OFFICIAL RECORD OF PROCEEDINGS

Tuesday, 10 July 2012

The Council continued to meet at half-past Two 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

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

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 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.

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:

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.

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

DR THE HONOURABLE LEUNG KA-LAU

PUBLIC OFFICERS ATTENDING:

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

MS JULIA LEUNG FUNG-YEE, J.P.
UNDER 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 PERCY MA, ASSISTANT SECRETARY GENERAL

BILLS

Committee Stage

CHAIRMAN (in Cantonese): The Committee continues to examine the clauses of the Companies Bill to which amendments have only been proposed by the Secretary for the Financial Services and the Treasury.

(Mr Albert CHAN stood up)

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

MR ALBERT CHAN (in Cantonese): Since we are to continue with the examination of the Bill, please 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)

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

COMPANIES BILL

CHAIRMAN (in Cantonese): Mr Andrew LEUNG, speaking for the second time.

MR ANDREW LEUNG (in Cantonese): Chairman, I would like to continue to talk about the clause which I touched on on the last occasion, that is, clause 456 on the exercise of "reasonable care, skill and diligence". According to the example of Britain cited by me, when considering the duty of directors, we expect

the directors concerned to act in accordance with general knowledge, skills and experience, without demanding that they have to exercise their individual skills. For example, we do not expect a director of the company with the qualifications of a solicitor to comment on the opinions of the company's counsel; we will only expect him to handle the company's affairs with the knowledge, skills and ability of an average person.

I accept this explanation of the Government. However, if something unfortunate happens to the company, and when some non-executive directors have the qualifications of a solicitor, accountant and auditor, I hope people will not apply the objective standard and criticize on hindsight that the non-executive directors, all being professionals, should have exercised their knowledge, skills and experience to resolve the problems faced by the company and hold them accountable.

There have been voices in the industrial and business sectors calling for the drawing up of a "safe harbour" provision on the duty of directors, so as to define under what circumstances will directors not be required to assume liability; or even to specifically adopt something similar to the Business Judgment Rule implemented by jurisdictions such as Australia to protect directors from having to assume liability for business decisions made in good faith but which are subsequently proved to be wrong. Nonetheless, the Administration considers such provision unnecessary. Although Australia has written it into statute law, the arrangement has been criticized as lacking flexibility while the common law in Hong Kong has provided adequate protection. So long as the act is performed in good faith, the person will be exempt from responsibility. In this connection, I would like the Secretary to confirm this when he speaks later.

Chairman, I would now discuss clause 358 of the Bill and section 141D of the existing Companies Ordinance (CO) on requirements for simplified financial reporting. I have pointed out in the debate on the resumption of the second reading that the authorities have stealthily deleted section 141D of the existing CO in the Bill tabled. The provision allows a private company which is not a member of a business group to draw up a simple account and directors' report for a particular year with the written approval of all the directors. In other words, under section 141D of the existing CO, so long as the company has the written approval of all the directors, it can adopt the simplified financial reporting. In Hong Kong, the majority of the private companies ― small and medium

enterprises (SMEs) in particular — draw up their financial reports in accordance with section 141D of the existing CO which is a simpler way to prepare their financial reports at a cheaper cost. Why then has the Government stealthily deleted it?

Moreover, financial reporting is an important means for the shareholders and watchdogs to monitor the management of the company, and to the minority shareholders, information contained in a simplified financial report and directors' report may be more detailed, useful and easier to understand. During the scrutiny of the Bill, I have all along strongly demanded that section 141D be retained and that the requirement on the adoption of simplified financial reporting be relaxed. Furthermore, a simplified financial report can be more effective in enabling minority shareholders to understand the operation of the company. Plus, a simplified financial report is by no means an inferior report, for it can also reflect the actual financial position of the company. The government officials have finally accepted my view and retained section 141D. I welcome this decision of theirs.

As regards relaxation of the requirement on the use of simplified reporting, many SME organizations and chambers of commerce of the industrial and business sectors hope that more companies can benefit from simplified reporting which will result in cost savings. We propose that with the approval of members holding 75% of the company's voting right, and if no other member objects, the application of the SME financial reporting standard issued by the Hong Kong Institute of Certified Public Accountants can be extended to private companies and groups of any scale.

We had over and again asked the government officials to raise the threshold of $50 million as set in the Bill, and had successively proposed that the Government consider using the threshold set by the United Kingdom in its Companies Act 2006, that is, small companies in the United Kingdom making less than £5.6 million for the year (around HK$67 million), with assets not exceeding £2.8 million (around HK$33.6 million) and employing less than 50 people; medium-sized companies making less than £22.8 million for the year (more than HK$2.7 billion), with assets not exceeding £11.4 million (over HK$1.3 billion), and employing less than 250 people; or consider using the existing listing threshold of $5 billion in Hong Kong as the standard. In this regard, the initial response from the Government was not positive. It only said the Bill definitely could not cover all SMEs and stated that there was no way to

predict how many SMEs could be exempted under the $50 million threshold set in the Bill. It just repeated that the provisions have already allowed some companies to switch to simplified reporting, and so on. We of course went all out to argue with the Government and eventually agreed on two options to allow more qualified SMEs to draw up simplified reports. For qualified companies, only two of the following three conditions have to be met to resort to simplified reporting:

(1) income for the year not exceeding $100 million;

(2) aggregate assets not exceeding $100 million; and

(3) not exceeding 100 employees.

Moreover, for private companies and groups of a larger scale, so long as they can secure the approval of members holding 75% of the voting right of the company, and provided no other member objects, plus meeting two of the following three conditions: that is, aggregate assets not exceeding $200 million, total revenue not exceeding $200 million and employing less than 100 people, they can adopt simplified reporting.

An annual revenue of $200 million is between the level set by the United Kingdom for SMEs, and is on a par with the exemption threshold of the "First Conduct Rule" of Hong Kong's competition law. To me, this threshold is acceptable at this stage, and I hope the Government will review it from time to time.

Chairman, the amendment proposed by the Government after heeding our views will not result in corporate governance becoming lax, nor will it affect the right of shareholders and investors obtaining more comprehensive information on the financial position of a company. On the contrary, the amendment has struck an appropriate balance among protecting shareholders' rights, facilitating business operation and bringing down corporate costs. Upon relaxation of the requirement, we anticipate that the vast majority of private companies will automatically be qualified to adopt simplified reporting, benefiting about 97% of the enterprises.

Chairman, I opine that legislation should keep abreast of the times. In order to bring the threshold governing total revenue, aggregate assets and the

number of employees in line with market changes, we hope that the Government will conduct regular reviews of the level for the various thresholds as mentioned.

Chairman, I so submit.

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 eighth time.

MR ALBERT CHAN (in Cantonese): Chairman, I would like to discuss clause 58 of the Companies Bill (the Bill) and the amendment proposed by the Government.

Chairman, clause 58 is about immunity. I believe other ordinances have similar provisions on immunity. However, I find it rare to discover immunity from liability as comprehensive as that stipulated under clause 58. Clause 58 states that "Neither the Registrar nor any public officer incurs any civil liability, and no civil action may lie against the Registrar or any public officer, in respect of anything done, or omitted to be done, by him or her in good faith — (a) in the performance, or purported performance, of functions under this Ordinance; or (b) in the exercise, or purported exercise, of powers under this Ordinance.".

Chairman, there are several problems with this. This is a legal provision similar to providing blanket immunity, among which there are two main issues. First, so long as it is in good faith, the Registrar or any public officer does not incur any liability for doing or not doing anything; and second, in the performance of (functions under) this Ordinance, so long as the decision is made in good faith, regardless of whether the Registrar of any public officer has or has not done anything, he or she does not have to face any civil action. This provision has absolutely neglected whether it is rational to do or not to do something, whether the spirit of the Bill has been breached, whether losses have been inflicted upon the people concerned, and whether the losses are substantial.

Recently, when the President of China visited Hong Kong, a reporter who shouted a question to him was illegally detained or alleged to be illegally detained for 15 minutes by the police. Both the reporter and the newspaper can bring an action against the Commissioner of Police and the various police officers who were then enforcing the law. When it comes to the disciplined forces enforcing the law, the public can bring actions against them, why then can the Registrar and public officers who are enforcing the rewritten CO be immune from all liabilities because of the expression "in good faith"?

Chairman, I find this immunity excessive and inappropriate. Yesterday, when I spoke on the other clauses, I already said that according to the other provisions, when the person concerned handles the documents, he is not responsible for verifying the truthfulness of the document. It can be seen in many clauses that the arrangements made under the Bill relieve the relevant officers of the Government from assuming many basic responsibilities. There may be work which he should do or which the public expects him to do. For example, in the handling of documents, he should have the basic responsibility of checking whether there is *prima facie* reason or evidence indicating the document may be bogus. However, clause 57 of the Bill unexpectedly prescribes that the Registrar needs not verify the truth of the information in a document. Moreover, clause 58 of the Bill also prescribes that so long as the protected person has acted in good faith, he can, for certain reasons, put the document aside or handle it incorrectly. All in all, it will be fine so long as he believes in good faith that what he has done is correct.

As regards "in good faith", there may be numerous past precedents indicating the yardstick for evaluation, but as I said earlier, when it comes to the handling of applications, a lot of details are known only to the government departments without being revealed to the public, and they are not responsible for making explanations to anyone. Because of this black-box operation mode, it is difficult for those outside the Government to learn about certain decisions of the government departments, or what administrative procedures will be followed. They are totally kept in the dark. For example, some provisions stipulate that applicants should produce certain documents when making their applications, but there is no mention of when the Registrar will have to return the documents. For the relevant people or departments responsible for handling applications for company registration as prescribed by the provisions, outsiders or the applicants do not have a clue about the procedures involved or the internal *modus operandi*.

Under the circumstances of absolute blackout on the outsiders and compounded by this immunity provision, the entire department can basically do as it wishes, with nothing to fear because of this *modus operandi*. Even if the people concerned want to bring proceedings against it, it can escape prosecution banking on this immunity clause. In my opinion, this arrangement by an accountable government of a cosmopolitan city will give the impression that it has not the slightest intention of assuming responsibility and will only play the blame game. Thus, I find this clause hardly acceptable.

Chairman, I would like to point out that with the Government's amendment, the immunity principle and scope of clause 58 will be extended to cover electronic filing service. This immunity is not provided for under the existing ordinance. If I have not mistaken, these two are newly added provisions. The original clause 58 has introduced immunity to protected persons providing electronic filing service, and the amendment further expands the scope for immunity to enable government departments to further restrict the responsibility to be shouldered and to pass the buck.

Chairman, since a lot of personal data will be handled by electronic means, it is natural that there will be an increase in the chances of data being leaked or the electronic systems being hacked. The authoritativeness and infiltration of WikiLeaks is a good tell-tale. Therefore, if there is this immunity provision when government departments provide electronic services, coupled with the fact that the registered information of any company can be basically located electronically in the future, I will not be surprised even if someone for whatever reason hacks systems providing electronic services to obtain the personal privacy data of the utmost importance to others. Just imagine, WikiLeaks can get hold of information of even the United States Department of Defense and The White House.

The electronic system of the Companies Registry holds important personal information and involves over 900 000 companies, and the information may also touch upon interests, competition or even legal disputes among companies, there may be people who, for some special reasons, wish to undermine the reputation of others or commercial deals through the dissemination of such information ……

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, would you please invoke Rule 17(3) of the Rules of Procedure to order 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, this is about problems with electronic systems. I would think that this is really worth the attention of Members and the public because the chances of such systems developing problems are very high and it may lead to serious loss or damage.

The amendment to clause 58(2) states "Where, …… a protected person provides a service by means of which information in electronic form is supplied to the public, or supplies information by means of magnetic tapes or any electronic mode, the protected person is not personally liable for any loss or damage suffered by a user of the service or information by reason of an error or omission appearing in the information if the error or omission — (a) was made in good faith and in the ordinary course of the discharge of the protected person's duties; or (b) has occurred or arisen as a result of any defect ……" — it is defect in equipment — "or breakdown in the service or any equipment used for the service or for supplying the information.".

Chairman, the situation described in that clause is entirely the fault of public officers. It is all because of the fact that they have made some mistakes or lost something or it is because of machine failure or such like problems, that the company concerned incurs losses. But it is surprising to note that no one is to bear any responsibility. Besides, another problem with this clause is that it creates a unique concept of "a protected person". The old provision, that is, in the existing CO, uses the term "the person in question". Of course, such persons

may be exempted from bearing certain responsibilities. The old provision uses the term "the person in question". The new clause creates the concept of "a protected person". According to the clause, a person who works for the Government is a protected person. It is really an interesting idea.

I have criticized this Bill for it seems as if the Bill is so drafted as to favour the giant consortia and the rich people. It looks as if it is drafted to protect the interests of the Government and the giant consortia. For the sake of protecting these giant consortia and the rich people, the penalties imposed are very light. In order that people who work for the Government in the department, that is, in the Companies Registry, are protected, the Bill specifies that they do not have to do certain things and they do not need to ensure the truth of the contents of the documents. The department may therefore operate in a black box and it does not have to be accountable for anything. There are many things which the Registrar does not have to hold himself accountable to anyone. And should he incur any liability in law, he will not have to be held responsible.

Considering the approach adopted overall in the Bill, I have an impression that it is fraught with defects. This of course has something to do with the extremely sloppy scrutiny of the Bill *(The buzzer sounded)* and that the time is too short.

