Law Council
OF AUSTRALIA

Business Law Section

7 December 2023

Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

By email: PPSAreform@ag.gov.au

Dear Sir/Madam

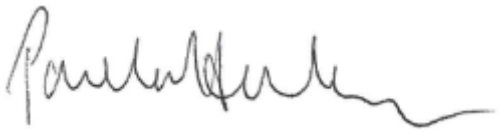
Review of the Personal Property Securities Act 2009

This submission concerning the Government Response to the Final Report of the Statutory Review of the *Personal Property Securities Act 2009* Consultation Paper is made by the Business Law Section of the Law Council of Australia (the **BLS**).

The BLS would be pleased to discuss any aspect of this submission.

Please contact Greg Rodgers, Executive Member of the BLS, at greg.rodgers@rbglawyers.com.au or on 0404 093 589, if you would like to do so.

Yours faithfully



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Submission

1. Introduction

a. The BLS welcomes the Government's response to the Whittaker Review.[1] We note that most recommendations made in the Whittaker Review have been accepted.

b. However, while the passage of time and usage in the market over the several years since the Whittaker Review may now warrant a different examination of some of the recommendations, we are concerned that the Government proposes to reject some recommendations or not accept some recommendations in their entirety when, in our review, that is not the correct response in some instances.

c. We also submit that there is one significant issue, which we address separately in section 2 of this submission—namely the proposed rejection of recommendation 362 that section 588FL of the *Corporations Act 2001* be repealed. We do not agree with the proposed rejection of this recommendation. We urge the Government to accept recommendation 362.

d. Our comments and recommendations about the Government's response to the Whittaker Review recommendations are set out in the table that is Annexure A to this submission. We have chosen to set out our comments and recommendations in that manner for ease of cross-referencing when comparing them to each of the Government's responses. Where we do not refer to a numbered recommendation in the table, our position is that we agree and accept the Government's response to that numbered recommendation—this should not be taken as our having no position on that recommendation. Rather, if the Government, in response to submissions from other parties or otherwise on its own volition, changes its proposed response to a recommendation, then we would urge the Government to conduct further consultation on such further changes.

e. In compiling and setting out our comments and recommendations in this submission, we have adopted various abbreviations used in the Government's consultation papers as published on its website.[2]

[1] Whittaker B: *Review of the Personal Property Securities Act 2009 Final Report (2015)* https://www.ag.gov.au/legal-system/publications/review-personal-property-securities-act-2009-final-report

[2] https://consultations.ag.gov.au/legal-system/government-response-to-pps-review/

Section 588FL Corporations Act

f. Recommendation 362 in the Whittaker Review was very clear in its terms—that s588FL of the *Corporations Act 2001* should be repealed. That recommendation was not made lightly, but rather was made after well-reasoned analysis and even a separate consultation process commencing with Consultation Paper 3.[3]

g. The Government's commentary on its position in rejecting recommendation 362 is that "*section 588FL is intended to discourage and protect against fraudulent claims prior to a company's insolvency*". With respect, we do not believe that retaining the requirement in section 588FL in addition to the usual requirement to register on the PPS Register would make any significant difference to the incidence of fraudulent claims prior to a company's insolvency.

h. Rather, we consider it is appropriate to reiterate the reasons and opinions summarised in the Whittaker Review with respect to this recommendation:

   i. Only one submission to the Whittaker Review considered that section 588FL should be retained, on the basis that it would incentivise secured parties to register against grantors that are companies promptly and so keep the Register up to date.[4] All other submissions supported the repeal of the section.

   ii. Bruce Whittaker reasoned that "*there are other compelling reasons under the Act why a secured party will want to perfect its security interest as early as possible—in particular, to set its priority position, to reduce the risk that a buyer or lessee could take the collateral free of the security interest, and to remove the risk that the security interest could vest in the grantor under s 267. A secured party that does not register promptly is likely to do so only out of inadvertence, so imposing a further deadline under s 588FL will not result in the registration being made any earlier than might otherwise have been the case. Secondly, the deadline under the section does make it very difficult to register effectively for some types of security interests, as described above. Thirdly, the section runs contrary to the Act's unifying principle, because it applies only to companies, not to all grantors.*"[5]

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[3] Whittaker B: *Enforcement of security interests; vesting of security interests on a grantor's insolvency; interaction with other legislation; governing law rules; other provisions in the Act; layout of the Act and related matters,* released 17 October 2014 https://www.ag.gov.au/legal-system/publications/statutory-review-pps-act-consultation-paper-3.
[4] Whittaker B: *Review of the Personal Property Securities Act 2009 Final Report (2015) op cit*, at p.438
[5] Whittaker B: *ibid*, at pp. 438-9.

i. Section 588FL unnecessarily complicates commercial transactions for no obvious benefits. Secured parties are adequately incentivised to perfect their security interests as soon as possible due to the potential loss of priority, application of the take free rules and vesting under the PPSA.

j. Further, as we point out in our detailed comments in section 5 of this submission, the current drafting of section 588FL refers to the vesting of the 'security interest' by reference to the 'registration time', but this may cause problems when there can be multiple 'registration times' (as contemplated by Note 3 to section160) for the one security interest[6].

