company". What does "the assistance is given in good faith in the interests of the company" mean? This provision is indeed very vague. If the assistance is in the interests of the company, whose interests does this subsection really refer to? We need to understand that one major point under the CO is for the directors to decide on matters in this respect, and the directors can always give assistance to only those buy-backs that are beneficial to them. For example, if a director is considering acquiring the shares of a certain company in future because he believes the shares have potential to increase in value, he may

acquire the shares of the company or even inject capital into the company to raise the face value of the shares he has acquired. Can we do anything to stop the director from doing that? No. He can do as he wishes so long as the assistance is given in good faith.

What does "in good faith" mean? From a common law point of view, I may not know something, but I believe in a certain person's words because I found that person trustworthy. The Defamation Ordinance refers to that as a fair comment. In other words, if I believe in good faith that *Wen Wei Po* alleges "Long Hair" as a beggar or member of a beggar gang, there is nothing I can do even if the paper publishes such reports every day. Perhaps *Wen Wei Po* believes in good faith somebody's words that I am really the head of a beggar gang, and there is nothing I can do even though it carries such reports every day. As far as "in good faith" is concerned, the Americans can play with the concept very easily. They seek advice from some experts and then acquire the shares of a company even though they know very clearly that such shares is not worthy of holding, for their purpose is to push up the share price before selling them out. Acquiring the shares when their price stands high may certainly lead to losses, but they can sell the shares out to reap a profit.

Hence, if we do not stipulate what "in good faith" means, the concept of "in good faith" will certainly be abused. And this is one of the reasons why professionals like accountants and lawyers enjoy such status in the commercial world, for they can offer a ground on which one can believe "in good faith".

A Member of the Council has once bought something in the United States and incurred prosecution. Some may suspect whether this Member has made the acquisition on privy to some hearsay views or insider information. If a certain person …… Let us say that person is me. I have overheard that the shares of a certain company is worthy of speculative investment, or perhaps I have overheard the insider information under discussion at the table next to mine (just like the situation where something uttered by Donald TSANG was overheard by his younger brother who was having dinner at the table next to his). If I immediately call my stock broker who has all along been taking care of my transactions or a licensed and well-known commentator, telling him that I would like to make some money and asking about the potential of the shares of the relevant company, and if that person considers the things heard from me with great care and understands what I was trying to intimate, says he understands what someone really means in giving a hint on the shares of Company A and does

some thorough research in that respect, then an interpretation of the meaning of "in good faith" in the common law context in this manner will open up all sorts of loopholes. That way, the effect of the two very reasonable conditions I read out at the beginning will be undone completely.

The subsection sets out clearly that the assistance is given "in good faith in the interests of the company" and not in the interests of the parties concerned. Here, I would like to use accumulator as an example. If Larry YUNG had really conducted some research, aware that he needed to hold some foreign currency if he was to operate ore businesses in Australia, and if he had asked a certain person this question "in good faith": "As holding Australian dollar is not very profitable, is there any way I can raise the value of such foreign currency? Is there any way I can hold the Australian dollar in a 'flexible and profitable' manner in the interests of CITIC Pacific?" If that person told him: "Boss, investing in accumulator is the way. Let me tell you, even though this may cause you to lose everything, the possibility of this happening is extremely low. On the other hand, you may earn 2% to 3% more in profit."

If Larry YUNG had heeded that person's advice, he would not have landed himself into any trouble, as he believed "in good faith" it was in the interests of CITIC Pacific. Certainly, what he did then does not fall within our scope of discussion today, but we may ponder on that. However, if it is possible for such things to happen …… In other words, if a listed company does as what I have heard him say on television, which is to consult a qualified lawyer and a qualified accountant on the matter, who then advise him to not say anything — the statement really reveals that these professionals have advised him to not answer any questions raised by reporters — the company can avoid any trouble. Who were those two guys smart enough to advise Larry YUNG to take such action? So far nobody has any idea. This is just like the case of suspected unauthorized building works at a mid-level manor house. The owner concerned said he had commissioned two persons to look into the matter and he would shoulder all responsibility. How come things can develop this way.

It would be better if some criminal liability was stipulated under this clause. In the face of criminal liability and prosecution, for defence purposes, the person concerned will certainly disclose the persons who have advised him and those who have not, or how he believed in good faith that what he did was

not in his own interests. Even though he may be benefited in some way from the transactions, or the investigation results even reveal that he has indeed benefited from the transactions, it is actually his hope that the company will benefit first, and then he follows suit.

This proviso is so easy to use. All you have to do is to seek advice from a professional, a celebrity or someone well-versed in it, and then proceed with the matter by following all the procedures required. As such, Chairman, I do not think the provision can do anything in this respect. It would be better if the legislation could stipulate the incidental codes or specifications concerned, just like some other legislation which requires the supply of forms for people to complete. At present, however, while a penalty provision is missing in the legislation, the general meeting of shareholders of a company is held only once a year, and some large consortia like "number 8" will not hold general meetings of shareholders unless after some special "tricks" have been employed. Under such circumstances, how can the general shareholders understand what is going on? Should they be required to read the financial news in the *Oriental Daily* and the stock market news on the *Apple Daily* every day? So, as far as this issue is concerned, the general shareholders just can hardly prove that the relevant assistance is not given "in good faith" in the interests of the company.

Hence, if this proviso should be established by way of legislation, the relevant person using this proviso as an escape should be subject to certain restrictions rather than doing so without any limits. As I have pointed out just now, for instance, what procedures does he have to go through to prove that he is doing so "in good faith" in the interests of the company? The procedures he has to go through should include seeking support from shareholders, as well as securing an endorsement signed by a certain number of professionals proving that what he does is generally in the interests of the company. If such a threshold is not put in place, it would mean that actions could only be taken at a snail's pace after something has gone wrong, in which case the actions to be taken afterwards are just meaningless.

The situations I refer to include holding or not holding the shares of a company for no reasons, or acquiring or not acquiring a certain asset for no reasons. Such situations may also refer to selling a building to a subsidiary for a consideration of $1, and the sale of a building at the price of $1 did happen before. As such, Chairman, I consider the proviso in this connection too outrageous. I believe the issue should be dealt with the other way round, by that

I mean if the person concerned cannot prove that he has taken into account the interests of the company as the major consideration in the doing the things in question, he should be penalized or removed from office, so that he cannot do such things again in the capacity of a member of the decision-making circle.

I hope the Secretary can understand this point. Thank you, Chairman.

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

(Mr WONG Yuk-man rose to indicate his wish to speak)

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

MR WONG YUK-MAN (in Cantonese): I was speaking on clauses 29 to 32 before the dinner break, and I have not yet finished with my speech. In my previous speech, I mentioned that the phrase "in consistent with" in the new part of clause 29(1)(h)(ii) is rather ambiguous. According to the Government's explanation, this includes the situation where the information contained in the document is obviously inconsistent with other information on the Companies Register.