Chairman, I wish to put it on record that I consider clause 58 most unacceptable.

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 seventh time.

(Mr Albert CHAN indicated that Mr LEUNG Kwok-hung should speak first)

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

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I am "Man-yuk WONG". Chairman, I wish to talk about clause 3 of the Bill which is on responsible person. Of course, Members have discussed the issue of responsible person in this Council. It is very important for "responsible person" to be placed in clause 3 of this Bill. After the passage of a Bill, if the issue of who shall be responsible and who shall not be responsible is not clearly defined, then we can say that this law is useless. So the clause on responsible person is placed immediately after clauses 1 and 2 which are on interpretation.

The Government has made an amendment to that clause whereby paragraph (b) of clause 3(2) is removed and substituted by another paragraph which removes the idea of "or fails to take all reasonable steps to prevent". That is to say, originally, the clause on "responsible person" includes a person who "fails to take all reasonable steps to prevent". What are "reasonable steps"? What is meant by being "reasonable"? Of course, for many things in this world, the question of whether they are reasonable or not is relative. In this law and also in many other laws, the meaning of "reasonable" is that the person in question has the ability and he knows his legal responsibility but he fails to comply with the requirements. Such is the meaning of "reasonable".

In clause 3(3) on "responsible person", the Government has deleted paragraphs (b) and (c) and in both paragraphs, the sentence "or fails to take all reasonable steps to prevent" is deleted. The meaning of this is that this type of persons does not have to bear any responsibility for in the clause on "responsible person", that is, clause 3(1)(a)(ii), it is provided that "a responsible person of a company or non-Hong Kong company commits an offence if there is …… (ii) a failure to comply with a requirement, direction, condition or order ……". I would not cite so much of that clause. I will just quote from subparagraph (ii) and I will not read out subparagraph (i) because it is also similar.

This responsibility refers to legal responsibility which is clear enough and it is also about the commission of an offence. What in fact are the consequences of committing an offence? It may be a fine or imprisonment or any other kind of penalty such as the revocation of a licence, and so on. These are not

stipulated here because under the CO, a responsible person found guilty will not have his licence revoked but he is only imprisoned. If the company does not mete out any penalty such as dismissing that person of its own accord, there is nothing the authorities can do. At most the person is put into prison and barred from acting as a company director. But if it is a private enterprise, even if a person is given a prison term of 10 years, he can still act as a company director of a private company after release from prison.

The Government has proposed to make amendments here but these amendments just beat about the bush, failing to target the problems. Under section 351(2) of the old CO, it is not the company concerned which is being penalized. Why should a company be penalized? It is a legal person, so how should it be penalized? You cannot beat it because it will not feel the pain. The only thing you can do is to impose a fine. The aim of the clause is to penalize officers who are in default. What are "officers"? In section 351(2) of the old CO, officers who are in default are defined as "any officer of the company …… who knowingly or wifully authorizes or permits the default, refusal or contravention ……".

In the old CO, a responsible person or the person to be penalized is called "officer who is in default". Why is "responsible person" mentioned as early as in clause 3 of the Bill? It shows that the Government considers "responsible persons" to be very important. The Government has indeed explained this and the CO has undergone meticulous revisions and much delay before it appears in its present form. When the Companies Bill was being drafted, reference was made to the Companies Act 2006 of the United Kingdom and the new concept of "responsible person" was copied to replace the idea of "officer who is in default" as found in section 351(2) of the old CO. What is the merit of adopting this new approach? It is to lower the threshold for prosecution. It is because a "responsible person" would include officers and shadow directors of a company ― a few days ago Mr WONG Yuk-man mocked at the law drafters, when he talked about "shadow director" and "behind-the-scene director". I would say that this is "shadow boxing director". In this way, there is a possibility that the scope of people who can be prosecuted under this law will be enlarged. It is also stipulated that negligent omission may also constitute criminal liability. What is meant by negligent omission? It means overlooking certain matters wilfully. It is also being reckless, that is, the person knows well the grave consequences but disregards them. There is an element of recklessness here.

In the past when reference was made to "an officer who is in default", it was difficult to prosecute because it must be proved that he did that on purpose. But the case is different now. If you do not do something on purpose but only that you do not care, then under this clause now, even if you say that you do not care or you are too busy and you are the director of four companies which are going to be listed, such that you cannot possibly fulfilled the requirements, sorry, you should hire some secretaries or staff to help you. If you cannot do that, you are contravening the law.

As a matter of fact, the officials have come to this Council and told Members — including those Members who have spoken today — that it is justified in making the amendments and it is not merely a change of wording. According to the officials, the new expression "responsible person" is meant to lower the threshold for prosecution and the coverage is extended to include reckless behaviour or reckless omission of the officers, hence enforcement is enhanced. So the Government knows what it is doing. You may say that this is a copycat act or you can say that it is coupling with international practice. In this way the Government has really considered the Companies Act of the United Kingdom when making the amendments. Of course, I do not mean to flatter the British Government here because what it has done is a mess. However, we must say that while it is making a mess of things or there is collusion between business and the Government, it will adorn the beast with human clothings and so it will look like a human being.

In the United Kingdom, it is the Parliament that enjoys supreme powers and laws are made by it, whereas in Hong Kong, the role is played by two parties. Laws are made by the Government and then introduced to this Council which is a quasi-parliament, an agency which resembles the functions of a parliament. Then after things are talked over and agreed, Members of this Council are asked to put their seal of approval on it. Chairman, just think about this. Why does the Government have to go back and take this course of action? The Government has pointed out to Members that it intends to do that. Right? The idea of a person who "fails to take all reasonable steps" is actually aiming at reckless behaviour or reckless omission, regardless of the intention of the doer. Our Bills Committee has really been very conscientious in performing its duties and members of the Bills Committee have urged the Government to stop and pointed out that it cannot do so because it will lower the threshold for prosecution and innocent people may be caught. This is because if someone is said to have

contravened this law, it is said that he has wifully neglected his responsibility and disregarded the consequences. It is not entirely because he should be proved negligent so as to pass the *mens rea* test. The effect is that many people would not have any chance to exploit the so-called loopholes in the law. So Members of this Council have urged the Government to stop, saying that if it is the case, then they will not pass the law and if it continues to have its way, the interest of the sectors concerned will be jeopardized.

This shows that the parliament — Chairman, I have once said that there is an English proverb which reads to this effect: "The Parliament can do anything, apart from changing a man into a woman or a woman into a man." But it is not the case with our parliament. This parliament has to say to another god something like this, "If you want to change a man into a woman or a woman into a man, it can be done. But if I say no, then you may not be able to do it." Actually, this is something which we all can see. But in this reform concerning the reference to "responsible person", Members in this Council commonly known as the conservatives — we are not calling them royalists now because it is no longer fashionable — think that no change should be made. They think that no change should be made because it may affect the interests of their sectors. And these conservatives are making a ferocious attack, putting up a strong opposition. They are doing this because all that is required in this Council is to count the number of votes. And so this reform introduced by the Government is once again aborted. However, I do not want to see this meeting aborted. I hope that the Chairman can act according to Rule 17(3) of the Rules of Procedure to do a headcount and see if this meeting would be aborted.

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 mentioned the history just now. We owe it to some Honourable Members who exercised their due diligence in opposing the Government and defending their own rights. Who are they? I learn from the report that they are Mr Andrew LEUNG, Mr Jeffrey LAM and Mr WONG Ting-kwong. These three Members have a clear-cut stand against the Government's amendment.

My argument is that their worry is excessive. It is certain that under a law, an ordinary person should not get hit by a single provision without knowing the hidden content. This is correct. However, when you read the provisions carefully (which I did not have time to explain just now and have to wait for another turn to speak), what are the first three conditions? They are "…… if the person authorizes or permits, participates in", followed by "or fails to take all reasonable steps to prevent, the contravention ……". In other words, the phrase "fails to take all reasonable steps" is at least referring to the three conditions before it, or without these three conditions, we then cannot explain the difference between it and these three conditions. Of course, this is not something I can elucidate within the remaining 15 seconds, and I have to expound on it in my next speech. For that reason, I hope the three Members concerned will rise to talk about why they would ask the Government to delete these provisions as if to erase them with an eraser. Please could you speak?

CHAIRMAN (in Cantonese): Mr LEUNG, the Members whom you just named have actually spoken on the grounds based on which the Government was asked to delete those words you just mentioned.

MR ANDREW LEUNG (in Cantonese): In regard to the amendment proposed by the Government, what I have explained just now should have been heard by you clearly enough. We have put forward our rationale. For the record, unlike what Mr LEUNG Kwok-hung said, we do not oppose the Government's amendment.

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

(Mr LEUNG Kwok-hung stood up)

MR LEUNG KWOK-HUNG (in Cantonese): It is stillbirth when the person does not know it. If the baby has already been born, it will be murder. Stillbirth is just related to abortion ……

CHAIRMAN (in Cantonese): Your point is made loud and clear.

MR LEUNG KWOK-HUNG (in Cantonese): …… there will not be any problem if it is lawful abortion.

CHAIRMAN (in Cantonese): I hope Honourable Members can listen carefully to the arguments of Members who have just delivered their speeches before making any response in order to avoid making pointless comments. Does any other Member wish to speak?

MR WONG YUK-MAN (in Cantonese): Chairman, I find that you can also be a stand-up comedian.

I wish to discuss clause 45. This provision has a few lines only. It originally does not worth any discussion. However, I find it quite interesting and so I have taken it out for discussion, and this will only take a few minutes. This is modelled on section 305(2) of the original CO and section 1092 of the Companies Act 2006 of the United Kingdom. Every time when I discuss a clause, I will point out the section of the original CO on which it is modelled and will print out the provision for reference. However, the Chairman may not have such information on hand. Besides, in regard to the Companies Act 2006 of the United Kingdom, all my information here has cross-reference. Why do I need cross-references? Because from such information, I can find that the intentions of amending or rewriting some provisions are very good.

In fact, after reading the Bill from the beginning to the end, we have to point out that the present Bill is definitely better than the existing CO. However, some places are being over-corrected, while some places are confusing. Why would they be rewritten as such? Some content has been deleted without reason after drafting. This clause belongs to the third situation, namely, some content has been deleted after drafting.

Originally, clause 45 is modelled on section 305(2) of the original CO and section 1092 of the Companies Act 2006. Mr Paul TSE is not present in the Chamber at the moment. This morning in a "now" programme, he said that he did not know what we were talking about, though the large group of lawyers in the Bills Committee are already well-versed in the content of the Bill. I have to reiterate that if it is considered that some arguments that have already been discussed in the Bills Committee meetings would not be necessary to be repeated in the Council meeting, then it is actually not necessary to call this Council meeting. This Council meeting has a voting procedure which is lacking in the Bills Committee meeting. Besides, other Members who have not participated in the Bills Committee also attend this Council meeting. Moreover, a Legislative Council meeting is an open meeting with a lot of television viewers, while no one may pay attention to a Bills Committee meeting. Therefore, this is a way of being accountable to the public.

In the Council, Members can fully express and analyse their arguments. No matter such arguments are right or wrong, they will be judged by the public. And it is also possible that the truth will be overshadowed by wrong information. This is the aim of a Council debate. Hence, one cannot say that these arguments have already been discussed in the Bills Committee meetings, that there are a lot of papers and that we have not read those papers …… Besides, frankly speaking, in the present discussion, we have already tried not to quote the arguments already discussed in the Bills Committee meetings. We only mention the developments and the background. Of course, some people will find this boring. Those members who have participated in the Bills Committee already heard of them all — if only they have attended each and every meeting.

This amendment suggests deleting this clause. Returning to this clause, Chairman, since this clause is very short, could you please allow me to read it out. First, look at the title. You may find it funny: "Issue of process for compelling

production of information on Companies Register". Who is the person in charge, or who is the issuer? Then, there are two subclauses: "(1) No process for compelling the production of any information on the Companies Register may issue from the court except with the permission of the court. (2) Any such process must bear on it a statement that it is issued with the permission of the court.". The two subclauses of clause 45 are very simple. Nonetheless, look at subclause (1): "No process for compelling the production of any information on the Companies Register may issue from the court except with the permission of the court.". Chairman, will you not find it strange? Since there should have the permission of the Court, how is "issue from the court" possible? Chairman, your Blue Bill has an English version. Could you please check the meaning in the English version?

First, let us not discuss the question concerning subclause (1). The amendment proposes deleting clause 45. During the Bills Committee stage, Members asked the Administration to review the drafting of clause 45, especially the Chinese version, in order to clarify the policy intent. However, in regard to this simple, reasonable and logical proposal, the Government fails to clarify the policy intent. It only thinks since Members deem that clause 45 is unnecessary, then it will be deleted. Hence, it has proposed this amendment in response to Members' view. The view of Members is that the Government should review the drafting of clause 45, especially the Chinese version. When I read it out, you will know that there are problems. Members asked the Government to review or clarify it. But the Government's response is that since Members do not like this clause and find it not feasible, it shall be deleted. Therefore, this amendment is related to deleting that clause.