2. Transitional arrangements

a. We respectfully agree with the statement in the Government Response (at pp. 23–24) that the approach to transition has significant legal, operational, and practical implications. We understand that these issues are presently being worked through in conjunction with AFSA. When a proposed approach to transition has been formulated, it should be the subject of a reasonable consultation period to enable any concerns and alternative approaches to be ventilated fully.

b. We suggest a number of general principles may be helpful starting points when developing the transitional arrangements. Such general principles will inevitably need to be elaborated and qualified, given the complexity of the law, the existing registration fields and AFSA's knowledge about how the Register has actually been used over the last eleven years. For now, we suggest the following general principles:

i. ***No additional steps:*** as a general principle, a secured party with a pre-amendment security interest perfected by registration should not be required to take any additional steps to ensure that its security interest continues to be perfected at any time post amendment. For example, if a secured party holds an All PAAP (with or without exceptions) or a registration with no end time, it should not be required to interact with the Register to "refresh" that registration during any transitional period after the new laws come into force.

ii. ***No alteration to pre-existing law as it applies to pre-existing security interests:*** as a general principle, pre-amendment registrations should remain subject to the registration requirements that apply immediately prior to the commencement date for the legislative amendments, despite the new law having come into effect. Secured parties should not have the opportunity to "cure"

[6] See part 5 of this submission at recommendation 362 in the table.

ineffective or defective registrations simply because the law is changing.

iii. ***Preservation of authoritative version of the existing Register as of the date of cutover to the new Register:*** the principle in (ii) suggests that for certain purposes it will remain important for there to be a searchable version of the Register ("preserved in aspic") as of the date of transition. In this regard we note that it is currently possible to conduct point in time searches of the PPSR.

iv. ***New Register should be a "one stop shop" to the fullest extent possible:*** despite the principle in (iii), in cases where a registration pre-dates the introduction of the new Register, there should be a special field (labelled, say, "Transitional Matters") for key matters in the superseded Register which are relevant to that registration at the time it was made and which do not fit into the registration fields to be made available under the new Register—e.g. the "original collateral class"; the fact that the registration was registered as a PMSI; or asserted that the secured party has "control" for the purposes of Part 9.5 of the PPSA. Over time, as the number of pre-existing registrations diminish, we expect that the "Transitional Matters" field will become less relevant. All other data in relation to a pre-existing security interest ought to be able to be displayed in fields that are relevant to post-amendment registrations also (e.g. the registration end time, (new) collateral class).

v. ***"Stream" existing registrations into the new collateral classes as part of the transitional process:*** We envisage that pre-existing security interests registered in collateral classes that will not exist in future will be "streamed" automatically into new collateral classes when the new Register goes live as per the "old to new collateral mapping table" appearing as Appendix A to the Government's Response. This streaming should carry any collateral descriptions and serial numbers with it to the greatest extent possible (noting that proposed changes to certain serial number requirements will mean this is not possible in all circumstances). As a general principle, an existing registration should not perfect any security interest that was not covered by the "original collateral class" or the collateral description when that registration was made.

vi. ***Transitional period:*** An SPG could choose to, but will not be compelled to, undertake a post-transition PPSA search and raise with AFSA any questions or concerns about how the SPG's security interests are displayed following the streaming, within a 2-year window. This would be in addition to working groups/testing with all major financial institutions prior to the cut over to the new Register.

c. Temporary perfection should only apply to existing registrations when this is absolutely necessary because it will require the secured party to take further action to achieve actual perfection during the temporary perfection period. As far as possible AFSA should be empowered to make the necessary changes to the Register to ensure existing registrations continue to perfect the security interests covered by those registrations immediately prior to the change in law.

d. These are our initial thoughts only. We are mindful that much careful work remains to be done. We do not intend to be dogmatic. We look forward to the opportunity to participate in a consultation in which the available options are considered in more detail, having regard to the present law and practice in relation to registration.

3. Digital Assets

a. Recommendations 64 to 71 in the Whittaker Review related to certain intermediated securities and financial products, and encouraged further consultation with industry in dealing with mechanisms for perfecting control over such assets.

b. Government did in fact issue a public consultation paper related to this subject in 2020.[7] The BLS made submissions in respect of that consultation. We reiterate our comments made in our submission at that time.[8]

c. In general, we support the amendments that have been proposed, flowing from the Whittaker Review and the responses to the 2020 public consultation paper.

d. However, we are aware that Treasury is presently consulting with industry on financial services regulatory changes to address digital assets (to the extent not already covered by the financial services regulatory regime). We recommend formal cross-portfolio communication between the Attorney-General's department and Treasury on these developments. The conceptual work and industry consultations by Treasury may assist the department to determine what, if any, "perfection by control" mechanisms ought to be included in Part 2.3 of the PPSA for collateral comprising of "digital assets". By "digital assets" we mean collateral, such as crypto assets, to which personal property rights can relate.

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[7] Public consultation paper: *Industry consultation on financial products and the Personal Property Securities Act 2009 (Cth)* 4 September 2020 (https://www.ag.gov.au/sites/default/files/2020-09/ppsact-and-financial-products-consultation-paper--2020.pdf).

[8] Business Law Section submission dated 14 October 2020 (https://lawcouncil.au/publicassets/aa713213-d30d-eb11-9435-005056be13b5/3899%20-%20Industry%20consultation%20on%20financial%20products%20and%20the%20Personal%20Property%20Securities%20Act%202009%20%20Cth.pdf)

e. We also recommend reviewing recent initiatives in overseas jurisdictions:

   i. As noted by the UK Law Commission in its "Digital Assets: Final Report" (June 2023)[9] stable collateral arrangements would enable users to "extract value from what otherwise could be underutilised assets. They might also have the potential to support increased market efficiency and stability by improving liquidity and more effective management of counterparty credit risk."[10]

   ii. Albeit in a different commercial and legal context, perfection by control provisions in relation to "controllable electronic records" have been included in the United States' Uniform Law Commission and American Law Institute's "Uniform Commercial Code Amendments (2022)".[11] In particular, we refer to the Prefatory Note to Article 12 elaborating on the purpose behind the amendments in that regard.

