16 September 2010

The Chair
Commerce Select Committee
Parliament Buildings
P O Box 18041
Wellington 6160

INSOLVENCY PRACTITIONERS BILL 2010

1.   This submission is made by the Legislation Advisory Committee (LAC).

2.   The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.

3.   The terms of reference of the LAC include:

   (a)   to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues:

   (b)   to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

Use of the Liquidation Surplus Account

4.   In this submission the LAC wishes to raise only one point. It relates to clause 7 of the Bill.

5.   Clause 7 of the Bill amends section 316 of the Companies Act 1993 to extend the matters that may be funded out of the Liquidation Surplus Account, to include payment of the reasonable costs and expenses incurred by the Registrar in performing the functions and exercising the new powers relating to the registration of prohibited or restricted insolvency practitioners. This account, formed from unclaimed assets of liquidated companies, may currently be used to pay the claims of any creditor in a company the surplus assets of which have

gone into the account and, subject to such conditions as the Official Assignee may impose, to meet a creditor's costs of proceedings in a liquidation. These uses are for persons who can be seen in having an interest in or connection with the assets.

6. Allowing the account to be used to cover the Registrar's costs may be seen to be putting it to a different purpose, which is not related to the companies that have surplus assets following liquidation. The consequences are that unpaid creditors of particular companies bear the costs of a system for prohibiting and restricting underperforming insolvency practitioners. There are two possible alternative approaches. One is to place a levy on all companies. A second is that, given the small number of insolvency practitioners and the very small number of these that are likely to be placed on the register, the Crown could bear the costs of the system. The explanatory note estimates the number of insolvency practitioners in New Zealand at less than 100. The costs of the registration system are, therefore, unlikely to be significant.

7. The Unclaimed Monies Act 1971 provides a statutory regime under which unclaimed money can become payable to the Crown. The Unclaimed Monies Act 1971 allows money that has not been claimed after six years to become the property of the Crown. Under this Act, a person entitled to unclaimed money is never precluded from claiming the money, even after it has gone to the Crown.

8. The Liquidation Surplus Account is specifically excluded from the operation of the Unclaimed Monies Act 1971 under section 316 of the Companies Act 1993, indicating that this fund is to be used for a different purpose than Crown revenue. However, the Bill, in effect, allows for unclaimed money after a liquidation to be used for a specific administrative purpose of the Crown, rather than for a purpose that is for the benefit of creditors. Moreover, there is not the same protection for those entitled to the unclaimed monies that go to the Liquidation Surplus Account, such as the six year period before the money goes to the Crown and the on-going ability to claim the money, as there are under the Unclaimed Monies Act 1971.

9. The Committee does not wish to be heard in support of its submission.

George Tanner QC
Acting Chair, Legislation Advisory Committee