First of all, this incident makes me feel puzzled. Second, I find the Government "imprudent" in doing so. People seldom use this word. I am not saying that it is "careless", which does not carry this meaning. The Government is very "imprudent". Why does it have to be so frightened? Members pointed out that the drafting of the Chinese version of this clause is problematic and asked the Government to review or clarify the policy intent. But the Government's response is that since you think that it is not good or unnecessary, that clause would be deleted. That means when formulating or drafting law, it is very often that the Government does not consider the policy intent. However, this goes

against the spirit of lawmaking. Otherwise, why is it necessary to enact a law? That definitely is based on some kind of policy.

In regard to clause 45(1), Members all think that it is redundant. It provides that "No process for compelling the production of any information on the Companies Register may issue from the court except with the permission of the court.". It is tautology. It is the Court that grants permission, and it is also the Court that issues the process. Basically, the Court has absolute power. Then, who is supposed to be regulated by this provision? Is it contradictory and imprudent? Who should be regulated by this provision? Nevertheless, the Government says no, the provision draws reference from section 1092 of the Companies Act 2006 of the United Kingdom. I guess — since I do not have enough time to check section 1092 of the Companies Act 2006 of the United Kingdom, maybe the Chairman can check it on the Internet now — when this provision was formulated by the United Kingdom, the British courts might have already made a distinction between the issuer of process and the person who grants the permission. It is only possible if this is the case, that the process is issued by a certain institution, while the permission is granted by another. However, is it really the case? That is my guess only. From this example, it is not necessarily right to indiscriminately take reference from the United Kingdom.

Nonetheless, I think clause 45(2) can be retained. It provides that "Any such process must bear on it a statement that it is issued with the permission of the court.". Since there are many kinds of process, which can be a process submitted by lawyers or a process issued with permission of the Court, the provision that such process must bear on it a statement helps to clarify the legal status of the process. As such, when the process is shown by the person concerned, it will not cause any misunderstanding.

Moreover, Chairman, in terms of arrangement, when the Government deletes clause 45 while adding clause 45A, will that not be very weird? Besides, clause 45A is related to the definition of this subdivision — the definition of Subdivision 1 of Division 7 of Part 2 — which actually is not related to clause 45. Then why should it be numbered 45A? Clause 45 is already gone. Since clause 45 has to be deleted, the following clauses should be renumbered, so as to avoid giving a first impression of the Bill being a law from which something has been removed. I find clause 45 rather interesting. Although there are only a

few lines and just two subclauses, why should that be arranged as such? Of course, the Secretary will respond only if he has the time. Now, all Members are rushing through their work. I just find this arrangement rather weird. 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): I have already finished discussing clause 45. It is the turn of another Member.

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

MR ALBERT CHAN (in Cantonese): Chairman, just now, I talked about immunity and basically, I have expressed my views. I definitely do not wish to see Hong Kong become a "city of bogus documents" or a "city of bogus companies" in the future on account of a host of problems, including the lack of verification of the truthfulness of information. We have to guard against such appellations.

Chairman, next, I wish to discuss clause 60. Clause 60 is somewhat different. Chairman, clause 60 involves another area, that is, the offence of destroying the register and documents. Basically, the difference between the amendments proposed by the Government and the original proposed provisions is very small. "On conviction on indictment" is added to clause 60(2) to enhance the clarity of the provision.

However, Chairman, the penalty for the offence of destroying information under the provision is very heavy. For example, "(1) …… if the person dishonestly, with a view to gain for the person's own self or another, or with

intent to cause loss to another, destroys, removes, alters, defaces or conceals" the relevant documents and information, he commits an offence. A person who commits an offence under clause 60(1) is liable on conviction on indictment to imprisonment for seven years. This is the provision with the heaviest penalty in the Bill. I agree with this point in principle. I think that in this Bill, the penalties for directors, the rich, the influential, and so on, are too light in other areas and often, only a fine at level 3 or 4 is imposed, so no deterrent effect whatsoever can be achieved, nor do they matter much. This is a heavier penalty.

President, subclause (1) provides that a person commits an offence if the person, with a view to gain(ing) for the person's own self or another, or with intent to cause loss to another, destroys any document and is liable on conviction on indictment to imprisonment for seven years. Next, subclause (3) states, "A person commits an offence if the person wilfully or maliciously destroys, removes, alters, defaces or conceals ……" and it is basically similar to subclause (1), only that it does not say "with a view to gain for the person's own self or another, or with intent to cause loss to another". However, Chairman, the relevant penalty is drastically reduced. The provision states that a person who commits an offence under subclause (3) is liable on conviction on indictment to a fine of $150,000 and to imprisonment for two years.

One penalty is imprisonment for seven years and the other penalty is imprisonment for two years and the difference lies in whether or not gains have been made or losses have been caused. I think this is a most unreasonable distinction. When it comes to making gains or causing losses, of course, offenders break the law in order to make gains or cause losses. Does anyone think that they would break the law just for fun?

Just now, I said that in the part on immunity in clause 58, if a person believes something and destroys a document "in good faith", he does not commit an offence. Chairman, earlier on, I talked about clause 58, saying that the relevant staff members authorized by the Registrar may believe "in good faith" that a document is outdated. It is very easy to do so. The relevant staff members should destroy a certain pile of documents but he mistakenly destroys other documents and this does not constitute an offence because he does so "in good faith". Of course, his intention and actual conduct must be proven by evidence. However, given the existence of clause 58, insofar as clause 60 is

concerned, if there is any need to destroy any document, one can find a staff member to do so, then offer him some kind of reward. This is another problem.

However, I think the distinction made in clause 60 is very unreasonable. First, often, it is not easy to prove whether or not the intention in destroying certain documents is to enable certain people to make gains or cause losses because of course, the people concerned would proffer all sorts of explanations. Therefore, to reduce the penalty under subclause (4) of this provision to such a low level would basically seriously undermine the importance of subclause (1). There can be reasonable differences between penalties, but I think such a great difference is not reasonable.

This is all the more so with regard to subclause 4(b), which says, "…… on summary conviction to a fine at level 5 and to imprisonment for 6 months". The penalties on conviction on indictment and those on summary conviction for the same offence are different. I believe that in the future, there would be more instances of lighter penalties being meted out than heavier penalties.

Chairman, a headcount please.

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 91. Just now, I talked about the differences in the penalties under clause 60. Clause 91 is about "Notifying Registrar of alteration by order of Court". The amendment proposed by the Government is related to two areas. First, to change the notice on effective date from 14 days to 15 days. In fact, this is a very simple amendment. Clause 91(1) points out that "If any provision of a company's articles, or the effect of any provision of a company's articles, is

altered by an order of the Court, the company must, within 14 days" — and the amendment changes it to 15 days — "after the date on which the alteration takes effect, deliver to the Registrar for registration a notice of the alteration in the specified form".

Chairman, in the past, many provisions would specify seven days, 14 days or 21 days, but 15 days is rarely seen. This may have to do with some procedures of the Court. Due to problems relating to various provisions or departments, the number is purposely changed to 15 days. This does not pose any major problem and I also think that this may be somewhat helpful to the people or departments concerned.

Chairman, another amendment is to add a new clause 91A. I think this poses a slight problem, so I hope the department or the Secretary concerned can pay attention to this. Clause 91A is about "Copies of articles to be provided to members" and it states, "A company must, on request of a member of the company, provide …… the member with an up-to-date copy of the company articles within 7 days after it receives the request.". If this provision is violated, a fine at level 3 can be imposed on conviction. I will not comment on the issue of conviction any further, since I have already said too much about this.

Chairman, I mainly wish to talk about the issue of "copy". I believe that in other provisions, there may be some stipulations regarding the definition of "copy". However, in other provisions, sometimes, it is stated specifically that the relevant hard copies or documents include those in electronic form. This is stated explicitly in some provisions, but it is not so in this provision. I also believe that the definition of "copy" should include electronic documents. However, if there is a lack of consistency among provisions, sometimes, this would cause confusion and create doubts. In all the provisions, if it is not stated explicitly that "copy" includes electronic documents, is it actually included or not?

I may not have the time to examine and cite each of them in detail but I have cited the relevant provisions a number of times in my speeches. I remember that some provisions state explicitly that documents can be submitted in electronic form. However, this is not stated in this provision.

President, the importance of including electronic documents in "copy" lies in the fact that firstly, the time frame is very tight as the provision stipulates that the document must be provided within seven days. Moreover, the provision does not state that the relevant members are limited to members in Hong Kong only. Of course, if the members are in Hong Kong, the handling of a lot of documents would be easier. However, I believe that quite a number of members are overseas. If electronic documents are included, the difference between members in Hong Kong and those overseas would not be great. However, if electronic documents are not included, in the event that some members are overseas and the company is required to provide the documents within a specified period of time, the likelihood of violating the seven-day requirement would relatively be greater. I express my concern about this but I believe that judging from the drafting and meaning of other provisions in the entire piece of legislation, it is probably the case that the "copy" in this provision also includes electronic versions.

Thank you, Chairman.

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

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I wish to go back to clause 3 again. Of course, just now, you misunderstood my point. What did I say? Let me clip on my microphone first. Sorry, for there is simply too much information. You misunderstood my point. What I mean is that during the scrutiny by the Bills Committee, some members put forward some proposals, the Government took on board their views and made some changes, and these changes became the present amendments. Therefore, those Members support the present amendments because they have achieved their ends. Therefore, in saying "aborted", I do not mean ……

CHAIRMAN (in Cantonese): Mr LEUNG, I told you just now that the Member concerned had already explained this point when he spoke, so please do not repeat. Concerning the issue raised by you, earlier on, we already discussed it for some time.

MR LEUNG KWOK-HUNG (in Cantonese): I understand what you mean but surely it is not a sin if I could not hear it? I only wish to explain it to you.

I think such a claim is unfair. The Government, in making the concessions now, as you said, is to shoot without any target. Since the Government did not adopt the entire Companies Act 2000 (sic) of the United Kingdom, its claim is that if a responsible person fails to take all reasonable steps to prevent a contravention, he should face prosecution. Members must understand that he would only be prosecuted but he would not be convicted immediately. He can still cite the defence that he has taken all reasonable steps. Even if the proposal put forward by the Government earlier on is passed, these officers can still find ways to cite some grounds in defence. If they are aware of this situation, they will surely draw up some internal rules in the company having regard to these new laws to stipulate this and that, from A to J, and so on. That he has taken all reasonable steps to avoid the occurrence this kind of things can be one of the excuses in defence. If he really has to take responsibility for a company, of course, he cannot just engage in empty talk, so there must be rules, articles and systems. If he has prescribed rules, articles and systems, he has already taken the first step towards a reasonable defence.

Second, someone makes a mistake only if he has prescribed rules, articles and systems but does not follow them. That is to say, he preaches one thing but practices another. Although he has laid down rules and articles, he does not follow them. Third, some people may argue that these people have lots of business to attend to and they have to manage a number of companies, so it is not possible for them to oversee all of the companies, so what can they do? If they cannot oversee all the companies, another counter-argument is that he can authorize someone to do so, just like the division of labour among the three of us, with "Yuk-man" in charge of A to D, "Hulk" in charge of E to G, while "Long Hair", who is the laziest, is in charge of H, I and J. After the division of labour, officers can monitor if staff members has complied with the rules, articles and systems. So long as he discharges his initial duty by prescribing the corresponding rules, articles and systems, it can be ensured that the law would not be violated.

Second, has he made appropriate authorization and third, after making the authorization, does he monitor those staff members? These three major tricks

are like a trio. In the event that he is charged, he can tell all the truth and the best witness is an honest witness. He can say candidly that since the Government passed a new definition of "responsible person" on a certain day, if his company or the people concerned, that is, people who are the "officer or shadow director of the company or non-Hong Kong company" that the provision refers to, wish to comply with the law, and so long as they are sincere, through the steps mentioned by me just now, they can already ensure that they would not be jailed wrongfully. The law is not designed to incriminate people but to let citizens, legal entities or organizations know what to follow. If a requirement is added to the law, someone knows what to comply with and he is capable of doing so but does not and falls foul of the law, on what ground can he complain that the law is too harsh? If someone does that, I believe that in this world, it would be difficult to enact legislation to regulate matters that have a bearing on public interest or powers that can cause loss of public wealth.

On this issue, up to now, I still do not understand why the Government only "copies half but not the other half". My conjecture is: The Government thinks that if it continues in this way, it may cause a reaction that may lead to a failure of the cause passing through this Council. In that case, all efforts would be in vain. The Government did not state its views but its claim was very laughable. According to the Report of the Bills Committee, "The Administration has pointed out that as compared to the CO formulation of 'officer who is in default', the prosecution threshold for the revised formulation of 'responsible person' will still be lower as there is no need to prove 'wilfulness', hence the policy objective of enhancing corporate governance and ensuring better regulation will still be achieved. The Bills Committee agrees with the proposal.". The Government's argument is that without the original amendment, the so-called aim can still be achieved. I do not agree with this. I have spoken for seven minutes by now. Members can think about this: If this number is deleted, is it still necessary to have the trio mentioned by me just now? First, he does not have to hold meetings personally in the company to prescribe rules, articles and systems and tell all people to comply with them — buddy, this includes shadow directors and "Shadow Dancers" because even shadow directors have such a responsibility — and he does not have to do so; second, without any rules, articles or systems, there is no need to devolve the power to someone else who will carry out the monitoring on his behalf or report to him immediately to ensure that the staff members of the company would follow these rules, articles and systems and third, he does not have to oversee those people. So, do you

think there is any difference? Of course, there is. What is the legislative intent of the Government? Is it to breeze into the Legislative Council, strike a gracious pose and say that amendments have been made? Frankly speaking, even if I do not rebut you, surely you would still feel embarrassed, wouldn't you? Where will all this end? What has been described by you people as unrivalled in the world has now fallen silent forever, so this cannot be justified.