[9] https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/06/Final-digital-assets-report-FOR-WEBSITE-2.pdf
[10] *Ibid*, at paragraph 8.3.
[11] https://higherlogicdownload.s3-external-1.amazonaws.com/UNIFORMLAWS/d5bcf850-366f-b4b5-e7d6-6749ba2382c6_file.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1700636916&Signature=HbUajVvdekocHWvQyfZpyxq7By8%3D

Annexure A: BLS Recommendations

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
51	That Government: • provide stakeholders with an opportunity to present further arguments in support of the competing models that have been proposed to explain the reach of the concept of "rights in the collateral" in section 19(2)(a), including by allowing proponents of the "possession" model to complete a corresponding version of the table that is attached to this report as Annexure C; • decide on the basis of the discussion in this report and that further input, which of those two models it prefers; and • include an	**Accept in part**	**Schedule 3 — Explanatory Memorandum—** Paragraph 105	We note that paragraph 45 in Schedule 2 of the EM and paragraph 105 in schedule 3 to the EM support the 'unitary model' interpretation of the PPSA. We argue that this is the preferred model for interpreting and understanding the PPSA. We would be pleased to provide copies of papers and articles supporting the unitary model interpretation of the PPSA if required but we expect Government has already been provided with the papers and articles published on this topic since the Whittaker Report. **Recommendation: The EM clearly states that the unitary model, as described in the Whittaker Review (including Annexure C to the Final Report), reflects the manner in which the PPSA is intended to be interpreted.**

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
	explanation of the preferred model in the Explanatory Memorandum for the legislation that amends the Act to implement other recommendations in this report.			
59	That section 20(2) be amended to make it clear that the requirements in the section need only be satisfied with the original grantor of a security interest over collateral, and not with a person who subsequently becomes the grantor as the result of the collateral being transferred to it.	**Reject**	This recommendation is not proposed to be pursued as it was considered that there is sufficient clarity in the current provisions	In our view, the clarification sought to be made by recommendation 59 is worthwhile making and would bring greater certainty around this issue. For further details around the issue please refer to Bruce Whittaker's paper titled "*Dealings in collateral under the Personal Property Securities Act 2009 (Cth) - in search of a "Harmonious Whole*"[12]. **Recommendation: The Government should revisit this issue and accept recommendation 59.**
89	That item 2 of the table in clause 4.1 of Schedule 1 to the	**Accept in part**	**Regulations** Section 24	The proposed regulation 24 does not accept the recommendation in its entirety but rather makes it permissible (rather than mandatory) for a financing statement to disclose whether or not collateral is subject to circulating asset control.

[12] Whittaker B: "*Dealings in Collateral under the Personal Property Securities Act 2009 (Cth) - In search of a "Harmonious Whole*" (2013) 24 Journal of Banking and Finance Law and Practice 203

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
	Regulations (Prescribed matters—financing statement) be deleted.			We do not believe it should be necessary for a financing statement to indicate if collateral may be subject to circulating asset control. This issue is only relevant to the insolvency provisions in the Corporations Act, not the PPSA, and it involves a number of issues of fact and law that are typically assessed by insolvency practitioners in the event of a grantor's insolvency. Including this indication in a financing statement would have little, if any, relevance to the ultimate application of the relevant insolvency provisions but it does make the PPSR registration process more complicated and confusing than it needs to be. **Recommendation: Item 2 of the table in clause 4.1 of Schedule 1 to the Regulations (Prescribed matters—financing statement) should be deleted altogether.**
93	That the collateral classes on the Register be changed to the following 6 classes: • serial-numbered property (with appropriate sub-classes for the different types of serial-numbered property); • other goods; • accounts; • other intangible	**Accept**	**Regulations** Section 20	We broadly agree with the proposed new collateral classes but query if a separate class is required for "accounts". We think accounts could be part of the proposed collateral class for "intangible property, and financial property." **Recommendation: The proposed separate collateral class for "accounts" should not be implemented.**

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
	property; • all present and after-acquired property; • all present and after-acquired property except.			
98	That item 4(d) of the table in section 153(1), and clause 2.4 of Schedule 1 to the Regulations, be deleted.	**Reject**	It is considered important that registrants continue to identify and describe proceeds.	**Refer to our submission in relation to Recommendation 130.**
101	That Government explore whether the current definition of "motor vehicle" in reg 1.7 of the Regulations could be amended so that a vehicle is a motor vehicle (and is only a motor vehicle) for the purposes of the Act and the	**Accept**	**Significant Amendment**	We note that the Whittaker Report recommended that the Government explore the current definition of 'motor vehicle', rather than recommending that the definition be changed. We are of the view that the Government should consult more broadly on the changes, as the change as proposed would result in a broad range of construction related equipment (and some older vehicles that do not have a VIN) not being a 'vehicle'/'motor vehicle', leaving potential buyers or lessees in a position where the taking free rules for searching by serial number would not apply (resulting in increased costs when buying or hiring equipment). As mentioned in our response to recommendation 149, the proposed change could lead to further confusion for a broad range of construction and earthmoving

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
	Regulations if it has a vehicle identification number.			equipment that are issued 17 digit 'Product Identification Numbers' (**PINs**) under ISO 1026—Earthmoving machinery—Product identification numbering system. Due to the similarities in appearance between a PIN and a VIN, members of the public could easily mistake a 17 digit serial number for a VIN (when it in fact a PIN), and then mistakenly believe that the taking free rules apply as a search of the serial number did not reveal a registration. **Recommendation: That further consultation be conducted before changing the definition of 'motor vehicle'.**
104	That Government consider whether clause 2.2(3)(d) of Schedule 1 to the Regulations should be amended to provide that the serial number for a watercraft that does not have an official number is its International Maritime Organisation (IMO) number, if it has one.	**Accept to consider / consult**	The department is seeking stakeholder input in relation to this recommendation. Please refer to part 4 of the discussion paper for further information.	We think this change would be appropriate. However, the Government should clarify if the IMO number is intended to replace a HIN or if it will be used as an additional identifier. We believe it should be an additional identifier as mentioned below. **Recommendation: The Regulations should be amended to provide that for a watercraft:** • **if the watercraft has, or is required to have, an Official Number, this is the serial number;** • **if the watercraft does not have, and is not required to have, an Official Number but it has, or is required to have, an IMO number, the IMO number is the serial number; and** • **if the watercraft does not have, and is not required to have, either an Official Number or an IMO number, but it has, or is required to have, a HIN, the HIN is the serial number.**
110	That the Regulations be amended so that a registration to perfect	**Accept**	**Regulations** Subsection 14(2)	Since the Whittaker Report was published in 2015 we think many legal professionals and financial institutions have come to the view that the identifying details when taking security over trust assets should remain as the ABN of the trust. This is due