Now, I would like to talk about clause 30. The connection between clause 30 and clause 29 is that the former stipulates clearly that the Registrar may specify requirements (for section 29(1)), and extends the power of the Registrar in specifying the requirements for the forms, authentication and delivery of documents. However, Chairman, I need to stop here and request a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR WONG YUK-MAN (in Cantonese): Clause 30 stipulates that the Registrar may specify requirements (for section 29(1)), thereby extending the power of the Registrar in specifying the requirements for the forms, authentication and delivery of documents, including rectifying the errors on the Companies Register.

I am very much concerned that this provision is giving the Registrar too much power. Besides, the requirements referred to in the provision will not be specified by way of subsidiary legislation, and therefore do not need to be scrutinized by the Council. As such, it may cause inconvenience to the public if the requirements are too stringent. On the other hand, I consider that greater flexibility should be allowed in respect of the manner of delivery of documents. For example, instead of stringently specifying one manner of delivery, the Registrar should specify more than one way of delivery, or that the document be delivered in one of the ways set out. As regards clause 30(6), it clearly states that the provision does not empower the Registrar to require a document to be delivered by electronic means. We find this point acceptable in principle.

Under clause 32, the Financial Secretary may make regulations requiring delivery by electronic means (for section 29(1)). By empowering the Financial Secretary to make such regulations, this provision has plugged the loophole of clause 30(6) which does not empower the Registrar to require a document to be delivered by electronic means. As the regulations to be made by the Financial Secretary need to seek this Council's approval, we do not have any objection basically. But then, in what manner will the regulations be made? Will the regulations require a certain company to deliver all of its documents by electronic means, or require all companies to deliver a certain type of document by electronic means? As the provision does not carry any clear stipulation on this, I hope the Government can submit the relevant papers as soon as possible.

Clause 31 allows the Registrar to enter into an agreement with a company to enable the company to deliver all or certain types of its document by electronic

means. This provision has also plugged the loophole of clause 30(6) which does not mandate the delivery of document by electronic means. However, under clause 31(4), it is stipulated clearly that "this section does not empower the Registrar to make any agreement that is inconsistent with regulations made under section 32". And this gives rise to an issue. How will the authorities deal with the situation where an agreement made by the Registrar is really inconsistent with any of the said regulations? Should the company concerned be compensated for the damages arising from the nullification of the said agreement? The Bill has made no mention of this point at all. In our view, this can be considered a flaw in the Bill.

With regard to the question of the clauses to which no amendments have been proposed standing part of the Bill, we actually hope that some of the clauses can be put to the vote separately. Having examined quite a number of clauses, I now consider that many of them are acceptable to us. Perhaps I will see if such clauses can be identified and ask the Secretariat if separate votes can be arranged. I will handle that tomorrow and notify the Secretariat. So ……

CHAIRMAN (in Cantonese): Mr WONG, you need to give the Secretariat enough time to make the necessary arrangements.

MR WONG YUK-MAN (in Cantonese): I will, as the voting process will take quite some time. I will now move on to clauses 129 and 131, which is under Part 4 — Division "Nature of Shares".

Clause 129, which is about the "nature and transferability of shares", is modelled on section 65 of the original CO, only that the new clause before us now is clearer and in greater detail than section 65. Section 65A was added to the CO (Cap. 32) in 1984, which is an outcome of some further amendments to an earlier version of the Ordinance. It has been a long time since 1984. The section stipulates that "each share in a company having a share capital shall be distinguished by its appropriate number"; and "if at any time all the issued shares in a company, or all the issued shares therein of a particular class, are fully paid up and rank pari passu for all purposes, none of those shares need thereafter have a distinguishing number, so long as it remains fully paid up and ranks pari passu

for all purposes with all shares of the same class for the time being issued and fully paid up."

In addition, the section also stipulates that "where new shares are issued by a company on the terms that, within a period not exceeding 12 months, they will rank pari passu for all purposes with all the existing shares, or all the existing shares of a particular class, in the company, neither the new shares nor the corresponding existing shares need have distinguishing numbers so long as all of them are fully paid up and rank pari passu but the share certificates of the new shares shall, if not numbered, be appropriately worded or enfaced."

With regard to "nature of shares", there is a rather significant difference between the original provision and the amended version of the provision before us now. Clause 129(1) clarifies that "a share or other interest of a member in a company is personal property". This seemingly simple principle actually involves rather complicated legal principles. On the legal front, "property" is categorized into "real property" and "personal property", and the transfer of real property, such as the sale of flats, is subject to stringent requirements. The Residential Properties (First-hand Sales) Bill passed by this Council recently requires the sale of flats to be conducted in a more meticulous manner, as there were many problems before the enactment of the said law.

The transfer of real property is subject to stringent requirements. The sale of flats, for example, involves a series of register search by the purchasing party. In addition to clarifying the relevant title, the lawyer also needs to find out whether the property purchased by his client has any unauthorized building works (UBWs). Hence, LEUNG Chun-ying was indeed lying when he said he had no knowledge of such works. The house costs him $60 million, how can he have no knowledge of UBWs? Chairman, we are not trying to make an issue of this clause. We are talking about real property, and clause 129(1) stipulates that "a share or other interest in a company is personal property". The transfer of real property and the transfer of shares are different.

In the transfer of real property, the parties concerned will not take the transaction lightly or handle things in an arbitrary manner. Perhaps the relevant requirements are more complicated than those governing share transfers. Hence, in addition to clarifying the land titles concerned, the most important step is to

find out whether the property purchased contains any UBWs. Finding out whether there is any UBW does not necessarily leads to demolition, does it? Some people have said that "it is a real joke if a luxury home does not have any UBWs, because all luxury homes have them". They are telling the truth, which is not the same as what "ying" has said, right? Those are truth-telling words, not "ying's words". The parties concerned have breached the law.

The transfer of personal property is comparatively less complicated. The different types of sale and purchase activities in our daily lives, even the lunch box I consumed just now, can be regarded transfer of personal property.

Clause 129(2) states clearly that "a share or other interest of a member in a company is transferable in accordance with the company's articles". What does this clause mean? As clause 129(2) has stipulated that in transferring his shares, a member in a company has to do so in accordance with the company's articles, allowing members in a company to transfer their shares will not constitute any relevant requirements imposed by the CO on private companies limited by shares. Under the CO, private companies limited by shares are required to set out in their articles of the company restrictions regarding the transfer of interest in shares.

Hence, the provision under clause 129 regarding the nature of shares is indeed much clearer and in greater detail than the requirements provided for under the original section 65. The said provision is related to the nature and transferability of shares, so it is naturally very important and should not be drafted carelessly.

Besides, clause 131, which is about the "numbering of shares", is also very important, and this clause is also modelled on section 65A of the original CO. As I said just now, under section 65A, "each share in a company having a share capital shall be distinguished by its appropriate number".