What I find the most laughable is that the Government specifies in other pieces of legislation that if it can be proved that reasonable steps have been taken to prevent the occurrence of incidents, this can be a defence. This concept of exculpation can be found in those laws instead. They have this concept of exculpation. Chairman, having said all this, I think the Government apparently does not understand that the people whom they mainly target at include shadow directors and that it is necessary to prevent them from being involved in illegal conduct or serious offences, to "authorize or permit, or participate in" them, is it not? If the Government ties its own hands now, how can it deal with these people? Not to mention dealing with them, how can the Government make the whole industry or all companies comply with this? If it is said that a small company cannot do so, for example, that a company with a couple of employees cannot do this, this is probably a kind of excuse. If they cannot even deal with matters relating to the company itself, they can only say that since they cannot even deal with such things, they just should not do any business. Do they not know how to seek legal advice? Obviously, this legislation of ours is not intended to target at such companies because how possibly can small companies have shadow directors? The shadow director may be the wife and this may be a case of a henpecked husband. There is no definition of this kind of shadow directors in law. Therefore, obviously, if the Government wants to target at "predators" in doing this kind of things, why does it have to tie its own hands?

In fact, if we look at other clauses or the clauses discussed by me just now, like the Government's amendment to add clause 38(4), which states, "If a person is charged with an offence under subsection (2) for failure to comply with a requirement, it is a defence to establish that the person took all reasonable steps to secure compliance with the requirement", there is actually such a concept in clause 38. There is also the very important concept of "responsible person" in clause 3 but in trying to catch ghosts like the Ghost Buster, ZHONG Kui, in Chinese folklore, we do not even know where the ghosts are. However, in other

chapters, the Government has introduced such a concept, that is, someone commits an offence and it is established that he has taken all reasonable steps to ensure that the requirements are complied with, so do you not think the Government wants to catch the small fry but let the big fish go? This concept cannot be found in such an important criterion as "responsible person", so what can this piece of legislation still target at?

Therefore, Chairman, please do not blame us for being inconsistent in our speeches here. I have not yet come to clause 38. Chairman, if the clauses on "responsible person" in which the Government seeks to tie its own hands are passed here today, I would really find this laughable. This is all I wish to say, but I also hope that the Chairman can exercise his power under Rule 17(3) of the Rules of Procedure to make sure that half of the Members are present in the Chamber.

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 WONG YUK-MAN (in Cantonese): Chairman, I would like to say a few words about Company Formation and Related Matters in Part 3.

In respect of clause 62 to which an amendment has been proposed by the Government, which deals with company formation, the related requirements were originally scattered in different provisions of the Companies Ordinance (CO) and arranged in a very confusing manner. In rewriting the CO, the Government has attempted to sort out similar circumstances, that is, grouping other provisions originally scattered in the CO under one or two clauses for categorization, rearrangement and consolidation. Many such cases can be found in the rewrite of the CO, and clause 62 is a case in point.

Company formation, which is now dealt with in clause 62, was originally scattered in different provisions of the CO. Though I have such information on hand, I will not discuss it in detail here for the sake of saving time. I will only read out the relevant headings in Cap. 32 to facilitate Members' understanding. They include sections 4, 12, 14A, 304 (Fees), and 360. Furthermore, the provisions in Schedule 8, Cap. 32, have been rewritten for inclusion in clause 62.

Section 4 in the original CO is quite lengthy. I would like to briefly elaborate on it before comparing it with the new provision, so as to give Members a clearer idea. The several clauses I mentioned just now were actually quite lengthy in the original CO. Under section 4, members of a company are required to sign their names on a memorandum of association, whereas an incorporation should be formed for a lawful purpose. This is the first point. Secondly, under section 12(1), articles shall be signed by each founder member of the company. Under section 14A(1), a person who wishes to form an incorporated company shall apply to the Registrar in the specified form, that is, the form specified in section 14A(2), which shall contain such particulars as the name of the company intended to be incorporated and the intended address of the company's registered office in Hong Kong. Under section 304, there shall be paid to the Registrar in respect of the several matters mentioned in the table set out in the Eighth Schedule the several fees therein specified. This is all about fees payable.

Hence, the requirements on company formation are not only scattered in different provisions in the CO, they are also found in sections 4, 12, 14 and Schedule to section 304. Is this arrangement not very confusing? Now, the Bill seeks to place all the relevant requirements in the original CO under clause 62, which deals with company formation, as I mentioned just now. Clause 62(1) provides, (1) Any one or more persons may form a company by — (a) signing the articles of the company intended to be formed; (b) delivering to the Registrar for registration — (i) an incorporation form in the specified form; and …… Nevertheless, the CSA seeks to delete "; and" and substituting a coma.

While clause 62(1)(b)(ii) deals with a copy of the articles, paragraph (c) deals with the payment to the Registrar a fee prescribed by regulations made under section 897. While a company may only be formed for a lawful purpose

under clause 62(2), a fee prescribed by regulations made under section 897 shall be paid to the Registrar under clause 62(1)(c). And, under section 897, the power to make regulations is vested with the Financial Secretary. If the relevant regulations are subsidiary legislation, they have to be passed by the Legislative Council.

Hence, Members can see that, compared to the provisions in the original CO dealing with company formation and fees, the rewritten provision is more specific, and we will have a clearer idea when we inspect the CO in future. When people refer to the law for the purpose of forming a company now, they have to flip through the pages of the CO according to its original arrangement. But the Bill will make things simpler, for all the relevant requirements are grouped under clause 62.

Of course, clause 62 is simple and clear. We will have a clear idea of the requirements for forming an incorporated company without the need to ― Mr CHAN Kin-por is not here ― hire an accountant or lawyer before we can set up a limited company. We do not have to let these people earn the money. I recall an incident that occurred several years ago in which a Member had written to Secretary Prof K C CHAN requesting that only accountants should be allowed to file tax returns. As a result, this Member was scolded fiercely by the public. It was said that he lost in the election because of this incident. He happened to be an accountant, too.

As clause 62 ― which deals with company formation and fees ― is clearly written, it will obviate the need for us to seek assistance from accountants and lawyers on every occasion. Hence, I must emphasize that the Ordinance must seek to provide convenience for the people. Although some matters must be dealt with by professionals, we can save money by taking care of those which we are able to deal with by ourselves. Of course, major organizations and large enterprises and listed companies have their own professional teams. They need not shed a tear for spending the money ― for they are not required to pay out of their own pockets. Small and medium enterprises, however, must foot the Bill themselves.

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, clause 62, which I mentioned just now, is rather simple. As clause 63, which deals with "content of incorporation form", does not involve any amendment, I will not discuss it here.

But the point is, regarding companies formed in different manners, clause 63 provides that an incorporation form must contain the statements specified in the relevant provisions of Schedule 2. This may be tremendously helpful to people intending to form companies.

Let me come back to clause 62(1)(c), under which relevant persons are required to "pay the Registrar a fee prescribed by regulations made under section 897". However, the Government has proposed amendments to delete paragraph (c) completely. Furthermore, the Government has also proposed an amendment to delete clause 897(3) at the same time. So, does it imply that the relevant persons are not required to pay any fees? In addition to the deletion of the part concerning fees in clause 62(1)(c), which also prescribe fees by regulations made under section 897, an amendment has also been proposed to delete clause 897(3) at the same time.

Clause 897(3) reads, "Without limiting subsection (1), the Financial Secretary may prescribe fees for the purposes of sections 62(1)(c), 126(1)(b), 137(3) and 166(3).". With the deletion of this subclause, does it mean that the relevant persons are not required to pay any fees?

Clause 897(1) reads, "The Financial Secretary may make regulations for any matter required or permitted to be prescribed under this Ordinance.". If the Government requires people who intend to form a company to pay fees, there is still a need to prescribe fees. However, the present circumstances are far from

clear. Is it because the Bill was enacted earlier than the regulations made by the Financial Secretary? If so, the Bill is premature. But now, it is provided that no fees shall be payable. So, should the Government withdraw this provision first or enhance it before tabling it to the Legislative Council?

I really have doubts about this. What about the priorities? The two provisions are now deleted. Hence, I really do not quite understand all this. We simply cannot find the answer in reading the Bill. Perhaps the Secretary can answer my question or respond to my query over this provision in his response later on — since these amendments are proposed by the Secretary.

I also hope that other Members who are members of the Bills Committee, if they …… as they say that many matters have been discussed in the Bills Committee, there is no need to bring them up again for discussion now. I hope they can take the trouble to enlighten me. Was this part discussed in the Bills Committee? Perhaps we can consult Mr Ronny TONG, though he is not here. Can members of the Bills Committee, including Mr Paul CHAN, who is Chairman of the Bills Committee, tell us whether this part was discussed? I wonder what it means if the part concerning fees is deleted. I hope Members can explain to me. Perhaps Paul can say a few words about it. Not much time will be wasted. Anyway, it seems that the die is cast insofar as this meeting is concerned.

Nevertheless, we will never trust some people. I do not know whether additional meetings will be held on Saturday and Sunday, and whether a meeting will be held around the clock on Monday. Chairman, your party is celebrating its birthday today. Of course, I do not want to be a spoilsport. All of you are in uniforms and sporting a blue tie. Leave and come back early!

Chairman, it does not matter even if the meeting is aborted today because tomorrow is Wednesday. It will be very serious if the meeting is aborted tomorrow. Although LEUNG Chun-ying has issued an ABN AMRO bank cheque and said that the special "fruit grant" would be ready within two months, the Secretary is now saying that it might not be ready within this year. We do not want to see this ……

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

MR WONG YUK-MAN (in Cantonese): Chairman, I know I have strayed away from the question. Anyway, wishing your party prosperity and becoming the ruling party very soon ……

CHAIRMAN (in Cantonese): Mr WONG, please speak on the relevant provisions.

MR WONG YUK-MAN (in Cantonese): …… I will then be your opponent.

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

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, Members were told to leave and come back early, but I do not wish to talk about such matters again.

I would like to discuss clauses 26 and 37, as the matters dealt with under these clauses are related. Clause 26 is related to the Companies Register. Of course, the Register is to blame for everything. Without this legacy, there is no need to discuss whether the Registrar of Companies (the Registrar) has the power to refuse registration and verify the truth of information, as well as matters concerning the Registrar's refusal if an investigation cannot be conducted and imposition of penalties if the relevant persons do not take notice after being refused registration, and so on.

It is very strange that the entire provision on the requirement for the Registrar to keep the records of companies under the Companies Register has been completely deleted and substituted by a new version. Why should the entire provision be deleted and substituted by a revised version? Of course, many details are involved. If Members care to examine these amendments — excuse me, let me find them …… I will put this issue aside for the time being, because I have no idea where I can find the information.

Let me talk about clauses 36 and 37 before coming back to clause 26 later. Clause 36 merely seeks to amend one word. Clause 36(2) reads, "The Registrar may send a notice of the refusal, and the reasons for the refusal, to ……". Of course, amending "may" as "must" is appropriate; otherwise, the Registrar may or may not send a notice of the refusal. However, the other party might have to bear the consequences if he is not notified or informed.

Hence, it is appropriate for the Bill to require the Registrar to send a notice of the refusal and the reasons for the refusal. It is inappropriate to use the word "may", as this will give the Registrar excessive discretion in choosing whether or not to do so. As a saying goes, "You get 36 dollars no matter whether you do the work or not". If the Registrar is obliged to do so, the requirement in subclauses (3) and (4) can be guaranteed. This is because a person who has not received the notice from the Registrar might fail to comply with the requirement because he does not know how to go about doing it. Subclause (3) reads, "If a notice is sent to a person under subsection (2) with respect to a document, the period specified in subsection (4) is to be disregarded for the purpose of calculating the daily penalty under an Ordinance that makes it an offence for failing to comply with a requirement to deliver the document and that imposes a penalty for each day during which the offence continues.". This provision can give people peace of mind.

It can be said that the Government has accepted good advice in striking a balance between responsibility and right, or obligation, by introducing this amendment. Under clause 36(1), the Registrar has the power to refuse to register a document under section 33(2) if the document is delivered to him for registration under an Ordinance. Hence, it is inappropriate if it is not mandatory for the Registrar to give notice in exercising such power, since the word "may" was previously used.

Being a civil servant, the Registrar will not be punished for failing to do so, unless civil proceedings are instituted against him. He will only be demoted at the most. However, such cases are rarely found, as the cost of a legal battle caused by the Registrar is borne entirely by public money. It is not worthwhile to compete with the Government in "burning money". Hence, the Registrar will indeed suffer no loss except for facing public criticism or being held accountable by this Council, which means that he will have to pay the price of no advancement in his career. Hence, the regulation of the Registrar with the word

"must" can actually give certain rights back to the relevant person, for their rights will be guaranteed protection, even if the Registrar has failed to notify him. In fact, even if the Registrar has made a mistake in failing to send a notice, there is nothing we can do, but still the relevant persons will not be punished as a result. Hence, this is a very good amendment.