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
	a security interest over trust assets should be made against the relevant details for the trustee, rather than the ABN or other identifying details for the trust.			to the number of trusts administered by some trustee companies which would make it difficult to search for security over a particular trust's assets if the ABN requirement is removed and the systems, documents and processes many organisations have in place to address the current trust identifier requirements. **Recommendation: The existing requirement for a registration to perfect a security interest over trust assets should be maintained, i.e. that the registration be made against the ABN for the trust.**
111	That a registration relating to assets of a trust not be required to include the name of the trust.	**Accept**	**N/A**	**Refer to our response in relation to Recommendation 110.**
113	That Government consider whether a registration should be able to be made against a scheme's ARSN if the security interest is granted by the scheme custodian, rather than the responsible entity.	**Accept**	**Regulations** Section 17—*Item 1 of table*	We do not think Note 2 in paragraph 17(1) of the draft Regulations is sufficient to clarify this issue. **Recommendation: The relevant clarification should be included in the table in paragraph 17(2) of the draft Regulations.**
116	That it be made clear that a registration against multiple grantors is only effective to perfect a security interest that	**Accept**	**Act—Schedule 5** Item 23—Section 153 , item 2 of the table	Proposed s153(2) would prevent a secured party (e.g. RoT supplier or lessor) doing one registration to protect its security interest against all members of a corporate group unless every member of the group is a grantor for every RoT supply agreement or lease. This is a fairly common practice, particularly among RoT suppliers. This change would result in increased costs for suppliers due to them having to make more individual grantor registrations.

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
	is granted by them jointly.			Because the PPSR is a notice-based register we do not think this amendment is necessary or justified. The Register merely alerts searchers that the named grantors (or any combination of them) have given security to the named secured parties (or any combination of them). The proposed amendment does not remove uncertainty because a security agreement will typically be granted jointly and severally where there are multiple grantors and some of the relevant collateral may be owned by the grantors (or some of them) jointly or it may be owned by some of the grantors severally or it may be owned by only one grantor. Because of this it is our view that this amendment may cause more confusion and uncertainty than it resolves. **Recommendation: That the proposed amendment not be made. However, if it is to be adopted then the drafting of section 153(2) will need to be more nuanced to address the range of scenarios in which multiple grantors sign security agreements and hold property subject to such security agreements.**
130	That section 151(1) be amended to provide that a registrant must include a further description of the collateral in the free text field, using the information that is reasonably available to the registrant at the time the registration is	**Reject but clarify**	**Act—Schedule 5** Item 23—Section 153 (item 4 of the table)	In our view proceeds do not need to be described in a financing statement. Section 32 provides that a security interest automatically attaches to proceeds unless the relevant security agreement provides otherwise. **Recommendation: The requirement to describe proceeds should be removed as a requirement for inclusion in financing statements.**

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
	made, but that the section not specify the level of detail that the further description needs to satisfy.			
132	That section 167 be amended so that: • it applies (and applies only) to registrations against individuals (or to registrations against serial-numbered property that do not include the grantor's details because the grantor is an individual); and • it only requires the secured	**Accept**		In our view, the proposed drafting of section 167 does not reflect recommendation 132 of the Whittaker Report (as it does not make any mention of the secured party's awareness). **Recommendation: The proposed drafting of section 167 be revisited and amended to better reflect recommendation 132 of the Whittaker Report.**

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
	party to remove a registration from the Register within 5 business days after it becomes aware, or should reasonably have become aware, that it no longer has any security interest over any collateral that is perfected because of the registration.			
137	That regulation 5.9(g) of the Regulations be deleted, and that the balance of regulation 5.9 be simplified.	**Accept**	**Act—Schedule 5** Item 43—Section 181	A failure by a secured party to show cause within the period specified in section 181(4)(b) may well lead to the Registrar registering a financing change statement under section 181(3) as soon as practicable thereafter, unless there is other evidence available to the Registrar indicating that there are reasonable grounds to believe that there continues to be an actual or contingent debt secured

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
				by a security interest (see sections 178, 182(3) and (5)). It is possible that the subject registration may have been made by the secured party quite a number of years before. The circumstances and sophistication of secured parties may vary and be affected by the passage of time. Balancing this against the potential consequences of removal of the registration (e.g. vesting or loss of priority), it is submitted that a modest enlargement of the time periods would be appropriate to mitigate somewhat against the risks of failing to respond/show cause in time due to inadvertence or a failure to understand the process. **Recommendation:** • **the period of 10 business days specified in proposed section 181(4)(b) should be amended to provide a longer period of 20 business days for a secured party to show cause in response to a notice from the register under section 181(4); and** • **the period of 5 business days specified in proposed section 181(1)(b) should be amended to provide a longer period of 10 business days for a secured party to register a financing change statement if it wishes to do so.**
149	That Government separately consider whether it wishes to facilitate the establishment of a register of construction and heavy industry machines.	**Accept to consider / consult**	The department is seeking stakeholder input in relation to this recommendation. Please refer to part 4 of the discussion	We do not see the need for a separate register. All that would achieve is fragmentation of the security law for certain types of equipment. One issue in changing the definition of 'motor vehicle' to only capture those with VINs, is that the search by serial number functionality and taking free rules will not apply to the vast majority of construction equipment that the public may assume are 'motor vehicles' (as they have four wheels and a 17 digit 'Product Identification Number' (**PIN**) that looks like a VIN, but is instead issued under ISO 1026—Earthmoving machinery—Product identification numbering system). The issue is that a serial number search of such construction equipment is no longer relevant or appropriate. See our comments in relation to Recommendation 101 in this regard.

