



## Office of Hon Simon Power

**MP for Rangitikei**

Minister of Justice

Minister for State Owned Enterprises

Minister of Commerce

Minister Responsible for the Law Commission

Associate Minister of Finance

Deputy Leader of the House

31 MAR 2010

Mr Robert Walker  
Chartered Accountant  
PO Box 9010  
WELLINGTON

Dear Mr Walker

Thank you for your letter dated 8 March 2010 regarding some of our primary corporate laws. The Prime Minister has referred your letter to me, as the majority of the matters you raise in your letter fall within the Commerce portfolio.

A substantive part of your letter relates to a company, Ariya New Zealand Limited (In Liquidation), for which you are currently acting as the liquidator. The allegations you make are very serious and I commend you for taking action. It appears from your letter that there are several agencies involved in investigating the alleged illegal activities undertaken by this company.

Suffice to say, you should continue to bring to the attention of the appropriate agencies any activity in breach of the law, as you become aware of it. I have been advised that your complaint regarding the conduct of the director of the aforementioned company is with the National Enforcement Unit (NEU) at the Ministry of Economic Development. I am also told that it is standard practice for the NEU to acknowledge complaints and that an acknowledgement of your complaint had inadvertently gone to the wrong person. You should have by now received an acknowledgement. You may also be interested to know that the NEU is indeed investigating the allegations.

I acknowledge that insolvency practitioners have a central role in maintaining the integrity of the company law system. I am currently developing a Bill to regulate insolvency practitioners, for introduction into the House next month. The role of a liquidator is complex and he or she must wear many hats. Liquidators, in order to do their job effectively, must possess the requisite skills, experience and knowledge, and exercise good judgement on a range of matters.

The Insolvency Practitioners Bill introduces a negative licensing regime. Essentially, the negative licensing regime gives the Registrar of Companies the statutory authority to restrict or prohibit individuals from providing corporate insolvency services. Rather than setting minimum standards before an individual can practice, individuals instead may practice but face prohibition by the Registrar, or supervision by another, experienced practitioner, where they fail to comply with their duties as set out in legislation. The aim of regulating insolvency practitioners in this manner is to provide for a low cost mechanism for removing incompetent and dishonest practitioners, who may consistently or substantially fail in complying with their duties. In this manner, the integrity of the law can be maintained.

I encourage you to make a submission outlining your views on this legislation to the Select Committee once the Bill is introduced.

You also raise several suggestions for reform of corporate law in general. In particular you are interested in the manner in which individuals can register a new company. The requirements to register a company in New Zealand are designed to be accessible and affordable, by placing a low burden of compliance on people wishing to start a business. There are more than 520,000 companies registered in New Zealand and the majority of these are legitimate small businesses with transparent company structures.

Although we would not want to impose a costly burden on these businesses, I have recently asked the Registrar of Companies to look into whether there are changes that might be made to strengthen the company registration process. Any new measures must be considered carefully so that we do not create additional compliance burdens for legitimate companies, but so that we can also ensure our register is not vulnerable to misuse.

There are also provisions in the Companies Act aimed at preventing the registration of a 'phoenix company', a company set up with the same or a similar name with the intention of harbouring the assets of an insolvent company.

You raise an issue covered by the current review of the financial reporting framework, whether small businesses should be required to prepare General Purpose Financial Reports (GPFR). Submissions on a comprehensive discussion document were due with the Ministry of Economic Development by 29 January this year. Officials are currently analysing submissions and will report to me on the outcome of consultation in June this year. I am aware of some of the pros and cons of this policy option, however at this stage the government has not made final policy decisions.

In my capacity as the Minister of Justice I am also able to respond to some of your points in relation to trust law, money laundering, the burden of proof in civil and criminal proceedings, and the regulation or oversight of the legal profession.

With regards to trust law, people are increasingly using trusts to arrange their business and personal affairs. However, if a person creates or transfers property to a trust in order to defeat a creditor's interests, remedies are available to the creditor or to a liquidator under the Property Law Act 2007. A court may, for example, set aside a disposition of property that prejudices creditors and order that the property vests in, or that compensation is payable to, the official assignee or the debtor, if the debtor is a company in liquidation.