With respect to clause 37, the Government proposes to delete subclause (1). What is the difference between the text provided by the Government and the one used to replace it? The original text reads, "If it appears to the Registrar that the information contained in a document registered by the Registrar is inconsistent with other information on the Companies Register, the Registrar may give notice to the company to which the document relates.". Now, "a document registered by the Registrar" is amended as "a document registered by the Registrar in respect of a company". The new text is certainly more precise and makes the meaning of the expression very clear. Hence, it is praiseworthy.

Nevertheless, some new requirements are also added to clause 37. They are — let me look at it carefully— subclause (4) is added to clause 37 to read, "If a person is charged with an offence under subsection (3) for failure to comply with a requirement, it is a defence to establish that the person took all reasonable steps to secure compliance with the requirement.". Subclauses (2) and (3) are also deleted from clause 38 to achieve the same purpose. I will not repeat the requirement that "if a person is charged ……" here to avoid being criticized for causing delay.

Chairman, this is a major point I raised in discussing subclause (3) just now. We are now dealing with some very minute issues. What is the offence? I will read out the original text of clause 38(3) because the difference between the original text and the revised one is not substantial. It reads, "If any other person …… ("any other person" is amended as "a person" in the revised text, though this is not a major point) fails to comply with a requirement under subsection (1), the person commits an offence and 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.". Such an amendment applies to the revised subclauses (2) and (3), too.

The third "responsible person", as I mentioned just now, is the most fundamental definition. The only difference lies between compliance and non-compliance. We are now dealing with a most minute matter. If the Registrar refuses to register a document but receives no reply to his explanation or inquiry or his request for registration is disregarded, the relevant person may be fined. Despite the minuteness of this issue, this concept is taken so seriously that there is an express provision that "it is a defence to establish that the person took all reasonable steps to secure compliance with the requirement." But why does the Government not do so in subclause (3)? Why would the Government want to kill them instantly, even though it knows very well that subclause (3) is a "catch-all" provision? Why does it have to trim the toes to fit the shoe? This is absolutely illogical, so to speak. Regarding such a minute matter, it has provided …… what is it called? Provisions in law are really troublesome …… it reads, "…… it is a defence to establish that the person took all reasonable steps to secure compliance with the requirement.".

Chairman, I certainly understand that the Administration embarked on amending the CO a long time ago, and a lot of consultation has been conducted. The simplest example was that a document was submitted to this Council in May 2010, though this issue was not raised in the document. May I ask the Government why this approach is not adopted in subclause (3)? The Administration can actually specify in the subclause that the issue can be resolved should a person do so and so forth. Should that be the case, directors and senior staff behind the scene can be handled with severity under subclause (3), as we would like. Chairman, would you please think this over. You should be able to figure out the answer. Most of the people who are incapable of doing so do not have the financial means to engage those people …… what is the constituency to which Mr Paul CHAN belong? Is it the accountancy constituency? Sorry, I am just being forgetful. The fact that I forget the name of a great man does not mean he does not deserve respect, right?

Chairman, I am talking about legal sense. If a person fails to comply with any requirements with 14 days, he will be in great trouble should he fail to respond to the Registrar's demand for explanation. However, not only do they lack the financial means to engage professionals to render assistance, they even have problems in reading the relevant documents. Honestly, Chairman, if you are not compelled to stay here and listen to our speeches, will you be interested in reading all these documents? I bet you will read your own favourite books.

Hence, we must not catch the thieves but release the robbers. When the thieves are caught, we even have to pretend to have mercy, saying we have mercy on them because they would not steal unless they had nothing to eat. Hence, they are now given exemption ― "…… it is a defence to establish that the person took all reasonable steps to secure compliance with the requirement". I really have to thank him for having some conscience.

In my opinion, the cart is put before the horse in this legislative exercise. While ordinary persons are given exemption, international predators …… honestly, the rich can engage lawyers to gather every ground which can be used as defence. Moreover, there is a presumption of innocence in criminal cases. Why should we worry about their barristers not knowing what to do or their accountants not advising them as Mr Paul CHAN did?

Hence, Chairman, please forgive me for my foolishness. I think the Government does not have mercy, logic and shame in enacting this piece of legislation. Why can a law not deal with its original target but, on the contrary, do harm to SMEs? Thank you, Chairman. This is what I wish to say.

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

(Mr LEUNG Kwok-hung stood up)

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I hope you can do a headcount in accordance with Rule 17(3) of 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): Does any other Member wish to speak?

(Mr Albert CHAN stood up to indicate his wish to speak)

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

MR ALBERT CHAN (in Cantonese): Chairman, next, I wish to discuss clause 92 of the Bill. Clause 92 is very interesting. The original proposal in this new clause is made according to the legal provisions in the United Kingdom. It mainly provides for a registration mechanism for any provision of a company's articles which is altered by any other ordinance. According to the relevant legal provisions in the United Kingdom, a company is required to notify the Registrar of Companies (the Registrar) of the alteration and provide a copy of the articles which have been altered by another ordinance to the Registrar.

The title of clause 92 is "Notifying Registrar of alteration by Ordinance", under which there are subclauses (1), (2) and (3). Subclause (3) is mainly a penalty provision, which provides for how the contravention of subclause (1) or (2) will be handled. It means that the relevant arrangements and requirements carry a certain degree of importance, and there is also a relevant time requirement that notification and registration should be made within 14 days. But, the Government has now proposed to delete clause 92 in its entirety.

Chairman, I do not quite understand the underlying purpose. Of course, after looking up the papers, I noted that during the deliberations of the Bills Committee, the Legal Adviser of the Legislative Council and members of the Bills Committee considered that this clause could be deleted, which is shown by the relevant records. My concern is that since there is this arrangement under the British law, there must be a need for it. Besides, views have been sought on this clause for many times and the scope of consultation has been very extensive. The clause is also in line with the legal principles.

Moreover, it is also reasonable in logic, because if a company's articles are altered by any other provision in another ordinance, it stands to reason that the Registrar should be notified and the relevant alteration registered. I understand that the explanation given now is that Hong Kong does not seem to have other

ordinances with such stipulations on alteration or amendment. But I am worried that there may be a chance for omission to arise, and if there is really an omission and if no relevant stipulation is made in this respect, there may be loopholes and problems in future. In the event of a company's articles having been altered by an ordinance or other alterations, omission may arise in the absence of any provision requiring registration.

I hope that supplementary measures can be taken administratively and the companies can notice the problem and provide supplementary information and make registration on their own initiative. As for whether the deletion of this clause will lead to a legal vacuum in future which would subsequently affect the operation and the relevant rights in law, that remain to be seen.

Clause 92 aside, I also wish to discuss clause 95. With regard to clause 95, there are similar provisions and requirements in other aspects. Clause 95 is about "Company must not be registered by certain names". This also involves the powers of the Registrar, because this clause basically provides that the Registrar has the power to specify that certain companies cannot be registered by certain names under certain circumstances.

Of course, the clause provides for certain restrictions but these restrictions are very broad, and it can be said that the Registrar has extremely absolute powers. For example, the clause provides that a company must not be registered by certain names and the details are: "(1) A company must not be registered by — (a) a name that is the same as a name appearing in the Index of Company Names", which is understandable because it involves a situation when the names are the same. For instance, if the People Power wants to be set up as a company and registered as a company, but if the same name is already registered, that will certainly be inappropriate. Besides, there is "(b) a name that is the same as a name of a body corporate incorporated or established under an Ordinance", which is also understandable. So, both paragraphs (a) and (b) have made appropriate provisions.

Paragraph (c) provides that "a name the use of which by the company would, in the Registrar's opinion, constitute a criminal offence". For example, the use of certain names of triad societies should be absolutely prohibited. Moreover, there is "(d) a name that, in the Registrar's opinion, is offensive or otherwise contrary to the public interest". Chairman, this stipulation is open to

question. The powers are all in the hands of the Registrar. What are the names that can be considered offensive? On a previous occasion when other clauses were discussed, I also cited similar examples because other clauses also give the Registrar similar powers, like this clause which gives the same powers to the Registrar to make a prohibition for the said reasons. However, on the question of a name being "offensive" or "contrary to the public interest", there have been many legal proceedings involving public interest before. Particularly in cases of land resumption, the Government's interpretation is often suspected to be skewed towards its position.

In past cases of land disputes and land resumption, even though they seemed to be extremely unreasonable cases, the Government could deal with them on the ground of extremely minor public interest. For example, even if the entire land resumption project involves just a small section of road, the authorities can still proceed to land resumption on the ground of public interest. Similarly, based on the same interpretation, the Government can also use this reason as a pretext in exercising public powers or powers of governance. For instance, the use of pepper spray in cylinders as large as fire extinguishers by the police can be presented as a way to protect the safety of protesters and the public and hence in public interest. So, from the series of administrative actions taken by the Government recently which are violent and which amount to abuse of powers and violation of human rights, we can see that the authorities have often conducted evil and scandalous acts under the pretext of public interest or protection of the public.

Therefore, if the Registrar is allowed to prohibit the use of certain names on the ground of public interest, Hong Kong people will be deprived of many political rights. Under this arrangement, if organizations would like to be registered as companies by certain names, I believe with the tightening of the "political straitjacket", the situation is set to worsen continuously in future, with many scandalous acts taking place frequently.

Recently, some friends have made applications for setting up some organizations and unlike the past arrangement whereby the applicant could obtain the permission of the Societies Office and receive a notification in some two months' time under another ordinance, their applications have been delayed for a long time. Similarly, when the Registrar handles registration matters under the CO, if he finds that a name carries political, religious and human rights

implications or makes a mockery of the Government, and for instance, if, following the example of the "coalition for toppling TUNG Chee-hwa" which was formed almost a decade ago, an application for setting up a "coalition for toppling LEUNG Chun-ying" is submitted, I wonder if this application can still be approved. After all, political factors will only cause the scope of freedoms to become increasingly narrow. Chairman, do a headcount please.

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 clause 95 of the Bill. I wonder if, during the deliberations of the Bill, those Members who used to attach great importance to human rights and the rights of the people had noticed that this clause might have an impact on human rights. The Registrar of Companies (the Registrar) has the power to refuse the registration of a company by a certain name that is "offensive or otherwise contrary to the public interest" and may even direct a company to change a name, and this power can be considered a substantial administrative power. So, Chairman, the People Power cannot support clause 95 and we will express opposition to it.

However, if this clause is taken out for it to be put to vote separately, it would add to the workload of the Secretariat substantially. So, I choose to put on record my views on this clause, rather than requesting that the clause be put to vote separately, because judging from our strength, it is quite unlikely for us to be able to vote it down. Having said that, we still have to state clearly that we do not accept this clause.

Chairman, I also wish to point out that this clause is actually modelled on section 20 of the original Ordinance. Section 20 of the original Ordinance

provides that a company cannot use a name which is the same as the name of another company and which may constitute a criminal offence. It does not include the part that I have just mentioned. It means that the stipulation concerning a name being "offensive or otherwise contrary to the public interest" is a new restriction which is not found in the original Ordinance. Therefore, I think this new stipulation is proof that the Government has kept on increasing its power of control, strengthening its control on politics through administrative means under the high-sounding pretext of business measures.

Chairman, another point is that the old provisions or the existing CO contains a part concerning the powers of the Chief Executive. For example, the original powers of the Chief Executive as provided for in sections 20(1) and 20(2) of the CO are given to the Registrar under the new clauses. I support this arrangement, because as I pointed out during the discussions on many relevant clauses, many new clauses proposed in the rewrite of the CO have specified that the relevant powers rest with the Financial Secretary, but I think these powers should be given to the Secretary for Financial Services and the Treasury instead. In fact, many of the powers basically do not have to be exercised by officials at such senior levels.

Although the original provisions stipulate that this should be the responsibility of the Chief Executive, I believe it is only meant to follow the practice of making this the responsibility of the Governor as in the times of the Hong Kong-British colonial government, it being a result of the replacement of the Governor by the Chief Executive as a matter of routine under the adaptation of law arrangement after the reunification in 1997. Therefore, given that many administrative powers have been devolved to the Secretary for Financial Services and the Treasury under the new clauses, I express my support for these changes. Meanwhile, let me take this opportunity to make an appeal: If there should be a chance to introduce amendments to other provisions in future, those work which is originally stipulated as the responsibilities of the Financial Secretary should be devolved to the Secretary for Financial Services and the Treasury instead.

With regard to this clause, Chairman, this is all I wish to say for the time being. Thank you, Chairman.

CHAIRMAN (in Cantonese): I now suspend the meeting until 7.30 pm.

6.05 pm

Meeting suspended.

7.30 pm

Committee then resumed.

MR WONG YUK-MAN (in Putonghua): Good day, Chairman.

(Someone at the meeting repeated "Good day, Chairman" laughingly in Putonghua)

(Mr Albert CHAN stood up)

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

MR ALBERT CHAN (in Cantonese): "Good day, comrades *(in Putonghua)*". Chairman, I know that today is the anniversary of the DAB and all people are happy. However, even so, they still have to attend the meeting. In fact, the Chairman should have adjourned the meeting, so that they can continue to have a good time. It is all the same if the meeting is convened tomorrow ……

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

MR ALBERT CHAN (in Cantonese): In fact, to resume the meeting tomorrow would be just as happy, wouldn't it?

CHAIRMAN (in Cantonese): What is the matter that you wish to raise? Please raise it.