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
			paper for further information.	The Government may want to consider whether construction and earthmoving equipment that is allocated a PIN under the above standard could be classified as serial numbered property, as that would reduce potential concerns as to the consistency and reliability of other types of serial number. **Recommendation: No separate register for construction and heavy industry machines is required.**
169	That Government consider further whether the Act should continue to provide that a transfer of collateral subject to a security interest will cause the transferee to become the grantor of that security interest, or whether the Act should be amended to reflect the alternative approach taken under the Canadian PPSAs and the NZ PPSA.	**Accept to consider / consult**	The department is seeking stakeholder input in relation to this recommendation. Please refer to part 4 of the discussion paper for further information.	Section 7.2 in the Whittaker Report suggests that treating the transferee of collateral as the grantor, in place of the transferor, is different from the approach taken in Canada and NZ. With respect, we do not think this statement is entirely correct. Section 51 in the Saskatchewan PPSA (and similar provisions in the other Canadian PPSAs) contemplates that when collateral is transferred subject to a security interest the secured party will amend its registration to disclose the name of the transferee "as the new debtor" or lose priority. Section 88 in the NZ PPSA is similar. The Whittaker Report suggests the requirement in section 34 is unique to Australia but we do not think it is all that different to the Canadian and NZ approach. Section 34 in our PPSA refers to the security interest becoming unperfected whereas the Canadian and NZ legislation refers to the security interest being subordinated to other security interests, along the same lines as sections 66 to 68 in our Act. All jurisdictions effectively require registration against the transferee. The Whittaker Report observes in sections 7.2 and 5.2.3 that there is some uncertainty around a number of issues relating to the effect of a transfer of collateral (e.g. does the security agreement between the original grantor/transferor and the secured party suffice in relation to the requirement for a security agreement section 20(2)), however, we do not think there was any intention to take a fundamentally different approach to the Canadian provinces and NZ regarding the transfer of collateral subject to a security interest other than in relation to continuity

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
				of perfection. We do not agree with the premise of recommendation 169 and we do not think the Act requires further amendment in this regard. **Recommendation: No change is required.**
170	That Government expand the further consultation process described in Recommendation 51 to include consideration of the extent to which the competing models described in that Recommendation will affect the position of a lessor of collateral that is subsequently subleased by the lessee to a sublessee.	**Accept**	**N/A**	**Refer to our response in relation to Recommendation 51**
171	That Government expand the further consultation process described in Recommendation 51 to include consideration of the extent to which the competing models described in that	**Accept**	**N/A**	**Refer to our response in relation to Recommendation 51**

Rec No.	Whittaker Recommendation	Government response	Government explanatory notes	BLS comments and recommendations
	Recommendation will affect a security interest over collateral that is leased by the grantor to a lessee, where the lessee subsequently becomes insolvent in a way that causes the grantor's interest in the leased goods to vest in the lessee under section 267.			
180	That the Act be amended to provide that a security interest over collateral that is perfected by registration is automatically perfected over any proceeds of that collateral.	**Reject**	It is important that secured parties continue to meaningfully engage with the PPS Register and ensure their registrations correctly align with the terms of any security agreement.	We disagree with the proposed rejection of Recommendation 180. Refer to our comments for Recommendation 130. **Recommendation: Recommendation 180 should be reimplemented and it should not be necessary to describe proceeds in a financing statement.**
182	If	**Accept**	**N/A**	**Recommendation: If Recommendation 180 is adopted section 33(1)(c) could**

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	Recommendation 180 is not adopted, that section 33(1)(c) be retained.			**be deleted.**
206	If Government decides (pursuant to Recommendation 169) to allow the Act to continue to provide that a transfer of collateral subject to a security interest makes the transferee the grantor of the security interest, that Government consider whether section 52 should be amended to provide that it does not apply to a security interest that is temporarily perfected under s34.	**Accept to consider / consult**	The department is seeking stakeholder input in relation to this recommendation. Please refer to part 4 of the discussion paper for further information.	We do not think any change is required. The current provisions favour a purchaser over a temporarily perfected secured party but, on balance, we believe this is appropriate. **Recommendation: No change is required.**
220	That the Act be amended to confirm that the priority position as between competing security interests is determined at the	**Accept in part**	**Act—Schedule 3** Item 58—Section 55 B	Proposed section 55B is not consistent with the recommendation. Case law suggests security interests "come into conflict" when a receiver is appointed or enforcement commences. This proposal opts for the time of distribution at the end of the enforcement process. We think it would be preferable for priority between competing security interests to be determined when these security interests "come into conflict". Indeed, it is necessary to determine the priority position of competing

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	time when they come into conflict.			security interests at the time of enforcement for the purpose of applying Chapter 4 provisions e.g. sections 118, 119, 129 and 144K. **Recommendation: The proposed section 55B be amended to be consistent with Recommendation 220.**
234	That the Act be amended to enable PMSIs in inventory to be cross-collateralised, to the extent that the items of inventory are not separately identifiable.	**Accept**	**Act—Schedule 3** Item 13—Subsections 14(7) and 14(7A)	Subsection 14(7B) does not implement the recommendation that PMSIs in inventory should only be able to be cross collateralised to the extent that items of inventory are not separately identifiable. The proposed amendments appear to permit the cross collateralising of an "all moneys" RoT in inventory even if paid inventory can be distinguished from unpaid inventory in an insolvency (so long as the inventory is not required or permitted to be described by serial number). Subject to our comments below, we support these amendments, even though they are not on all fours with the Whittaker Recommendation. **Recommendation: We agree with the proposed implementation. Given the expanded meaning given to "collateral", as a result of the inclusion of section 14(7A)), we would recommend amending section 14(7)(a) and (b) to make it clear that the purchase money obligations are only those that are outstanding (as opposed to the purchase price of any inventory in which the secured party has held a PMSI and for which the secured party has already been paid). The amendment could read as follows:** ***"(7) This subsection covers an obligation of a debtor incurred:*** ***(a) as all or part of the outstanding amount of the purchase price of the collateral; or*** ***(b) for the outstanding amount of the value given to enable the grantor to acquire or use the collateral (provided the collateral is so acquired or used)"***