The courts also have the jurisdiction to determine whether a trust is a 'sham'. For an arrangement to be a sham the parties must have had a common intention not to create the legal rights or obligations which the documents purported to create. In determining this, the courts might look at the degree of control retained by the settlor of the trust over the trust property, whether the trustees' decisions were heavily influenced by the settlor, or whether there was some intermingling of trust and personal affairs.

You may be interested to know that the Law Commission is currently reviewing the law of trusts and is interested in hearing the public's views. The Commission's contact details are available on its website [www.lawcom.govt.nz](http://www.lawcom.govt.nz).

With regards to money laundering, you may be aware that in October last year the Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) Act was passed, with the intention of enhancing New Zealand's compliance with internationally agreed standards to combat money laundering and terrorist financing. There is, of course, a balance between meeting these standards and at the same time enabling businesses to transact easily. Information collection and verification is a key aspect of the AML/CFT reforms and I would expect that the measures enacted last year, once they take effect, will meet a number of the concerns that you raised in relation to money laundering.

You also suggest that the law around the burden of proof needs reform, and that a director of a company should have the onus of proving his or her innocence, rather than the plaintiff having to prove guilt. Section 25(c) of the New Zealand Bill of Rights Act 1990 provides that everyone who is charged with an offence has "the right to be presumed innocent until proved guilty according to law." The obligation on the prosecution to prove guilt beyond reasonable doubt is therefore fundamental to the criminal law. The standard of proof is lower in civil cases, but the same principle applies.

There are currently a very small number of offences to which a reverse burden applies, in which the defendant must prove their innocence. Because a reverse burden is prima facie a breach of the presumption of innocence and therefore the Bill of Rights, there must be a strong justification for any offence containing a reverse burden. In my view, the failure to maintain appropriate company records does not meet this threshold.

In addition, there are offence provisions within the Companies Act if proper records are not kept. And here again, it is essential the agencies and individuals responsible for administering and enforcing the law do so.

Finally, you raise concerns about the self-regulation of the legal profession. Regulation of the legal profession has been significantly enhanced by the Lawyers and Conveyancers Act 2006 (the Act), which came into force on 1 August 2008. The Act brought a new consumer focus to the legal profession, reflecting consumer requests for a more effective complaints and disciplinary process.

Under the Act, lawyers must follow certain standards of professional behaviour. If a lawyer breaches these standards, it is possible to make a complaint about that lawyer. The Act established the Lawyers Complaints Service for this purpose. The Complaints Service is operated by the New Zealand Law Society and provides a national system for handling all levels of complaints about lawyers. In the first instance, the Lawyers Complaints Service will refer a complaint to a Standards Committee. If a complainant does not agree with a decision of a Standards Committee, the complainant can ask the Legal Complaints Review Officer to review that decision. Both the Standards Committee and the Legal Complaints Review Officer can refer complaints to the Lawyers and Conveyancers Disciplinary Tribunal.

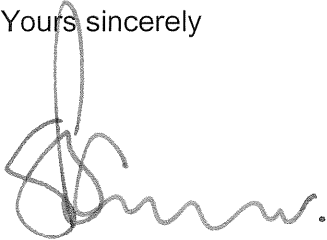
The Ministry of Justice administers the Legal Complaints Review Officer as well as the Lawyers and Conveyancers Disciplinary Tribunal, to preserve the independence of these bodies. More information about the complaints process, the remedies that may be available, and the sanctions that may be imposed, can be found on the website [www.lawsociety.org.nz](http://www.lawsociety.org.nz).

As you are aware, late last year Dame Margaret Bazley released a report on improving the legal aid system in New Zealand. The report expressed concern about the performance of some lawyers in the system. I expect the Law Society will be taking these issues very seriously and will address these problems. The Government has given the Law Society two years to address the quality concerns raised, and if they do not then I will consider bringing in an independent regulator for the legal profession.

I hope I have reassured you that the foundations that our laws and our legal system are based on are sound. There is always room for improvement however, and the work I am doing in both the Commerce and Justice portfolios continues in that vein.

Thank you again for your letter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Simon Power', with a large initial 'S' and a long, wavy tail.

Hon Simon Power  
**Minister of Commerce**