MR WONG YUK-MAN (in Cantonese): Rule 17(3) of the Rules of Procedure.

MR ALBERT CHAN (in Cantonese): Chairman, I know you have just come back from a thoroughly enjoyable time, so I ask you to summon those Members who already have had a thoroughly enjoyable time back to the meeting.

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 LEUNG Kwok-hung stood up indicating his wish to speak)

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

MR LEUNG KWOK-HUNG (in Cantonese): Thank you, Chairman. Today marks the 20th anniversary of your party. Let me say this to you as my compliments: "如此星晨非昨夜" (the stars of tonight are no longer like those of the old days), and you must know the next line of this poem ……

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

MR LEUNG KWOK-HUNG (in Cantonese): What did you say? I could not hear you.

CHAIRMAN (in Cantonese): Please speak on the contents of the clauses of the Bill.

MR LEUNG KWOK-HUNG (in Cantonese): It is because you are the President that I respect you, and I see you so often, buddy. "The stars of tonight are no longer like those of the old days". Right, I will speak now.

I am going to talk about clause 26. This is, of course, related to my speech in the last session. As I could not find the relevant information then, I had to talk about the latter half of it first and now, I will talk about the first half of it. Clause 26 is about "Registrar must keep records of companies". The Government has proposed significant changes to clause 26. In its amendment the Government proposes to delete the clause and substitute it by 26 …… and then it also proposes a clause 26A. It means that the entire clause is deleted and requires a rewrite. Why is it so?

The original Division 3 "Companies Register" is too cumbersome and complicated in describing the past situation and now, the provisions are made more clearly, and this may be the so-called modernized drafting, whereas the old way of drafting is archaic indeed, as one does not know what it is talking about even after reading it through. What are the details of the clause? The original clause is deleted in its entirety, and clause 26(1) in the amendment provides that "The Registrar must keep records of ……". What records must be kept? Clause 26(1)(a) in the amendment stipulates this: "the information contained in every document that is delivered to the Registrar for registration and that the Registrar decides to register under this Part", meaning information in all such documents. Subclause (1)(b) stipulates this: "the information contained in every certificate that is issued by the Registrar under this Ordinance". So, there are two kinds of information. One is the information contained in every document that is delivered to the Registrar, that is, information in all such documents, whereas "the information contained in every certificate that is issued by the Registrar under this Ordinance" is different. It means that after the Registrar has read it and considered under the Ordinance the requirements in clause 36 that I

mentioned in my previous speech, such as giving consideration to why the information is not relevant and whether supplementary information can be provided, and after all these procedures are completed, approval will then be granted to registration and retention of records. Subclause (1)(c) stipulates this: "the information contained …… under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ……". All these are exhaustive. This way of drafting is a bit different from that of the original provisions, for it states that the Registrar has the duty to require the provision of such detailed information. The original provisions stipulate that records must be kept on information that should be retained, but what information should require record keeping? We do not know. Perhaps records can be kept on information in this document but not information in that document. But now, the details are all set out very clearly.

Then, many other amendments have also been made. Clause 26(4) in the amendment provides that "After the specified address is recorded under subsection (3) as the correspondence address of a director, reserve director or company secretary of a company, the Registrar must update the entry of such correspondence address with — (a) the latest address of the company's registered office contained in a notice of change of address of the company's registered office" and then "(b) the latest address of the company's principal place of business in Hong Kong contained in a return in respect of the change of address of the company's principal place of business in Hong Kong …… that is registered by the Registrar under this Part". It means that the latest information must be provided to the Registrar no matter what changes have been made. It was different in the past, as information was kept without having regard to any subsequent changes made to it.

I think this approach is certainly logical. That is, when the Registrar has put in so much effort to complete the requirements in clauses 26(1)(a), 26(1)(b) and 26(1)(c) (paragraph (c) is not too difficult) that I have just read out, requiring that records must be kept on the information contained in every document, but if he is not informed of any changes made to the document, what is the point then? I think these changes are sensible, and Members need only take a look at the original clause to understand that it is cumbersome and complicated before amendment.

Clause 26(5) in the amendment provides that "…… if, in relation to the director, reserve director or company secretary of a company — a notice or return is delivered under …… in respect of a change of the person's correspondence address ……". It involves only one point. For instance, under clause 26(6) in the amendment, paragraph (a) provides that "immediately before the commencement date of this section, the address was shown on the register of companies under the predecessor Ordinance as the address of the company's registered office or principal place of business in Hong Kong", and paragraph (b) provides that "the address is contained, as the address of the company's registered office, in an incorporation form ……". These are actually meant to put everything together for registration and record-keeping by the Registrar. No omission will possibly arise after all these are done properly, no matter how the directors have tried to fiddle with the information.

Clause 26A in the amendment is "Provisions supplementary to section 26" which imposes some restrictions on the Registrar as the other side has fulfilled their responsibility. Subclause (1) provides that "The records kept under section 26 must be such that information relating to a company is associated with the company in a manner determined by the Registrar, so as to enable all the information relating to the company to be retrieved.".

This is a very important point, because the Registrar has the relevant powers. I said earlier that clause 26 is deleted, with substantial amendments made. What is the addition? In fact, the Registrar has the relevant powers because the records have to be kept in a manner determined by the Registrar such that the information is associated with the company. This is a very enormous power. In fact, the Registrar has a purpose or statutory duty in establishing this link and that is, "to enable all the information relating to the company to be retrieved". Of course, the word "all" does not really mean all, but the information involved in section 26. It is not the case that other information for which declaration is not required will be handled by him in an exhaustive manner. No, this is surely not the case.

Clause 26A(2) in the amendment provides that "A record of information for the purposes of section 26(1) must be kept in such form as to enable any person to inspect the information contained in the record and to make a copy of the information", and this approach is good. In other words, it does not only allow people to retrieve the information, but there are ways to allow them to

inspect the full texts of the information, and this can protect the rights of the person inspecting the information. An example is the secondary school in which I had studied. In the library of the school, many ancient works by Governor Cecil CLEMENTI were kept, but no photocopying was allowed for such information kept in the library. We could only read it, and if we wanted to keep records of it after reading it, we must copy it manually. A History teacher of mine would ask two rows of students to copy a famous work for him in each lesson, and they would need to do such a thing back then.

Now clause 26(1) in the amendment stipulates that apart from meeting the requirements in paragraphs (a), (b) and (c), the Registrar is also required to keep all the records relating to the company under clause 26A(1), and he should keep them "in such form as to enable any person to inspect the information contained in the record and to make a copy of the information", which means that people are allowed to make a copy of the information. If this is a statutory duty of the Registrar, this is also our right.

Clause 26A(3) in the amendment provides for the way how these two things can be done properly. It provides that "a record of information may be kept in any form that the Registrar thinks fit". I think this is not a good way of drafting because it is too hollow. Frankly speaking, if we do some counting, we will see that there are no more than 10 methods for keeping information. Now, it provides that information "may be kept in any form that the Registrar thinks fit", and what if there is an omission? For instance, he may not provide the information for public inspection on the Internet and may consider this unnecessary. If we can specify in the legal provisions the methods that the Registrar is required to use, just as what is done in other ordinances, perhaps the information can be provided on the Internet even if it is not a must to do so, and these methods of record-keeping will actually have a bearing on other people's access to the information.

Clause 26A(4) in the amendment is somewhat in conflict with subclause (3). It provides that "If the Registrar keeps a record of information in a form that differs from the form in which the document containing the information was delivered to, or generated by, the Registrar, the record is presumed, unless the contrary is proved (the Chinese rendition "相反證明成立" can be simplified as "反證成立"), to represent the information contained in the document as delivered or generated.". This is only a proviso and a safeguard, so

that even if differences are resulted from the transfer of information, the Registrar will, when handling the information, ultimately use the form of information in which it is provided initially. This, I think, is reasonable too, or else the Registrar cannot handle the information and when something goes wrong, he will not know which version to use as the basis. For these reasons, the Registrar should enjoy these powers.

Clause 26A(5) in the amendment provides that "If the Registrar records the information contained in a document for the purposes of section 26(1), the Registrar is to be regarded as having discharged any duty imposed by law on the Registrar to keep, file or register the document". This is correct, and this really represents a full stop. It means that he cannot shun this duty, for this is his statutory duty. I think this may be a new way of drafting, and it is well-structured, enabling us to see in the end that this duty is expressly spelt out. But what is the problem then? With regard to the responsibility of the Registrar, we certainly cannot provide clearly in this clause that he is subject to this level or that level of penalty, but this is very clear. If a judicial review is filed against the Registrar on the basis of this clause, and the Registrar may really lose the lawsuit, but it would be another question as to what penalty he will be subject to after losing the case.

I think clause 26A(5) in the amendment is well-written, for it states that the people can pursue accountability by proper means and an application will be immediately approved once it is submitted, and legal proceedings against the Registrar will stand a chance to win. I think this so-called modernized drafting is commendable, for it enables ordinary people to have more specific and explicit relief under the law.

Thank you, Chairman.

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

MR WONG YUK-MAN (in Cantonese): Chairman, clause 453 of the Companies Bill comes under Part 10 Division 1 Subdivision 3, and the Government has proposed some amendments to it. The clause is mainly about the removal and resignation of directors. This clause has got nine subclauses,

from (1) to (9). I would like to discuss clause 453 and the relevant amendments on two separate occasions.

This is a clause about resolutions to remove directors. In the relevant provision, that is, section 157B of the original CO — what has been introduced now is called the Companies Bill or the Bill for short and the existing law is the CO, I think this would be easier to understand if we clarify this point. The heading of section 157B in the CO is "Removal of Directors" and this is changed to "Removal and Resignation of Directors" now. This will obviously flesh it out in greater detail.

On the basic principles of removal of a director, clause 453(1) of the Bill points out that "A company may by an ordinary resolution passed at a general meeting remove a director before the end of the director's term of office, despite anything in its articles or in any agreement between it and the director.". Since pursuant to the Bill, a limited company does not need to have any Memorandum of Association — this has been discussed before — and so what clause 453 refers to must be the Articles of Association. Before the amendment of the CO on the last occasion, if a company wants to remove a director, it must do so by way of a special resolution. In other words, the relevant threshold was lowered in the previous company law reform.

Members may also look at clause 453(2). The clause provides: "Subsection (1) does not, if the company is a private company, authorize the removal of a director holding office for life on the commencement of the Companies (Amendment) Ordinance 1984 (6 of 1984).". In other words, unless otherwise specified by the law, those directors will hold office for life as directors of the private company concerned. Clause 453 (1) and (2) have taken reference to section 157B (1) of the existing law. Apart from embellishment made in wording, the Bill does not change any principle …… 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): The scene of the summoning bell ringing beginning tomorrow would be a sight to watch for. It does not matter much today as there is only an hour or so of meeting time left. Tomorrow, it would be a scene of "God bless the whole family".

The reference in clause 453(1) "…… despite anything in its articles or in any agreement between it and the director" focuses on the fact that in some companies, some of the articles specify that the director of the company must be a certain person, or other contracts between a company and the director exist. For this reason, the effect of clause 453(1) is: The power of the company to remove its director is not constrained by the aforementioned requirement. For this reason, clause 453(9) clarifies the validity of other kinds of requirements and states specifically, "This section is not to be regarded as depriving a person of compensation or damages payable to the person in respect of the termination of ……".

The following two provisions under clause 453(9) are very important. They are, "(a) the person's appointment as director; or (b) any appointment terminating with that as director.". I can use an analogy to explain this. For example, there is an employment contract between the company concerned and a person and often, the terms of the contract would include that of appointing this person as the director of the company. For example, a listed company hires an executive director, general manager or departmental manager and also allows him to serve as the director at the same time, so it is necessary to specify this in the contract. In such a situation, he is a member of the management and also a director of the company. When the company exercises the power under clause 453(1) to terminate the appointment of this person as director, this would not affect the right of this person to claim compensation from the company according to the employment contract.

Another example is that the employment contract states that this person would also assume other posts on account of his status as director and that this person can also claim compensation from this company in accordance with the employment contract — because this is specified in the employment contract — for terminating his other appointments. These are two different situations.

One of them is the right to claim compensation according to the employment contract and the person concerned may be compensated with money or in other ways because of the dismissal — in fact, this is not dismissal but removing him from his capacity as the director. However, since he is removed from his capacity as director, he also loses other posts at the same time. In the other situation, he can claim compensation for his office as director.

Clause 453(3) states, "Subsections (4), (5), (6), (7) and (8) apply in relation to a removal of a director by resolution, irrespective of whether the removal by resolution is under subsection (1) or otherwise.". The "otherwise" in subclause (3) probably also includes the relevant agreement between a company and its director. In other words, if there are already some provisions on removal in the agreement, clause 453(1) will provide an additional channel for the company to remove its director.

Clause 453(4) requires the relevant resolution to be issued in the form of a special notice. The form of the resolution can be "a resolution — (a) to remove a director; or (b) to appoint somebody in place of a director so removed.". That is to say, the company concerned does not necessarily have to appoint another person in the same meeting to replace the director so removed and the relevant vacancy can be filled as a casual vacancy.

Clause 453(6) makes a provision for the time at which that director is to retire. It provides that "A person appointed director in place of a removed director is to be regarded, for the purpose of determining the time at which that person or any other director is to retire, as if that person had become director on the day on which the person removed was last appointed a director.". The last sentence is very important, moreover, again, it is drafted in English, then translated rigidly into Chinese, so I had to find the English version for a look.