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244	That section 64 be amended to provide that an accounts financier can use the section to take priority over both a PMSI held by an inventory financier in the proceeds of its inventory, and over a non-PMSI security interest held by the same inventory financier in those proceeds.	**Accept**	**Act—Schedule 3** Item 64—Subsection 64(1A)	The use of the term "inventory financier" is potentially confusing in the proposed new section 64. Presumably the concept is intended to capture RoT suppliers who would not typically see themselves as "inventory financiers". **Recommendation: Change the reference "inventory financer" to "inventory secured party" or something similar; change "inventory financer's PMSI" to "inventory secured party's PMSI" or something similar; and change "inventory financier's non-PMSI" to "inventory's secured party's non-PMSI" or something similar.**
247	That section 64 be amended to require that the relevant registration be against the collateral class "accounts".	**Accept**	**Act—Schedule 3** Item 64—Subsections 64(1A)-(2)	We query if a separate collateral class is required for accounts if the sole purpose of this separate class is as described in proposed new section 64. **Recommendation: Refer to our submission regarding Recommendation 93.**

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256	That the Act not be amended to address whether a trustee's lien ranks ahead of or behind a security interest over the assets of the trust.	**Accept**	**N/A**	A trustee's equitable right of indemnity and lien has been found to satisfy the requirements of section 73(1) of the PPSA; *Frances, in re Fotios v Helios Corporation Pty Ltd* [2022] FCA 199. However, despite the court's finding that the trustee's right of indemnity and lien against trust assets satisfied the requirements of section 73(1), there is some doubt as to whether section 73 is intended to apply to such a lien. This is because it is arguable that, as a matter of general law, the trustee's lien operates as against the trust beneficiaries and does not affect secured parties with properly perfected security interests in the trust asset. This is unlike most liens that compete with security interests in the relevant collateral. The trustee's lien should not, in our view, rank ahead of a perfected security interest in the trust assets and we believe this issue should be clarified. **Recommendation: The Act should be amended to clarify that such liens do not rank ahead of a perfected security interest in the trust assets.**
264	That Government consider further, in consultation with industry and through consideration of the position in Canada and under Article 9, whether the commingling rules should be extended to commingled intangibles.	**Accept to consider / consult**	The department is seeking stakeholder input in relation to this recommendation. Please refer to part 4 of the discussion paper for further information.	**Recommendation: The commingling rules be extended to intangibles.**

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266	That section 101 be amended so that it limits the amount recoverable under a security interest, not just its priority.	**Accept**	**Act—Schedule 3** Item 86—Subsections 102(2) and 103(2)	Drafting of proposed section 102(2) could be clearer regarding "at that time". It is not entirely clear what time is being referred to. **Recommendation: That the proposed section 102(2) be changed to refer to the time when the goods became processed.**
273	That Government consider further whether: • the exclusion from section 81 of construction contracts and financial services contracts is appropriate; and • section 81 should be amended to make it clear that the transfer may not adversely affect the obligor on the account.	**Accept in part**	**Act—Schedule 3** Item 75—Part 2.7, section 81	The proposed section 81B is unclear. The proposed section 81B should be clarified so that it is clear that the words "would make performance of the account contract more onerous" are intended to be references to the performance of the account contract being more onerous for the account debtor. In our view a note should also be included to make it clear that the mere fact that the account holder needs to re-direct a payment into a different account will not make the performance of the account contract more onerous. **Recommendation:** • **The term "account contract" should be defined.** • **The proposed section 81B should be amended so that the words "would make performance of the account contract more onerous" refer to the performance of the account contract being more onerous for the account debtor.** • **A note should also be included to the effect that the mere fact that the account holder needs to re-direct a payment into a different account does not make the performance of the account contract more onerous.**
274	That Chapter 4 be amended to make it clear that the	**Accept**	**Act—Schedule 4**	We are concerned that there is an inconsistency between the proposed provision and the Explanatory Memorandum.

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	following principles apply: 1. A secured party may use enforcement remedies in its security agreement or under laws outside the Act (even if they parallel remedies contained in Chapter 4) without needing to comply with any corresponding notice or other requirements in Chapter 4, except to the extent that a provision in Chapter 4 expressly states that it applies to the exercise of remedies outside the Chapter. 2. If a secured party elects to rely on a remedy provided		Item 1—Chapter 4	It appears that the intent from the drafting is that none of the mandatory rules affect contractual rights, powers and duties contained in security agreements—they are just mandatory as regards the exercise of rights provided for by Ch 4: see section 107 Guide to this Chapter in stating that "This Chapter does not affect any rights and remedies that the parties to a security agreement have, apart from this Act, against each other." and section 112. But the Explanatory Memorandum (Schedule 4) at 42 is to the opposite effect, and, for e.g., the new section113 seems unclear in this context. The position should be clarified. See our submission in relation to [280], noting the following statement contained in the guide in section 107: "This Chapter does not affect any rights and remedies that the parties to a security agreement have, apart from this Act, against each other." Note also what is stated in the proposed section 112. However, the Explanatory Memorandum (Schedule 4) at 42 states that "Mandatory enforcement rules apply to the enforcement of all security interests, whether that interest is enforced following Chapter 4, according to the terms of the security agreement, or through other means." The Explanatory Memorandum at 42 should reflect the proposed section 107 and section 112 and should make it clear that mandatory rules such as those contained in section 113 and section 131 apply only to exercise of rights contained in Chapter 4 and not to contractual rights or powers contained in a security agreement. This was the intent when Ch 4 was introduced: see e.g. clause 4.1 of the of the Replacement Explanatory Memorandum which stated "The Bill would not codify the rights, duties and obligations of the parties to a security agreement as the parties should be free to negotiate their own contractual terms, subject to the provisions of