Even though clause 131 is very straightforward and very easy to comply with, it is very important. Why did I say that? Chairman, some companies have been established for 70 to 80 years with a long history, and when the companies were initially established, the management of the companies' stocks

and shares was very chaotic because the relevant requirements were not yet prescribed in the law in force then. Chairman, a rather well-known example in recent years is the Sociedade de Turismo e Diversões de Macau (STDM), which has lost its register of shareholders and caused a great controversy. Even though the STDM is not a company in Hong Kong *(The buzzer sounded) ……* Let me take a short break first.

(Mr Albert CHAN stood up)

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

MR ALBERT CHAN (in Cantonese): Chairman, a quorum is not present. I request a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR ALBERT CHAN (in Cantonese): Chairman, I previously mentioned clause 328, which is about the authority for or arrangement of holding debenture holders' meetings. I said that we need not go to court all the time; and we can draw reference from ordinances such as the Building Management Ordinance (Cap. 344), stipulating that as long as a certain percentage of debenture holders jointly request a meeting, the company concerned is required to hold a debenture holders' meeting.

Chairman, in my opinion, this arrangement can strengthen direct liaison between debenture holders and the company concerned, given that debenture holders are vested with certain rights. So, if an established arrangement can be

included in the ordinance, debenture holders can cut down unnecessary legal costs.

Chairman, another more important point is, given that large corporations and companies are so rich and imposing and many international super tycoons are so contemptuous and bullying, do the debenture holders have sufficient resources to initiate legal actions against them? I hold that the law should treat people equally even if their capacity in terms of assets or wealth differs. The law should not undermine the legal rights of people who are at the poorer end of the wealth gap. Recently, some property owners in Guangzhou came to Hong Kong and petitioned at the company owned by the number one tycoon in Hong Kong. When they came to me, I reminded them to be careful because the company staff might make a scene at the petition and the security guards might claim that they were hit ……

CHAIRMAN (in Cantonese): Mr CHAN, you have strayed away from the question.

MR ALBERT CHAN (in Cantonese): Yes. Sorry, Chairman, I meant to cite some examples to show the numerous unscrupulous tactics employed by the plutocrats.

Hence, Chairman, if it can be provided in the law that the aggrieved persons or interested persons need not …… Chairman, I repeat, it is "need not" …… go through long and expensive proceedings in court, it can increase the chances of Hong Kong becoming an international hub of company registration. In Hong Kong, 90% of the companies are SMEs. Many small companies in Southeast Asia or on the Mainland wish to have the opportunity to set up registered companies in Hong Kong.

Hence, if the clause concerned can facilitate these small companies in this regard, I believe it will only benefit Hong Kong rather than otherwise. I hope the Government can take this point into consideration in formulating relevant provisions in future. If it is not mandatory to settle a certain issue through the Court pursuant to the ordinance, it is often more appropriate, fairer, comparatively just and logical to settle it through the mechanism of mediation.

Regarding this principle, the top echelons of the Government, such as the Chief Executive, the Chief Secretary for Administration, the related financial officials and the Secretary for Justice, have advocated in many public events the use of mediation to settle commercial disputes and related issues. However, the Companies Bill is made up of over 900 clauses, seeking to address a variety of issues. Different interest groups or organizations have not settled their disputes through the mechanism of mediation. I think this is rather absurd. The Government's deeds do not match its words. There is something the Government can do with the clauses, but it has not done so. I hope the Secretary can give serious consideration to this.

Chairman, please do a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR ALBERT CHAN (in Cantonese): Chairman, next, I wish to talk about clause 347, which is "Notice of appointment of receiver or manager". Chairman, this clause is under Division 6, "Notice of Registrar of Enforcement of Security", and Division 6 is under Part 8, "Registration of Charges". Many problems in Division 1 to 5 under Part 8 are related to registration and some other issues. Chairman, I will not explain the many paragraphs preceding it one by one, but they basically provide for different arrangements which require notification to or registration with the Registrar.

Under Division 6, "Notice to Registrar of Enforcement of Security", why do I specifically pick clause 347? Regarding clause 347, Chairman, pardon me, as a layman, I am a little puzzled and perplexed after reading it. I wish to share my view with the Secretary and see if he can perfect the clause to benefit members of the public. Clause 347(1) is about giving notice of appointment of a

receiver or manager: "If a person obtains an order for the appointment of a receiver or manager of the property of a company or the charged property of a registered non-Hong Kong company, or appoints such a receiver or manager under the powers contained in an instrument, the person must, within 7 days after the date of the order or of the appointment under those powers, deliver a statement of that fact to the Registrar for registration.".

Chairman, this part of the clause is fine; and clause 347(2) and 347(3) further provide for the details of the statement, requiring that the statement must contain the name, address and identity card number of the manager or receiver. However, the point is, Chairman, an appointment of a receiver is an important matter. It may involve the rights and interests of many stakeholders. In the "Registration of Charges" in the earlier part of the Bill, it only requires that registration be made with the Registrar. I may well take it as a formality of the general operation of a company, or regard it as an administrative issue or arrangement of the company. As for clause 354 in the latter part of the Bill, it provides that certain instruments and register is open to public inspection. And it is purely for inspection only.

However, the appointment of a receiver is an important matter. Should it not at least be announced in a notice? The appointment should not be regarded purely as an internal affair of the company or simply registered with the Registrar. A legal procedure or arrangement should be put in place instead. Whenever it comes to the appointment of a receiver, the procedure should be different from or expanded and enhanced to cover a scope larger than the procedure for registration of charges. An arrangement should be laid down to require that the public or the interested persons should be informed of the appointment because it will very likely have an impact on the rights and interests of a certain group of people or the shareholders.

Certainly, if the company purely regards the appointment of a receiver as its internal affair and follows the procedure to give notice to the Registrar of the appointment, it should be able to prevent information from being withheld or other irregular acts. If the appointment has already been registered with the Registrar, it should be more likely to pre-empt illegal activities. That said, I think it has gone a little overboard if the company is not required to issue a notice to announce the appointment or notify other interested persons. Is this again my conspiracy theory? In discharging its duties, the Government often needs some

sort of administrative safeguard; but when the duties involve the rights and interests of a certain party, it would overtly protect the rights and interests of the companies and their board members; and the rights and interests of the aggrieved or other interested persons are not even informed or notified of important company matters such as the appointment of a receiver, particularly if the aggrieved persons are scattered and powerless. Hence, in respect of giving notice of appointment of a receiver, a procedure should be put in place to require the company to issue a notice and another mechanism should be put in place to notify other interested persons. By so doing, the rights and interests of different interested parties can be better protected.

Chairman, next is clause 355, which is "Financial Secretary may make regulations for purposes of this Division". The clause provides that "copies of instruments creating charges are to be kept by a registered non-Hong Kong company under section 350". Chairman, I do not intend to read all the clauses out. The clauses that follow are about the fees, regulations or place, and they span several pages. Chairman, is it necessary to let the Financial Secretary be the one to make regulations? I do not think so.