Clause 453 is about "Resolution to remove director" and what does subclause (6) under it say? The Chinese version is difficult to comprehend. It says, "該人須視為猶如在該人所替代的人最後獲委任為董事之日出任董事一樣". However, the English version is easily comprehensible. It says, "as if that person had become director on the day on which the person removed was last appointed a director.". Isn't this awful? The English version is very clear but when translated into Chinese …… Chairman, you are again laughing at

me for being repetitive and doing this again. However, how can we expect people to understand this law in its Chinese version?

In fact, the entire expression would create doubts as to whether or not the replacement director should serve the remaining term of office of the removed director or should it be "as if", that is, in normal circumstances, he should be appointed for the same period of time? People would not be able to figure this out. If we look solely at the meaning of the Chinese text, we cannot see such a meaning but this is very clear in the English version.

This reminds me of …… the term of office of "Bowtie" has ended but on 27 April 2005, the Standing Committee of the Nation People's Congress made an interpretation of the Basic Law in relation to his term of office by interpreting Article 53(2) of the Basic Law. This Article states, "In the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law. During the period of vacancy, his or her duties shall be assumed according to the provisions of the preceding paragraph.". However, it is necessary to make an interpretation because the intention was to change the term of office to two years.

In that case, it is necessary to look at the words used in the interpretation. The passage explaining the election of Donald TSANG as the Chief Executive says, "…… in the event that the office of Chief Executive becomes vacant before the expiration of the five years prescribed in Article 46 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" …… Article 46 stipulates, "The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years. He or she may serve for not more than two consecutive terms.". The argument in the interpretation exercise was, "…… in the event that the office of Chief Executive becomes vacant before the expiration of the five years prescribed in Article 46 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" …… this is also a very long Chinese sentence but it is very clear. The next sentence is, "…… the term of office of the new Chief Executive shall be the remainder of the term of office of the previous Chief Executive.".

President, I think this example is really clever for it serves to explain why Members cannot comprehend clause 453(6). Of course, I do not agree with the interpretation of the Basic Law by the Nation People's Congress (NPC) and I

even oppose it, but I cannot deny that this explanation was written in an uncluttered, simple and easily comprehensible manner. The situation described in clause 453(6) is more or less the same but it is written as "該人須視為猶如在該人所替代的人最後獲委任為董事之日出任董事一樣".

Of course, I oppose the interpretation of the Basic Law but it cannot be denied that the explanation was written in a clear and uncluttered manner because it was written in Chinese. The interpretations of the Basic Law by the NPC were not drafted in English first, then translated into Chinese and herein lies the difference. In fact, I think that the manner in which they were written was still somewhat cumbersome …… Chairman, a quorum is not present. I am delivering such an excellent speech but there is no one here to listen to it.

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 mentioned the interpretation of the Basic Law by the Standing Committee of the National People's Congress (NPCSC). In response to Donald TSANG's assumption of office as Chief Executive in 2005, the NPCSC interpretation of Article 53(2) of the Basic Law on 27 April 2005 is somewhat similar to the situation provided in clause 453(6) that I mentioned earlier. Of course, it is not exactly the same, and the difference in the text is very clear. The laws in Hong Kong should be written in Chinese one day, but this is something which may happen on an uncertain date in the future and there may be many people who cannot put their mind at ease.

Clause 453(4) has proposed a requirement which is the so-called "special notice". What does "special notice" mean? Clause 568 has provided a relevant explanation. Clause 568, which is about "Resolution requiring special notice",

has provided the definition of "special notice". It is stipulated in clause 568(1) that "If by any provision of this Ordinance special notice is required to be given of a resolution, the resolution is not effective unless notice of the intention to move it has been given to the company at least 28 days before the meeting at which it is moved.".

Meanwhile clause 568(4) also provides that "If, after notice of the intention to move the resolution has been given to the company, a meeting is called for a date 28 days or less after the notice has been given, the notice is to be regarded as having been properly given, though not given within the time required.". Clause 568(4) seeks to ensure that "notice of the intention to move the resolution" — such as the notice to remove a director — will not be void due to the fact that the meeting is held within 28 days. And this provision seeks to complement clause 453(4) concerning the requirement of "special notice".

Furthermore, clauses 453(7) and (8) are about another separate issue. I will discuss it when I speak on the next occasion. Thank you, Chairman.

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

MR ALBERT CHAN (in Cantonese): Chairman, I would like to speak on clause 100 of the Bill concerning the effect of licence. This provision is generally based on section 21 of the original Companies Ordinance (CO). It stipulates that the word "Limited" and the expression in Chinese "有限公司" can be omitted from the name of a company granted a licence under section 21 of the CO.

Basically, this arrangement also appears in the past provisions. However, if my understanding is not mistaken, according to the new arrangement, it is not necessary to deliver the member list of the company to the Registrar. Besides, the new provision also stipulates other requirements on the memorandum and articles of the company, and it mainly deletes the reference to memorandum. I believe the main objective of the Government in proposing this amendment is to clarify the legislative intent of the authorities. The intent, instead of providing that a company granted a licence under clause 98 of the Bill is exempt from all regulations made under clause 650 of the Bill, is that the company is only exempt

from the regulations in relation to its name — that relates to the word "Limited" or the expression in Chinese "有限公司" — is applicable. The company shall also comply with other requirements under clause 650, such as display of a company's name in conspicuous locations of the office.

The main problem with this provision is that the company being exempted does not need to deliver the particulars of its members. According to my understanding, while the law was being drafted, no explanation or reason was provided to support this arrangement. Having obtained a licence, a company can be exempted from using the word "Limited" or the expression in Chinese "有限公司" in its name, so this naturally will bring certain special status and benefits to such kind of companies. Members also clearly know that the organizations generally being exempted are possibly charitable or scientific research organizations. Under this kind of special circumstances, if it is stipulated that information such as member list and the number of staff should be provided, I believe this will help in enhancing the transparency of such companies. Since these companies enjoy such a privilege, the public should have the right to know information like composition of membership. I think this may not have negative effect.

Clause 100(1)(b) of the Bill actually also mentions regulations made under clause 650 of the Bill, and those regulations are related to the relevant arrangements on the use of the word "Limited" or the expression in Chinese "有限公司" as part of the company's name. When examining clause 650, we also need to examine clause 653. Because clause 100(1)(c) also mentions the arrangement in relation to the delivery of particulars relating to members to the Registrar, and this refers to clause 653. Therefore, I checked clause 653 again about the requirement to deliver an annual return. Clause 100(1)(c) of the Bill stipulates that: "section 653 in relation to the delivery of particulars relating to members to the Registrar." Hence, it also stipulates that the Registrar can issue an instruction so as to render the delivery of particulars relating to members unnecessary. Schedule 6 of the Bill states the particulars of the information to be contained in an annual return, which has shown more clearly the real meaning of the particulars relating to members mentioned in this provision. I think this is an ambiguity of the provision. If the authorities could stipulate it clearly, Members would not have to cross study the few provisions — for instance, clause 100, clause 653 and Schedule 6 — in order to clarify that it is ultimately unnecessary to deliver particulars relating to members. In my opinion, if this

can be clearly stated in the provision, there will not be so many instances of confusion and unclearness.

On the other hand, I would also like to talk about clause 102 of the Bill, under which company may change name by special resolution. In regard to the arrangement for a company to change name, clause 102(1) stipulates that "A company may change a company name by special resolution.". This provision is originally drafted as an amendment of section 22 of the CO. At present, in respect of the regulation in this part as well as similar regulations in other parts, the authorities amend the specified period from 14 days to 15 days.

Chairman, if my understanding is correct, the Government has originally amended the period from 15 days to 14 days. However, it is now back to the original in the amendment, changing from 14 days to 15 days. The many times of amendment have caused much confusion. As I pointed out in my comments on other provisions earlier on, the period is generally 7 days, 14 days or 21 days. However, in regard to the period specified in several provisions here, especially concerning the arrangement for a company to deliver to the Registrar a notice — for example, it provides that within 15 days after the date of passing the special resolution, the company must deliver to the Registrar a notice — the several kinds of period within which a company must deliver its decision to the Registrar is also specified as 15 days.

The Companies Bill is peculiar in many aspects. It has a distinctive arrangement for the specified period, that is one day longer, which is different from many provisions in the past. This is of course related to the special needs of the administrative or legal arrangements. In regard to the fine, if a company contravenes the Ordinance, the maximum penalty is a fine at level 3, that is $10,000, and the daily fine is $300 at maximum. This kind of penalty is basically meaningless to large corporations.

Besides, I would also like to talk about clause 103 of the Bill, by which the Registrar may direct a company to change same or to a similar name, and so on. Under clause 102, a company may change name by special resolution. The power rests with the company and it has to have special reasons. However, under clause 103, the Registrar may direct a company to change name when the same or similar name appears. The provision has listed some reasons. Under

the specified situations, the Registrar may by notice in writing direct a company to change its name. Clause 103(1) has listed various kinds of situations as in paragraphs (a), (b), (c), (d) and (e).

One of the points that I would like to raise is that if the names are too similar, I think it is reasonable to direct the companies to change name. However, clause 103(1)(c) states that "it appears to the Registrar that misleading information has been given for the company's registration by the name". That involves the power of the Registrar. On the question of whether it is misleading or has any problems, if this mistake is verified through the prosecution process, this is the decision of the Court. However, under this provision, the relevant power of decision and interpretation basically rests entirely with the Registrar. If he thinks that it is misleading, he may make a decision according to his interpretation, understanding and analysis. This is one of the parameters specified under subclause (1).

Chairman, I think this is a little arbitrary, and the so-called discretion is also too loose. Under other clauses before this, the Registrar may also direct a company to change name or not accept its name. If the reason is related to public interest, it is acceptable. Under this provision, once the Registrar thinks that it is misleading, or it appears to him that it is related to public interest, or there are other similar reasons, he may disallow or refuse registration of the company, or direct that company to change its name, otherwise the company is liable to punishment. Basically, there is no independent mechanism to monitor the power of the Registrar.

In my opinion, the related mechanism and scope should not be so absolute, because a name can easily be regarded as misleading. If only a word is different between the names of company A and company B, they may be regarded as carrying misleading information. In the past, there were a lot of legal arguments in this respect. When I read the newspaper today, I learn that there is a lawsuit between Mr MURDOCH, the media mogul, and a British associate company of a pay-television company of Hong Kong, as the names of the companies concerned are similar (are the same actually).

Particularly when the Bill involves many kinds of businesses and companies, it is possible that similar names will appear among various kinds of companies. If the Registrar favours certain companies, especially wealthy and

overbearing consortia, due to this kind of favouritism and partiality, when it is obvious that an ordinary member of the public or a small-scale company is right and appropriate …… maybe the name has been used illegally in other aspects or the name is only used afterwards …… maybe due to political partiality and difference in clout, it is easy that the Registrar may make use of this power to cause some instances of unfairness and injustice. Therefore, concerning this provision, especially clause 103(1)(c), I cannot accept such regulation.

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 has been rung, a number of Members return to the Chamber)

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

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

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

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I will talk about Subdivision 4 (Authorization for Giving Financial Assistance), and the previous subdivision. Why do I combine these two subdivisions for discussion? It is because they are related.

CHAIRMAN (in Cantonese): Which part, division and subdivision are you referring to?

MR LEUNG KWOK-HUNG (in Cantonese): It is Subdivision 4.

CHAIRMAN (in Cantonese): Subdivision 4 of which part?

MR LEUNG KWOK-HUNG (in Cantonese): It starts from clause 279 of the Companies Bill (the Bill). I will also talk about Subdivision 2 of Division 5, which starts from clause 271. The provisions of Division 5 are stated in page C588 of the Chinese version onwards, coming after clause 269. Division 5 starts from clause 270.

CHAIRMAN (in Cantonese): You should start with Division 5 of Part 5.

MR LEUNG KWOK-HUNG (in Cantonese): I am sorry. As I just saw "Division 5", I thus said "Division 5". You know where it is? There are a few pages.

I will talk about Subdivision 2 of Division 5, which is clause 271. The Government proposes an amendment to clause 271(1) by deleting "or its holding company, the company" in the second line and substituting ", the company or any of its subsidiaries". This of course is meant for achieving clarity in drafting of the provision.

The title of Subdivision 2 "General Prohibition on Financial Assistance for Acquisition of Own Shares" and the title of clause 271 "Prohibition on financial assistance for acquisition of shares or for reducing or discharging liability for acquisition" are both very difficult to comprehend. They can actually be presented in a simpler way. The meaning that they are intended to express is actually very simple. The first title can be changed into "General Rules to Prohibit Financial Assistance for Acquisition of Own Shares". What does the title of clause 271 try to say? There are two things and they are: providing financial assistance for acquisition of shares, and providing financial assistance for reducing or discharging liability for acquisition.

The Government does not amend the following provisions until clause 271(2)(b) (and I quote): "any person has incurred a liability for the purpose of the acquisition, the company", and the Government proposes to add "or any of its subsidiaries" here so as to render the meaning of the provision clearer.