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	by Chapter 4, it must comply with the associated notice or other requirements in the Chapter, except to the extent that the secured party and the grantor agree otherwise in accordance with section 115.			the Consumer Credit Code (the Code), to the extent that it is able to operate concurrently" and clause 4.6 of the Replacement Explanatory Memorandum which stated "The enforcement provisions would not diminish the rights and remedies available to parties, whether those remedies are provided for by the security agreement, any Commonwealth or State and/or Territory law and/or any rule of law or equity (clause 110)…" **Recommendation: The Explanatory Memorandum at 42 should reflect the proposed section 107 and section 112 and should make it clear that mandatory rules such as those contained in section 113 and section 131 apply only to exercise of rights contained in Chapter 4 and not to contractual rights or powers contained in a security agreement.**
276	That section 109(1)(b) be deleted.	**Accept**	**Act—Schedule 4** Item 1—Chapter 4, subsection 109(1)	We agree that the reference to "incidental" to a transfer of an account or chattel paper in current section 109(1)(b) gives rise to some ambiguity. Whittaker noted that two respondents had suggested this may be necessary to address turnover trusts [8.1.3.2]. Whittaker suggested that "... such a trust is highly unlikely to be a security interest in the first place, as the transferor is simply agreeing to hold on trust for the transferee an amount of money that belongs to the transferee." However, section 268(2) provides for a trust to give rise to a security interest. Section 268 excludes such trusts arising under subordination arrangements from the vesting rules - See also section 599FN(1) CA. **Recommendation: Replacement (b) could be drafted following from language in s 268(2) [to be amended in recommendation 330 below] to make it clear that s 109 does not apply to turnover trusts.**
280	That section 111 not	**Accept**	**Act—**	Consistently with proposed sections 107 and 112, it appears that the drafting

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	be amended.		**Schedule 4** Item 1— Chapter 4, section 113	intention is that the proposed section 113 applies only to rights, duties and obligations that arise under the statutory provisions of Chapter 4. However, the change in drafting by deleting the words "that arise under this Chapter" and the use of the words "in the enforcement of a security interest" together with the statement contained in the Explanatory Memorandum (schedule 4) at 42, suggests that contractual powers and rights under security agreements could be subject to the operation of section 113. This change in drafting is not consistent with the intention of Recommendation 280 which was that section 111 not be extended to rights, duties and obligations under a security agreement and that the general law should continue to regulate the exercise of rights, duties and obligations under security agreements. See paragraphs 8.1.7.2 and 8.1.7.3 of the Whittaker Review Final Report. Contrary to what is stated in the Response Index, the drafting of proposed s 113 does not appear to reflect the recommendation. This should be clarified by reinstating in the proposed section 113 the words "under this Chapter" which appear in s 111 and amending the Explanatory Memorandum as suggested at [274] above. A secured party should be entitled to enforce all or any of its rights in accordance with the terms of the security (obviously within the bounds of established legal principles). If the proposed section 113 were extended to apply to the exercise of powers under security agreement documentation, such as the right to appoint a receiver, this would not be consistent with, and would go much further than, other legislative regulation on the exercise of rights under securities: e.g. section 420A Corporations Act and the general law duties of good faith and like. **Recommendation: The words "under this Chapter" should be reinstated in the proposed** section **113.**
286	If section 116 is retained, that it be	**Accept**	**Act— Schedule 4**	Section 131 of the current PPSA is expressly limited to a disposal under section 128 (i.e., not under a power in the security agreement). The drafting proposed for the

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	amended to reflect these principles more clearly: • Chapter 4 does not apply to property if the property is in the hands of a receiver, or a receiver and manager, unless the grantor of the security interest is an individual. • Section 131 does not apply in relation to property while a person is a controller of the property, unless the grantor of the security interest is an individual. • The parties to a security agreement can also agree that any other provision of Part 4.3 will not apply to property that is in the hands of a controller other than a receiver or receiver and manager, unless the grantor of the		Item 1—Chapter 4, subsection 109(3) and subsection 131(2)	new section 131 could be read so that the section 131 duty applies to disposals by a secured party under s 128 "or otherwise", when taken with the statement at paragraph 42 Explanatory Memorandum (Schedule 4). See our submissions at [274] and [280] above. We submit that the proposed section 131 should be amended by deleting the words " (whether under section 128 or otherwise)" and replacing them with the words "under section 128". We submit this, when read with the new section 128 and section 130, better reflects the intention of the new section 131 as indicated at 138–141 of Explanatory Memorandum (schedule 4), consistently with proposed sections 107 and 112. **Recommendation: The proposed section 131 should be amended by deleting the words "(whether under section 128 or otherwise)" and replacing them with the words "under section 128".**

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	security interest is an individual.			
287	That Government consider further whether the nature of company receiverships is such that they need to remain outside Chapter 4, taking into account Government's deliberations on the extent to which provisions in Chapter 4 should be mandatory to all enforcement processes, and that section 116 be retained or deleted in accordance with Government's conclusion.	**Accept to consider / consult**	The department is seeking stakeholder input in relation to this recommendation. Please refer to part 4 of the discussion paper for further information.	There is no need for additional requirements under the PPSA to be overlaid on receivers as receivers' duties and obligations arise under the Corporations Act, the security agreement and at law. It is unnecessary and could unduly delay and adversely impact the realisation of proceeds for creditors. The policy reason for imposing Ch 4 obligations reflects that secured parties may not always be experienced in enforcement; and this policy reason cannot be said to apply to professional receivers. Once appointed, receivers will invariably act as agent of the grantor, under the terms of security agreement and statutory powers (i.e., under the Corporations Act); and not as agent of the secured party. The application of Ch 4 to receivers would not readily sit with the appropriate characterisation of the role of a receiver. **Recommendation: No broadening of the application of Chapter 4 should occur.**
313	That section 130(5)(b) be deleted.	**Accept**	**Act—Schedule 4** Item 1—Chapter 4,	We disagree with proposed amendment (i.e. the deletion of the notice requirement is limited circumstances). The existing section 130(5)(b) is reasonable, and this should be retained to allow swift action when required. For example, where the goods are perishable, there would necessarily be a material decline in value if disposal is