We genuinely hope that the proposed reorganization of the Government Secretariat into five Secretaries of Departments and 14 Directors of Bureaux will not be endorsed in this year nor in the future because we consider the proposed structure excessively bloated and inappropriate. The Financial Secretary is already bearing a heavy responsibility, and an even heavier responsibility will be placed on the Financial Secretary under the new structure. Chairman, what are in the portfolio of the Financial Secretary now? Under the present structure, the Financial Secretary takes charge of the Financial Services and the Treasury Bureau as well as the Development Bureau with the exception of transport and infrastructural affairs. Besides, his ambit also extends to monetary affairs and many different matters concerning the Development Bureau. He oversees a myriad of complicated and important matters on which the economy of Hong Kong hinges.

Pursuant to this Division, the regulations to be made mostly seek to deal with administrative issues or instruments. I do not see why the Secretary for Financial Services and the Treasury, who is here today, is incapable of or cannot be authorized to take up this duty. In terms of actual operation, we all know that even though a certain Secretary of Department or even the Chief Executive is the

authority prescribed under the law to take up a certain duty, 99% of the work is often taken up by different government departments, which can be a directorate officer or a Director of Bureau. Similar to the case of the Bill on fisheries that we debated some time ago, many duties are actually taken up by the relevant directorate officer. In making regulations concerning companies, the scope of these regulations *(The buzzer sounded) ……*

CHAIRMAN (in Cantonese): Mr CHAN, your speaking time is up.

MR ALBERT CHAN (in Cantonese): Chairman, if no other Member wishes to speak, can I continue to speak?

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

(No Member indicated a wish to speak)

MR ALBERT CHAN (in Cantonese): Chairman, I request a headcount.

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

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

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

(Mr Albert CHAN rose to indicate his wish to speak)

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

MR ALBERT CHAN (in Cantonese): Chairman, I wish to finish the last part of my speech and let Mr WONG Yuk-man take over.

Chairman, the Financial Secretary can make regulations, and I said just now that the Secretary for Financial Services and the Treasury should take up this duty instead. I have my justification. If Members still remember it, during the Chief Executive Election earlier, Mr Henry TANG challenged C Y LEUNG over the issue of urban renewal. But he had actually forgotten that under the Urban Renewal Authority Ordinance, the development of the Urban Renewal Authority is subject to approval of the Financial Secretary, and he himself was the incumbent Financial Secretary during that period of time.

Hence, if the Financial Secretary is to make regulations, I believe he may not know what regulations he has made after he has done so. I think this arrangement is absurd. The issues to be prescribed for in the regulations are in fact very minor. For example, under the relevant clause, "(the) Financial Secretary may make regulations (a) prescribing a place at which (i) copies of instruments creating charges are to be kept by a registered non-Hong Kong company under section 350". The Financial Secretary has to deal with this issue as well as many other issues set out in the provisions that follow. I think this is not necessary at all.

As stated in my simple analysis just now, the ambit of the Financial Secretary covers financial, monetary and development issues. If the future Government Secretariat is to expand to five Secretaries of Departments and 14 Directors of Bureaux, the Financial Secretary will be given a much heavier brief, covering financial, monetary, housing, transport and works issues. In other words, the Financial Secretary will take charge of affairs accounting for more than 70% to 80% of Hong Kong's Gross Domestic Product. How on earth can he manage that amount of work? Why can he not be simply tasked with financial services, so as to better prevent any more Lehman Brothers incidents from happening, guard against predators from attacking Hong Kong dollar, handle housing affairs to prevent any gap in housing supply, and discharge his management role to stop the poverty issue from worsening.

Hence, Chairman, with so much work on his hand, we cannot help but asking this question on seeing this clause, "Does the Financial Secretary have nothing to do?" I really do not understand why the Financial Secretary has to be the one to make regulations. Therefore, if there is still an opportunity to amend the clause …… Chairman, of course, the time to amend the clause has expired …… When we read the clause, we thought …… Of course, many things are done just as a matter of routine; even so, it should not be done in such a perfunctory and careless manner. It should be logical and be able to fit into the Government's structure and needs of operation.

Chairman, in the old days when there was still a governor, particularly in the 1960s and 1970s, almost everything was decided by Governor in Council. In present-day ordinances, this task is gradually being devolved to Directors of Bureau, with some even having been devolved to directorate officers. The CO, however, is different in that it still upholds the notion that the higher the rank of official, the more authoritative the Ordinance is. But this is impractical and in fact, ridiculous. Hence, in my opinion, the Government should take the initiative to amend the clause, should the opportunity arise, so as to tone down the absurdity of the clause. It is because, first and foremost, everyone knows that the Financial Secretary will definitely not directly intervene in this matter, and after the Bill is enacted, he may have already forgotten about it ……

CHAIRMAN (in Cantonese): Mr CHAN, you are repeating yourself.

MR ALBERT CHAN (in Cantonese): No, Chairman, I am not. I am summing up my speech and I will give the floor to Mr WONG Yuk-man.

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

(Mr WONG Yuk-man rose to indicate his wish to speak)

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

MR WONG YUK-MAN (in Cantonese): Chairman, I was up to clauses 129 and 131 just now. Both clauses concern the nature and transferability of shares. Clause 131 is about the numbering of shares, setting out several specific requirements. Reference has also been made to section 65A of the CO, prescribing that each share in a company shall be distinguished by its appropriate number. The provisions of clause 131 are straightforward and easy to follow and comply with. That said, the provisions are very important. As I said just now, some companies have a long history and the law at the time when they were founded did not have any requirements on their shares. As a result, we may find that these companies are very chaotic in their share or stock management. The example I cited was Sociedade de Turismo e Diversões de Macau, S.A..

Clause 131(2) provides a statutory exemption to clause 131(1), allowing shares which are fully paid up and rank equally to be exempted from carrying a distinguishing number. I have reservation about this exemption. Chairman, I understand that clause 131(2) is drafted with reference to the long-standing practice set out under section 65A of the original CO, but I hold that it is indispensable to have a distinguishing number for each share, as so required in clause 131. I thus consider the statutory exemption in clause 131(2) to clause 131(1) problematic. In the example just cited, companies which were founded a long time ago may have already lost their register of shareholders or it might have been damaged. Having the share numbered will facilitate the identification of shareholders or may even act as proof of shareholding.

In the commercial society nowadays, public limited companies generally will issue shares of different ranks, such as different ranks of preference shares. It thus serves little practical function to provide an exemption in clause 131(2). In contrast, the requirement prescribed in clause 131(1) is not stringent. It provides that "Each share in a company must be distinguished by an appropriate number, except as provided by subsection (2) or (3)." I thus have a little problem with the statutory exemption on the requirement to have a distinguishing number for each share. Clause 131(3) further clarifies the handling of shares of different ranks. It seeks to deal with practical issues concerning the issuance of shares of different ranks by public limited companies. If the exemption in clause 131(2) is deleted, clause 131(3) will become redundant. Hence, when the

relevant section is rewritten into the present subclauses (1), (2), (3) and (4), we notice that some of them conflict with each other.