Because the Government is worried that if this provision is not written clearly, the company's subsidiaries would not be prohibited from carrying out the prohibited acts. This amendment makes a useful supplement to the Bill which can render it more comprehensive. Chairman, do you see that the Government has added "or any of its subsidiaries"? If only "the company" is stated, the meaning will be most obscure. On the contrary, if it is stipulated that the company's subsidiaries will also be regulated, the meaning of the entire provision will be very clear. In other words, for those things that the company itself is prohibited from doing, its subsidiaries cannot do that on its behalf. I think this is a very good amendment.

The problem lies in subclause (4), which stipulates that "If a 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 of $150,000 and to imprisonment for 12 months.". In the Bill, there are not many provisions relating to imprisonment. The penalty of imprisonment stipulated in this provision is due to any company which has incurred a liability or has its share capital or assets reduced as a result of acquiring its own shares. This actually is a very serious matter, and thus the penalty should be heavier. However, I think that the penalty for committing this kind of offence should be more than imprisonment for 12 months. Under many other ordinances, the penalty for making false statements or subreption is also very heavy. For instance, if a person cheats an officer of the Immigration Department by saying that he comes to Hong Kong for tourism purpose but actually comes here for work or doing business, this is a very serious crime and will be punished heavily. Of course, the defendant can plea for leniency. Compared with other penalties for dishonest conduct, the penalty of imprisonment for 12 months stipulated in clause 271 seems to be too light.

Subdivision 2 (General Prohibition on Financial Assistance for Acquisition of Own Shares) is very official. What is the Government trying to prohibit? It is to prohibit a company from cheating people or incurring loss to other shareholders with this kind of means. To the Companies Bill, such conduct is of course a kind of challenge. Because what is a "company"? A company is a place for doing business with its door open. Many people will come here to invest, purchase the company's shares or join the company through direct share purchase. Therefore, credibility is the most important element of a company. If a company has committed the serious crime stated in Subdivision 2, it is an extremely grave matter in a commercial society. The provision stipulates that

"and each is liable to a fine of $150,000 and to imprisonment for 12 months." However, I am not sure whether this means he is liable to a fine as well as imprisonment. I personally do not think so.

The following clause is clause 272 (Consequences of failing to comply with Division), in which there are some stipulations. In fact, this subdivision is connected to the next subdivision which is "Exceptions from Prohibition". The Government has also proposed some amendments to these exceptions.

In regard to clause 276(2), the Government has amended the definition of "children". It is of course correct to propose this amendment, as law should keep abreast of the times. In the definition of "children", the amendment deletes "and illegitimate children" and substitutes ", illegitimate children and children adopted in any manner recognized by the law of Hong Kong". It is appropriate to expand the scope of "children". In regard to clause 277(2), the definition of "children" is also deleted and substituted with "child (子女) includes a step-child, an illegitimate child and ……". These two amendments have further clarified the definition of "children". To people in general, it is common place that they will pass their assets to their children in order to assist them. Therefore, I think that it is right to amend this definition.

As regards clause 279, in Subdivision 3 (Exceptions from Prohibition) that I just mentioned …… it is Subdivision 4 (Authorization for Giving Financial Assistance). The meaning of "giving financial assistance" is to give money. If a company is to perform such an act (that is giving financial assistance to any person to purchase its own shares), it needs to obtain an authorization. All the content of this provision is reasonable. First of all, before the assistance is given by that company, the directors have to agree to it by way of resolution. The amendment only deletes paragraphs (c) and (d) and substitutes with "the aggregate amount of the assistance and any other financial assistance given under this section that has not been repaid does not exceed 5% of the paid up share capital and reserves of the company". That is a restriction on the amount of money, but I do not know how this restriction was worked out. Why is it not 6% or 7%? I believe this has drawn reference from the original ordinance.

This amendment has deleted paragraph (d), which is "the company receives fair value in connection with the giving of the assistance". It is because the

company cannot make its own resolution and statements like "The financial assistance given for the purpose of the acquisition of a share does not exceed 5% of shareholders funds. And the company can receive fair value in connection with the giving of the assistance.". In my opinion, it is right to propose this amendment. Because who should make a fair valuation? There is no standard. In the past, I once mentioned that only if you can find anyone or a licence holder to agree with what the company has done, and say that the company can make a profit of 5% or 7% with that 5% of money, that company can do whatever it wants. At present, authorization for giving financial assistance is simple and clear. A company may give financial assistance provided it follows the regulations of items (i), (ii) and (iii) of paragraph (a), as well as paragraphs (b) and (c) — I am sorry, there is no paragraph (c). I think that this amendment is reasonable.

Nonetheless, there is a flaw at last. It appears in clause 279(5), which is also related to the penalty. If the company contravenes subsection (4) and fails to give an account to members of the company on the matter of giving financial assistance, it will only be liable to a fine. The fine is merely at level 3 and $300 for each day. I think this is too loose. The effectiveness of the Bill will be reduced *(The buzzer sounded) ……* as on one knows what the company is doing.

Thank you, Chairman.

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

MR ALBERT CHAN (in Cantonese): Chairman, I believe everybody is very tired. My vision is blurring and my mind is getting more and more confused. I cannot read the words clearly. Chairman, I will try my best. If my speech is not coherent, will the Chairman please correct me.

Chairman, let me skip over more clauses. I would like to discuss clause 449 which is related to "Direction requiring company to appoint director" under Part 10. Chairman, I am discussing this clause mainly because I wish to point out the current situation. I expressed a similar view when discussing other

clauses in the past. My view is that while government officials are vested with infinite and absolute powers, there is no checking or monitoring mechanism ……

(Mr LEUNG Kwok-hung stood up)

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, are you requesting a headcount?

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, the Government's power is great and yours is also great. Please do a headcount in accordance with Rule 17 (3) of 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, in talking about the provision relating to "Direction requiring company to appoint direct" in Clause 449, I wish to point out the bias and unfairness of the entire provision. The power conferred by the Bill on the relevant government officers can be described as absolute, subjective and authoritarian. It can be said that the power is unlimited but there is no need to assume responsibility. When talking about other provisions, I have already pointed out that there is no need to ascertain the authenticity of certain documents before they are accepted. Even if the people concerned made a mistake that causes others to suffer losses, as long as they acted in good faith, even though there is mistake in the computer system, information is disseminated casually or personal privacy is violated, they are protected and do not have to assume civil liabilities, with the exception of such criminal liabilities as corruption.

Members can see that the entire penalty clause is lenient to wealthy directors by making them liable to a fine at level 3 or 4 only. If they do not comply with a direction of the Registrar, the penalty would reach level 5 or 6, depending on the stipulations of the provision. I point out this clause relating to the "Direction requiring company to appoint direct" specifically because this is a provision conferring an enormous and absolute power. This clause provides that "if it appears to the Registrar that" — just appears to be and there is no need to obtain concrete evidence through investigation or a ruling from the Court — "that a company is in contravention of section 444(2) ……". Members can look at the wording of this provision and see how vague it is. I consider this unprofessional. I wonder what views barristers have on this. In sum, if it "appears" to the Registrar that the provision has been violated, that will be the case. These words are rarely used in other legal provisions relating to the Government's administrative power.

This clause states that "if it appears to the Registrar that a company is in contravention of section 444(2), 445(1) or 448(2), the Registrar may direct the company to appoint a director or directors in compliance with that section.". To my understanding, of the provisions cited therein, for example, section 445 and other relevant provisions …… Chairman, just a minute …… section 445 is under Division 1 of Part 10 entitled "Directors and Company Secretaries". Section 445(1) stipulates, "A private company must have at least one director.". Section 448(2) states, "The company must have at least one director who is a natural person.". Chairman, there are always exceptions to everything. For example, the persons concerned may be ill or out of town, or there may be an acceptable situation that is considered a reasonable defence. However, the provision does not allow the people concerned to cite any ground as defence and only provides that the aforementioned period shall be not less than one month or more than three months after the direction is issued.

Although to some extent, a period of three months is reasonable, the penalty for contravention is a fine that can be as high as level 6. Chairman, this is a very harsh penalty. Just as I said in my previous analysis, the penalty for non-performance of obligations, such as directors convening a general meeting without notifying the auditor, is generally at level 3. This further proves that the Registrar has great authority as non-compliance with his direction on time limit is liable to a fine at level 6. Does this mean that the failure to provide documents to shareholders and the failure to comply with the required procedure to notify the

auditor are not serious? It can thus be seen that the authority of the Registrar cannot be challenged and non-compliance with his direction is liable to a fine at as high as level 6, that is, a fine of $2,000 for each day.

Of course, this amount of fine can be trivial to some people. However, to "one-man" companies, generally speaking, they are small companies unless they are set up by plutocrats. Basically, the Bill allows bureaucrats to hold infinite sway over small companies and their bureaucratic authority is supreme. Firstly, there is no provision that allows small companies to cite any defence. In other words, if I think you are wrong, then you are. Chairman, I also think that you are very authoritative and have great rhetorical skills. What we are talking about now is the law and it involves a penalty of a fine at level 6, yet it is to be decided solely by the personal whims of the Registrar.

Chairman, this clause further supports the series of comments made by me in the past couple of days. The deeper I delve into the details, the more the problems I found with the clauses. If we compare the regulatory provisions enforced by various government departments and the penalties that people contravening the requirements of these provisions are subjected to and the relevant responsibilities they have to assume, we will find that this clause is totally unreasonable and unjust. At the Committee stage now, I wonder if Members who attach great importance to human rights and the protection of the interests of ordinary members of the public would share my feelings on seeing these clauses conferring administrative power. In the past couple of days, I read the clauses very carefully and the more I read them, the stronger I feel. After the passage of the Bill, in the future, instances of injustice will arise in society. Some bosses of small companies may create a nightmare lasting a lifetime for themselves on account of setting up their own companies. Just as Hong Kong people have become the slaves of hegemonic property developers, buying a property is also the beginning of another nightmare, particularly if one buys a flat with diminished floor area or a flat with long-term water-seepage problems and is bullied by the management company.

Therefore, here, I appeal publicly to Hong Kong people, particularly ordinary members of the public, not to set up their companies in Hong Kong by all means, in particular, they have to avoid being regulated by company law because they may be bullied by the Registrar through the power conferred by the

legislation and exercised by him, so much so that they would remember it for the rest of their life.

I hope the Secretary can take on board my views and in the future, when implementing the provisions relating to the power of the Registrar, adopt other means to impose checks and balances. We have seen too many instances of power abuse and I have already discussed the abuse of power by the police in the legislature a number of times, so I hope the same situation would not arise in respect of company law.

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

MR WONG YUK-MAN (in Cantonese): When I spoke on clause 453 concerning "Resolution to remove director" earlier, I did, in particular, point out that the Chinese version of subclause (6) is most problematic among subclauses (1) to (6). Now I would like to discuss clauses 453(7) and (8) which are related to weighted voting.

Speaking of weighted voting, I think of the functional constituencies, the arrangements of "one person, two votes" and "one person, three votes." Weighted voting is really amazing. I remember that NI Kuang, an elder whom I very much respect, emigrated to the United States in the early 1990s on the ground that he disdained to be living under the communist rule. He came back to Hong Kong a few years ago because of his wife. After he had come back to Hong Kong, a reporter, in an interview with him, said, "Mr NI, you are finally willing to return to Hong Kong. It is great. You were a second-class citizen in the United States and are a first-class citizen in Hong Kong, a place which belongs to the Chinese people. You are now a permanent resident of Hong Kong." Mr NI then replied, "Sorry, I am a first-class citizen in the United States, not second-class. Although I am an elderly not required to pay tax, and I have no ties with the government, I can elect the mayor and participate in the election of state legislators. So, I am a first-class citizen there and a third-class citizen in Hong Kong. "

He also talked about the meaning of "first-class citizen". According to his definition, it means a citizen who can elect the Chief Executive, as well as

functional constituency Members and directly elected Members. In other words, a first-class citizen refers to a person who has three votes. As for the second-class citizens, they can elect functional constituency Members and directly elected Members, but not the Chief Executive. This is the definition of second-class citizens. As we can only elect directly elected Members, we are third-class citizens, right?

There will be "super seats" in the functional constituency, which are invented by the Democratic Party. As a result, registered voters will have two votes each under the "one person, two votes" arrangement. It is really amazing.

CHAIRMAN (in Cantonese): Mr WONG, please speak on the contents of the relevant clauses.

MR WONG YUK-MAN (in Cantonese): Political parties with more financial resources are now given more opportunities to stand in elections. I saw Mr LAU Kong-wah on a big television screen in Kwai Chung Plaza yesterday — this handsome man, who is your friend and party comrade — explaining the meaning of "one person, two votes". Chairman, this is precisely weighted voting.

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

MR WONG YUK-MAN (in Cantonese): Just now I discussed weighted voting and the examples were quoted to facilitate Members' understanding so that they will not find my subsequent remarks difficult to understand. To my surprise, Mr LAU Kong-wah also knows how to explain clauses 453(7) and (8) concerning weighted voting rights. But what he said is the voting arrangement for the District Council Functional Constituency and geographical constituencies.

Chairman, the relevant provision is section 157B(5) of the existing Companies Ordinance, which has imposed restriction on weighted voting rights …… 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)

NEXT MEETING

CHAIRMAN (in Cantonese): It is now eight minutes to ten o'clock. I believe the debate cannot come to an end tonight. I now adjourn the meeting until eleven o'clock in the morning on 11 July 2012, which is tomorrow.

Adjourned accordingly at seven minutes to Ten o'clock.