I have raised this point because I am particularly concerned about clause 131(4): "If subsection (3) applies and the shares are not numbered, any share certificates for the new shares must be appropriately worded or enfaced." What does it mean by "appropriately worded or enfaced"? Why are these shares not numbered? These shares need not be numbered, but at the same time share certificates for the new shares have to be appropriately worded or enfaced. What does it mean by that? I thus find the requirements set out under clauses 131(1) to 131(4) are conflicting with each other. Some requirements are simply redundant. They are mutually exclusive. That is, if you need A, you do not need B; if you need B, you do not need A.

Under clause 131(4), share certificates for the new shares must be appropriately worded or enfaced; but as compared with numbering the shares, which mechanism is better? What should be enfaced on the share certificates? What does it mean by "appropriately worded"? Hence, the best and clearest way is to adopt the mechanism set out in clause 131(1), that is, adding a distinguishing number to each share. The mechanism stated in the original section 65A(2) is also clear, just that when the mechanism is rewritten into clause 131(3), it becomes more complicated and not as clear as before.

Hence, we have great reservation about the statutory exemption in clause 131(2) to clause 131(1). I hope the Secretary can consider this issue again, whether the numbering of shares as provided for in clause 131 can be further improved. Certain provisions under subclauses (1) to (4) give people the impression that they conflict with each other. All these are provided for under Division 1 "Nature of Shares" of Part 4 "Share Capital".

Besides, another issue is raised in clause 134, which is "Repeal of power to issue share warrants". We are still talking about a clause to which no amendments have been proposed, that is, one of the clauses in the Bill proposed by the Government.

Clause 134 is a new clause that seeks to repeal the power to issue share warrants. It is under the Division titled "Nature of Shares". Chairman, a characteristic of the clause is that it fundamentally alters the power of a company to issue share warrants. This is a major change. If we refer to the original CO,

a company, be it a public limited company or private limited company, can issue share warrants so long as this is authorized by its articles. This is set out in section 73 of the CO (Cap. 32) titled "Issue and effect of share warrants to bearer". But now this part has been changed into "Repeal of power to issue share warrants".

In the original section, it provides that, first, "A company limited by shares, if so authorized by its articles, may, with respect to any fully paid-up shares, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares included in the warrant"; second, "Such a warrant as aforesaid is in this Ordinance termed a share warrant"; and third, "A share warrant shall entitle the bearer thereof to the shares therein specified, and the shares may be transferred by delivery of the warrant.".

A special point to note here is that, first, it is provided in clause 134 titled "Repeal of power to issue share warrants" that "A Company does not have power to issue a share warrant". This is provided for in subclause (1); and subclause (2) provides that "The bearer of a share warrant issued before the commencement date of this section is entitled, on surrendering it for cancellation, to have the bearer's name entered in the register of members of the company"; subclause (3) provides that "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"; subclause (4) provides that "The Company must enter the date of surrender of a share warrant in the register of its members"; and the last subclause provides that "If a company's articles so provide, the bearer of a share warrant may be regarded as a member of the company, either to the full extent or for any purposes specified in the articles.". We wish to stress that after the changes contained in the clause are made, if the articles of a limited company do not provide for issuance of share warrants, the company cannot be authorized to issue share warrants pursuant to Table A in the First Schedule to the Companies Ordinance. This is a rather special point.

Regarding this problem, we all know that Hong Kong people, including many housewives, are very fond of speculating in the stock market, making financial investments and trading in stocks. We have also come across financial

programmes aired in the two radio stations, in which people would quote a certain stock number to the programme host and ask questions about the stock, and the stock analyst would declare at the end that he or she does not hold any of the stocks mentioned. Is it a legal requirement for them to do so? I later asked a person working in a radio station about this and he said that it is not required in law for them to do so. Hong Kong people are fond of speculating in the stock market. Many housewives or ladies know what warrants are. But I must stress that the "share warrant" mentioned in clause 134 is different from "option warrant" in law.

Warrant means that the holder can exercise his right to buy a certain quantity of a certain stock at a predetermined price within a predetermined time limit. It is a less costly method for companies to raise new capital. Buying option warrants are highly speculative. When the company concerned performs well, its stock price will rise. Option-warrant holders can seize the opportunity to exercise their warrants for profits; if not, their warrants can very shortly turn into trash. Hence, it is essential that corresponding regulations be laid down in the CO to minimize losses that can be incurred by stock holders and prevent them from being caught in a predicament.

Thank you, Chairman.

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

(Mr Albert CHAN stood up)

MR ALBERT CHAN (in Cantonese): Chairman, I request a headcount.

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

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

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

(Mr LEUNG Kwok-hung rose to indicate his wish to speak)

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, please.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I now turn to clause 223 which I have already briefly discussed earlier. Clause 223 is one of the clauses under Subdivision 3 and I have briefly discussed clauses 221 and 222.

Subdivision 3 is about "Reduction of Share Capital Confirmed by Court". Clauses 221 and 222 set out two scenarios, the first of which is "Special resolution and application to Court for confirmation of reduction of share capital". In other words, it sets out the procedure for those who wish to confirm reduction of share capital and how the Court handles such applications. The other scenario concerns the creditors, setting out how they can lodge an objection to reduction of share capital. In relation to these two parties, clause 223 sets out that an officer of a company who misrepresents the list of creditors shall commit an offence.

Actually, in the human world, it is just human nature to lie. There are white lies, lies of a good intent or of an evil intent. Not every lie will constitute an offence. Nevertheless, when it comes to the list of creditors, the offence concerned involves someone lying. The Chinese clause starts with "公司的高級人員不得……" ("An Officer of a company must not ……") In other words, if the lie is not told by a "高級人員" (a senior staff member of a company which is rendered as "an Officer" in the English clause), it will not constitute an offence. Then, how should "高級人員" be defined? There certainly should be a definition.

In fact, a senior staff member can make use of a lower-rank staff member to disseminate information about reckless or intentional concealment of the name of a creditor who wishes to object to reduction of share capital. Under clause 221, a special resolution can be passed, that is, a meeting can be called to discuss this special resolution and an application can then be made to the Court. To begin with, this is an act of deceiving the Court. If the senior staff member does not make an application to the Court, he cannot obtain an order for

confirming reduction of share capital. Under clause 222 "Creditors entitled to object to reduction of share capital", a counter-measure is prescribed for creditors. Is this not a premeditated conspiracy? Given that only senior staff members of the company can attend meetings to discuss a special resolution, they are the ones to decide whether the resolution should be passed.

Clause 223(1) provides that "An officer of a company must not intentionally or recklessly ……". By "intentionally", it means that the officer makes a plan, and incessantly schemes or conspires with others. By "recklessly", it means that the officer is fully aware of something but he remains silent; he is aware of it, but he does not tell the truth when others ask him about it; or, he is fully aware that someone has lied but he does not correct it. What makes him commit an offence? He commits an office if he "(conceals) the name of a creditor entitled to object to the reduction of share capital; or (misrepresents) the nature or amount of the debt or claim of a creditor". The offence targets the creditors.

Chairman, in the capitalistic society, this is a very serious offence as it involves money. The clause sets out two conditions. The first one involves an officer "(concealing) the name of a creditor entitled to object to the reduction of share capital", obviously showing that the officer does not want others to know about the creditor; and second, even if the officer knows who the creditor is, he misrepresents the creditor's claim. And the officer who "knowingly concerned in any such concealment or misrepresentation", as set out in clause 223(1)(b), is acting recklessly. A few days ago I already talked about what is recklessness. What are the consequences of committing this serious offence? The offender is liable "(a) on conviction on indictment to a fine of $150,000 and to imprisonment for 2 years; or (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months." A level-6 fine means that it will not exceed $100,000.

Just imagine this. If a person makes a misrepresentation to a certain government department, say, the Immigration Department (ImmD) …… For instance, it happens every day that people, at the request of the ImmD, often disguise their intention to work here, which is their genuine reason for entering Hong Kong, with such excuses as coming here to attend their mother-in-law's funeral or visiting their dying grandfather; or, some people would declare that they come here to work as domestic helpers, but end up taking up other jobs.

These offences happen every day. When we met with trade unions for Filipinos, many Filipinos complain of unfair treatment, such as being asked by their employers to do other jobs. Employers certainly should bear the responsibility, but so should the domestic helpers because they obviously have made misrepresentations to the ImmD. The penalties that they receive are heavier than those received by the rich people. They are liable to a fine at level 6 and to imprisonment for six months. It is a very serious offence for anyone making misrepresentation to the ImmD.

As I have previously said in this Council, I truly do not understand why employees who have made misrepresentations because of work are subject to a heavier penalty than the employers who employed them. Just think about the people at whom the clauses under Subdivision 3 target. I am talking about the people stipulated in clause 223. They are board members or senior staff members of a company. In the capitalistic society, they are enshrined in a noble position by the law. They enjoy a divine position in business, investment or financial facility. If not, they need not be regulated by the CO.

Just think about how they conspire with others to confirm reduction of share capital …… Certainly, it may not necessarily involve a conspiracy because "recklessness" can also constitute an offence. This is exactly where the problem is. If they have done something in order to gain some advantage, this will work to the disadvantage of the public or the system itself. Of course, I couldn't care less if the system is ruined. But I just do not understand why in meting out the penalties, the balance is tipped to the disadvantage of ordinary folks who are looking for a job or those who come to Hong Kong to try their luck. Of the two groups of people, which will do greater harm to Hong Kong? Between the two, who have a greater potential or capability to cause negative impacts on transactions or the co-operative business mechanism protected by the CO? A Filipino domestic help who works for her employer during the day may take up another job at night washing dishes. Is she capable of ruining the system? She at most may have taken away a job opportunity of a Hong Kong worker by working for a lower wage. But in the end, it all boils down to the greed of the employers who wish to employ Filipino or Indonesian domestic helpers at a cheaper rate.

Chairman, this group of people has incessantly schemed to shift the responsibility of failing to operate the capitalistic system to another party; and

they have resorted to proceedings, that is, by making applications to the Court to prove that they have not lied to others. Chairman, is this how justice should be?

Chairman, I also wish to seek justice. According to Rule 17(3) of the Rules of Procedure, if the attention of the Chairman in Committee of the whole Council is drawn to the fact that a quorum is not present, he has the responsibility to do a headcount.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, as I have pointed out just now, if this ordinance is to serve its desired function *(Mr LEUNG Kwok-hung adjusted his microphone)* …… Sorry, I have lost my voice. If the ordinance is to serve its function, in providing for the penalties, a balance must be struck and fairness upheld. The present clause provides that those who deliberately exploit the loophole to their advantage and deceive the Court or persons who have a conflict of interest with them are liable on conviction on indictment to imprisonment for two years. My view is simple. First, the penalties should be meted out on the basis of the amount involved; that is, they should be fined for the amount covered up. Second, one should not be deceived by the term "高級人員" in the Chinese clause which means senior staff members of a company. Everyone …… I mentioned the "keeper" concept just now …… When something happened, the one who lost the rock-paper-scissors game assume the responsibility. Should the ordinance be like that? All in all, instead of randomly catching a person concerned to bear the responsibility, consideration should be given to the concept of conspiracy so as to oblige the persons concerned to prove that they are innocent of the conspiracy. At any rate, this is the job of the prosecution, but as far as these problems are concerned, I hold that

the concept of conspiracy or plotting, rather than the "keeper" concept, should be adopted. Thank you, Chairman.

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

(Mr Albert CHAN rose to indicate his wish to speak)

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

MR ALBERT CHAN (in Cantonese): Chairman, I do not know if this is a piece of bad news. I just heard in the Ante-Chamber that there seems to be sufficient votes to veto the Government's amendment in respect of the criminal liability of the auditor. If we stall on the debate for a few more days, the outcome will be different again. Let us wait and see what the outcome will be. It is up to you to decode whether this is a piece of good news or bad news, but it is evident that interest groups in Hong Kong have a very strong mobilization power and it is especially evident that some people always waver.

Chairman, the clauses in question cover an extensive scope, and I wish to say a little more on another clause which also involves a court procedure. This concerns another court procedure, that is, clause 374 "Court may order accounting records to be inspected on director's behalf". This clause is under Subdivision 2 of Division 4 of Part 9 "Accounts and Audit". The Bill is gradually subdivided into this clause. The clause basically provides that "On application by a director of a company, the Court may by order authorize a person to inspect the company's accounting records on the director's behalf.".

Chairman, it is provided in a preceding clause that directors have the power to obtain financial statements. It is set out under Subdivision 2 "Accounting Records", somewhere around clause 369 …… paragraph (c) that directors have the power to obtain information about accounting records and this power extends to persons authorized by the directors. The authorized persons are, generally

speaking, professionals who have access to information about disputes among the directors, financial problems of the company or issues concerning the distribution of rights and interests.

However, is it necessary to expressly set out in the Bill that this has to go through a court procedure? Just as I have pointed out earlier in discussing another clause involving a court procedure, this can also be settled by means of mediation or by compliance with the regulations set out in the clause. This is absolutely feasible. The clause provides that a director of a company may authorize a person, who may be a designated professional, to inspect the company's accounting records in relation to a certain issue. If this has already been expressly provided in the clause, the persons concerned need not go through the legal formalities in order to inspect the records. I am better versed in the Landlord and Tenant (Consolidation) Ordinance, which provides that a landlord has the right to inspect records. Of course, as I have just mentioned, clause 369 also provides that directors have the power to obtain financial information.

Similarly, in respect of the authorization, the clause does not specify what type of person should be authorized. But, in my opinion, some of the legal formalities can be saved if the Government can devote one of the subclauses on authorization of specific professionals to inspect the accounting records in relation to a specific issue. The rich and overbearing will usually find an advantage in these legal formalities. Some directors are not the major shareholders of a company. Generally speaking, the director holding the largest number of shares will be the one controlling the operation of the company; and directors who hold a smaller number of shares will generally have a smaller say or influence in this regard and they often have to resort to legal means to seek justice. However, being extremely weak in terms of finance and power than their counterpart, these directors will have to bear an additional burden and financial risk if they seek to redress for their grievances by legal means. Thus, I believe it is more logical and appropriate if this can be expressly stipulated in the clause.

This is all about upholding a basic principle. The Government should not always resort to the Court to settle disputes. Disputes can be settled by regulations laid down in the law, or by means of mediation or some other mechanism. As I have mentioned earlier, is it feasible to set up a company tribunal? Instead of employing legal representatives to take trivial issues or disputes involving rights and money to the Court, the two parties can take the

matter to the tribunal. I believe this is a "swift, smart, swell" approach and it will be able to help investors who are not as rich and powerful.

I ask the Secretary to seriously consider this again. In order to develop Hong Kong into an international company centre, the Government must ensure that the CO is able to balance the interests of different parties, rather than tilted to some of them. The Bill is still excessively tilted, but the amendments and many new clauses have already strengthened the monitoring and controlling power of the Government on the operation of companies and some loopholes have been plugged. This is commendable. However, individual clauses, which provide for the handling of a certain relationship, always resorted to legal procedures in addressing conflicts between companies and parties vested with certain interests. This is not something which the public would welcome. Small investors or investors who are not as rich would also not welcome it either.

Chairman, I wish to pledge my support for another new clause, that is, clause 465 which has used the term "company secretaries". In the original section in the principal legislation, only the word "secretary" is used in denoting the person to be authorized. And clause 465 provides that "A company must have a company secretary." According to subclause (4), this company secretary must "(a) if a natural person, ordinarily reside in Hong Kong; and (b) if a body corporate, have its registered office …… in Hong Kong". I think the Government has kept abreast of the times by using "company secretary" in the Bill because many companies do not employ a person as their company secretary, but engage the service of a professional body, organization or company to act as their company secretary. This is not a new trend that happens only today. I believe this practice has existed for quite some time.

I believe the development of company secretary service will be further boosted after this amendment is passed and enacted because more and more such companies have been established to provide secretarial service for corporations. Besides, I believe that with the passage of the Bill, companies which provide secretarial services for large corporations or SMEs will also grow in number and their business will thrive. Engaging secretarial services provided by these companies may even become a trend in the development of SMEs in Hong Kong.

University graduates majoring in accountancy or law are good at drafting minutes. I believe the SMEs will find such services helpful. Particularly in

view of the fact that the new ordinance, after enactment, is consisted of some 990 sections which are much more complicated, it will be helpful if these professionals or professional service companies are well-versed in the provisions. "Yuk-man" and I have been studying the clauses in the past few days and we are becoming more and more well-versed in the CO.

The establishment of professional service companies can create more job opportunities. These positions can be clerical or public relations in nature, and some may be relatively professional. Law firms or accountancy firms will no longer be the exclusive service providers. With the new requirement laid down in clause 465, the amendment will benefit professional companies offering company secretary services.

Chairman, I wish to raise some minor problems in relation to clause 476. This is the expertise of "Yuk-man" and I do not wish to undermine his authority. I have studied the clause and really found it hard to understand. It mainly involves the problem of translating the clause from English into Chinese. Secretary, I hope that you can take a look at the clause.

Clause 476 is titled "Circumstances constituting contravention". What is it about? Let me read it out in Chinese and see if Members understand it: "在本部中，提述構成違反的情況，如屬一項若非因任何事實或情況便會因第2分部第3次分部而不會被禁止的交易或安排，包括該事實或情況。" ("In this Part, a reference to circumstances constituting a contravention includes, in the case of a transaction or arrangement that, but for any fact or circumstances, would not be prohibited because of Subdivision 3 of Division 2, the fact or circumstances.") Chairman, I have read the clause 10 times but still do not understand what it means.

When one does not understand a Chinese clause, he will normally refer to the original English clause. This is how absurd and unacceptable legislation in Hong Kong can be. I feel a little better after reading the original English clause. Chairman, actually, the English clause is also very difficult to understand. You have corrected my English before. I must thank you. My Chinese and English are both not very good. I am just an unrefined fellow, playing football all the time when I was small. When it comes to language, I am never good at remembering all the words and phrases.

The English title of the clause is "Circumstances constituting contravention". This is comprehensible and corresponds to the Chinese title. The English title does not pose much of a problem, except that its word order is the opposite of the Chinese title where the word "Circumstances" is placed at the start, followed by "constituting contravention". The word "contravention" corresponds to the Chinese words "違反".

The original English clause provides that "In this Part, a reference to circumstances constituting a contravention includes, in the case of a transaction or arrangement that, but for any fact or circumstances, would not be prohibited because of Subdivision 3 of Division 2, the fact or circumstances.".

Actually, the original English clause is also incomprehensible, and the Chinese clause is entirely translated from the English clause, following the English word order. Given that the original English clause is already quite obscure, it is even more difficult to directly or stiffly translate that paragraph of obscure English into Chinese, thus making the Chinese translation even more obscure. Among the many clauses that I have read, or at least among the clauses preceding clause 476, this clause can possibly be the most …… I can hardly say anything positive about the Chinese translation. I think the Secretary or the Law Draftsman should review this clause again.

No matter how good one's Chinese standard is, after reading the clause another 10 times …… I have read it at least 10 times, but still find it very obscure. Although I know what the clause is trying to convey, in terms of the wordings, SMEs in general, or the 910 000 SMEs *(The buzzer sounded)* …… I believe hardly anyone would understand it.

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

(Mr WONG Yuk-man rose to indicate his wish to speak)

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

MR WONG YUK-MAN (in Cantonese): With regard to "Repeal of power to issue share warrants", I have spoken on it briefly earlier.

Coming back to share warrants, clause 134(1) states from the outset that the power of a company to issue share warrants is repealed.

Clause 134(2) stipulates that the bearer of a share warrant issued before the commencement date of this Bill is entitled, on surrendering it for cancellation, to having the bearer's name entered in the register of members of the company. In other words, the power of a limited company to issue share warrants to bearers is forfeited as soon as the Bill is enacted and comes into effect.

Nevertheless, section 73(1) of the original CO stipulates that "A company limited by shares, if so authorized by its articles, may, with respect to any fully paid-up shares, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares included in the warrant.".

Clause 134(2) ensures that the entitlement of the bearer of a share warrant is unaffected. In fact, it is rather uncommon for a company to issue share warrants. The Hong Kong Government or the Financial Services and the Treasury Bureau dose not encourage the issuance of such share warrants because of the need to combat money laundering. So from that angle, the ownership and transference method of such share warrants are not so transparent, thus it will not help the fight against money laundering if such share warrants are permitted to be issued.

For that reason, when the Government was rewriting these provisions, it was proposed that the power of issuers of companies to issue share warrants be removed, and so this provision came into being. Of course, the provision also takes reference of the practice in Singapore and the United Kingdom. In the United Kingdom, companies issuers are permitted to issue share warrants while Australia forbids it. The existing provisions, sections 97(3) to (5) of the CO, adopt the practice in section 66 of the Companies Act of Singapore.

Before we go on discussing clause 134 of the Bill, it is necessary to talk briefly about what exactly is share warrant as mentioned in clause 73(1) of the

existing CO. Share warrants can be freely transferred or transacted as other common instruments, and the company concerned may not even know well who the share warrant bearers are. Therefore, the transference or transaction of such warrants needs not be brought to the attention of the company concerned. As the interest of share warrant bearers is comparable to that of shareholders, generally speaking, the bearers shall of course receive the dividends. As there is no registration system for share warrants, therefore, companies will only recognize the warrants instead of the bearers. Clause 134(5) therefore stipulates that if a company's articles so provide, the bearer of a share warrant may be regarded as a shareholder of the company, but he is not considered as a member of that company.

At this point, I recall the recent case of Asia Television Limited (ATV), and we may mention this case here. The management of ATV was under investigation by the former Broadcasting Authority (BA), which is now called the Communications Authority. The investigation was launched because the major bearer of ATV's share warrants is WANG Jin, but he is not ATV's board member, and that contravenes the licensing conditions of the former Broadcasting Authority. However, as a licensed institute, his shareholding in ATV should be reported to the BA and approval should be sought from the BA, as who is taking up whichever post should be reported to the BA, but WANG Jin does not hold any post in ATV at all. However, after investigation, it was found that WANG Jin had actually been involved in the management of ATV.

DR MARGARET NG (in Cantonese): I do not know the whole story of this BA case very well, but it is very likely that the case is under judicial review, therefore, Members of this Council should take note of this when they speak on the case.

CHAIRMAN (in Cantonese): Mr WONG Yuk-man, please consider Dr Margaret NG's advice.

MR WONG YUK-MAN (in Cantonese): Thanks to Dr NG for the reminder, but what I have said just now is known to all. I cited this as an example to illustrate the argument in respect of clause 134 that a bearer of a share warrant may be

deemed a shareholder of a company but not a member of the company. The example I cited just now can best describe the case, because he is not permitted to run that company practically. Of course, the case is under judicial review, but the things I mentioned just now have all been disclosed by the media.

CHAIRMAN (in Cantonese): Mr WONG, you have already highlighted the crux of the problem lied.

MR WONG YUK-MAN (in Cantonese): Certainly, I can refrain from mentioning that, but it is stipulated in clause 134(5) of the Bill.

Moreover, some people call these "share warrants to bearer", and these share warrants are actually unregistered shares, and unregistered shares are also known as "bearer shares". That is, the name of the shareholder is not shown on the face of these shares or in the register of shareholders of a limited company. Compared with registered shares, the difference does not lie in the issue of the rights of shareholder.

Chairman, a quorum is not present.

CHAIRMAN (in Cantonese): Will the Clerk please ring the bell to summon Members back 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.

MR WONG YUK-MAN (in Cantonese): Just now I was talking about the difference between unregistered shares (also known as "bearer shares") and registered shares, and the difference does not lie in the rights of shareholder, but in the way of putting down a record of shares. When unregistered shares are

issued, their counterfoils would usually be retained. For formality purpose, they are divided into two parts, one is the body of the share certificate which contains particulars of the company, including the name of the company, the number of shares the certificate represents, and so on; and the other part contains the dividend of the share for dividend clearing purpose, and to exercise the capital increase right, that is, to issue additional shares. We should bear in mind that as unregistered shares have no legal basis as they do not carry the names of shareholders, if anyone loses some unregistered shares, then they are gone for good. The original bearer will lose his rights as a shareholder, and such loss cannot be registered.

Therefore, share warrant has a lot of shortcomings. Due to this characteristic, why does clause 134(4), that is, from subclauses (3) to (5), retain the practice under the existing law to deal with these long-standing problems of share warrants? Clause 134(3) specifically stipulates that "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.". The meaning of this clause is, if the share warrant is not surrendered or cancelled but the company enters the bearer's name in the register of its members, then the company is liable for any loss incurred.

Clause 134(3) has not specified the meaning of "liable", to whom should the company be liable for? An interpretation for the legal liability should be set down in the first place, right? In case the company enters the bearer's name in the register of its members without the share warrant concerned being cancelled, then it will create two identical sets of such instruments. Furthermore, this will undermine the interests and rights of the share warrant bearer, as well as that of the person registered as member of the company in question. For that reason, clause 134(3) is rather ambiguous. I believe the legislative intent during the drafting stage was that both circumstances could be covered, but when one looks at the provision, one will find it rather vague.

When the draft Bill was discussed in the Bills Committee, or even when the relevant provisions were presented for consultation, some people considered that the Government should learn from the practice of other places, that is, to implement a registration and recognized custodian system to store these unregistered share warrants as a compromise alternative. However, the Government has all along held the view that it is unnecessary to introduce these

complicated systems, as repealing the issuance of bearer share warrants can put an end to all the fuss as it is the most straightforward way and will save all the troubles. Moreover, it will help to combat money laundering, thus it is a once and for all solution. But when the Bill was drafted, we found that it was a bit vague in this respect. What will happen in future? Actually we can only find out when it is enacted in future. Since clause 134(1) has already repealed the power of companies to issue share warrants, if our understanding is correct, subclauses (2) to (5) must be transitional provisions, because the main body of the provision is to repeal the power, while subclauses (2) to (5) are apparently transitional. For that reason, after the enactment and announcement of this piece of legislation, I believe share warrants will become history, a historical name only.

Lastly, I cannot help but raise a point concerning drafting in the Chinese version. There is this expression in the Chinese version of the draft clause 134(5)"則股份權證的持有人在十足程度上". This expression is exceptionally good, "十足程度(the full extent)" is better than the platitude "some extent" or "a certain extent" as some people like to use. What is the extent in "some extent"? How certain is the certain in "certain extent"? This expression is excellent, it is really interesting. The Chinese expression "則股份權證的持有人在十足程度上或就該章程細則所指明的任何目的而言", Chairman, is really hard to understand. The English version is more easier to comprehend, it being "either to the full extent or for any purposes specified in the articles". Given that it is "to the full extent", why is there a need to state another circumstance? This is really appallingly funny, which will place the reader in bewilderment or confusion. No one actually knows what the expression "股份權證的持有人在十足程度上或就該章程細則所指明的任何目的而言" means. The original intent is to make the scope of coverage wider, but it make one feel that it is gilding the lily and it is not comprehensible. This is really a faulty expression. I have finished discussing clause 134 concerning "Repeal of power to issue share warrants", and it just so happens that my speaking time is up.

SUSPENSION OF MEETING

CHAIRMAN (in Cantonese): Members need to rest now. I now suspend the meeting until 9 am tomorrow.

Suspended accordingly at a quarter past Eleven o'clock.