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			subsection 130(5)	delayed. **Recommendation: That the section be retained.**
314	That section 130(5)(c) be amended to provide that it applies if the secured party believes on reasonable grounds that there will be a material decline in the value of the collateral if it is not disposed of before the end of the period that would have applied under section 130(3) if the notice had been given (rather than "immediately").	**Accept**	**Act—Schedule 4** Item 1—Chapter 4, paragraph 130(5)(b)	**See recommendation 313.**
330	That section 268(1)(a)(ii) be amended to read: "(ii) a PPS lease;".	**Accept**	**Act—Schedule 4** Item 129—Subparagraph 268(1)(a)	Although we understand the arguments for making this change we do not think it is likely to improve the outcome for an unperfected lessor under a PPS lease that is not an in substance security interest because any perfected competing secured party will be entitled to the leased asset. More importantly, in circumstances where there is no competing perfected security interest this change is likely to increase disputes as to whether a particular PPS lease is also an in-substance security

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				interest in circumstances where this is not clearcut. **Recommendation: The proposed amendment is unnecessary and should not be made.**
356	That sections 340 to 341A be amended so that collateral is only a "circulating asset" of a grantor if it is inventory (in the ordinary meaning) of the grantor (other than inventory that is subject to a PMSI), or its proceeds.	**Reject but clarify**	**Act—Schedule 7** Item 33—Sections 339–341A Item 28—Corporations Act 2001—Sections 51 CA and 51CB	We believe the Government should reconsider Recommendation 356. The circulating security interest concept and related definitions are overly complex, confusing and need to be streamlined, if not as per Recommendation 356, then in some other manner that results in a genuine improvement in this area of the law. Policy objectives should be capable of being achieved without the abstraction and complexity found in the current arrangements. The concept of a grantor's "usual practice needs to be clarified, in the current provisions and the proposed provisions, in relation to inventory ('*the grantor's usual practice is to comply with the agreement') and* in relation to accounts ('*the usual practice is for such amounts to be so deposited'*). The case law makes it clear that the time for assessing whether an asset is circulating or not is at the relevant date (i.e. the appointment of receivers, administrators or liquidators). The question we have is around what time period it must be the usual practice? For example, if there is a 'control event' under a security document 72 hours before the appointment of receivers, administrators or liquidators and that contractually obliges a grantor to comply with proposed section 51CB(4), and they do so for 48 hours (because it takes the secured creditor and the grantor 24 hours to set up the controlled account and they then deposit all debtor receipts into the account), does that mean that the usual practice of the debtor is for such amounts to be so deposited (because they have complied since the controlled account was set up)?

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				Or is the intention to be that this is an arrangement that has been in place between the secured creditor and the grantor for long enough since the granting of the security that it is the usual practice between them since granting of the security (or the entry into of the relevant facility agreement)? The same question arises in relation to inventory. although the amendments (i.e. that there is now a requirement that there be an agreement in relation to 'specific items of inventory' that they be allocated to the security interest) may make this less of an issue for inventory than accounts. **Recommendation:** • **Government should reconsider Recommendation 356. The circulating security interest concept and related definitions are overly complex and confusing and they need to be streamlined, if not as per Recommendation 356, then in some other manner that results in a genuine improvement in this area of the law. Policy objectives should be capable of being achieved without the abstraction and complexity found in the current arrangements.** • **section 51CB(4) be amended to require that the grantor's usual practice for such amounts to be so deposited must be since the security interest first attached to the account.** • **section 51CB(2) be amended to require that the grantor's usual practice to comply with the agreement must be since the security interest first attached to the items of inventory.**
358	If sections 340 to 341A are not amended in accordance with	**Reject but clarify**	**Act—Schedule 7** Item 28—Corporations	Refer to our submission in relation to recommendation 89. Whether or not a secured party has a "circulating security interest" under the Corporations Act in respect of certain kinds of collateral is not relevant to the PPSA

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	Recommendation 35 6, and the Register continues (despite Recommendation 89) to allow a person registering a financing statement to indicate whether or not the secured party may have control, that section 340(2) be amended to make it clear that an ADI that is perfected by control over an ADI account does not need to register a financing statement and indicate that it has control, in order to cause that ADI account not to be a circulating asset for the purposes of section 340.		Act 2001— Sections 51 CA and 51CB	itself. Including this information in financing statements will not ultimately be determinative as to whether a secured party has control of circulating assets under the Corporations Act but it does complicate the registration process. **Recommendation: All references to "control" or "circulating asset control" should be removed from financing statements.**
362	That section 588FL of the Corporations Act be repealed.	**Reject**	Section 588FL is intended to discourage and protect	We strongly disagree with the Government's response on this recommendation. Recommendation 362 should be implemented. Section 588FL unnecessarily complicates commercial transactions for no obvious benefits. Secured parties are adequately incentivised to perfect as soon as possible due to the potential loss of

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			against fraudulent claims prior to a company's insolvency.	priority (including PMSI priority) and vesting under the PPSA. There are number of technical and practical problems with section 588FL. For example, section 588FL refers to the vesting of a 'security interest' by reference to the 'registration time', when there can be multiple 'registration times' for the one security interest (as contemplated by Note 3 to s160 in the existing PPSA, and under the proposed new definition of 'registration time' in s 160 of the Bill that determines the registration time by reference to a particular registration). One effect being that if a secured party has a security interest over collateral that is registered with the appropriate timeframes (so that section 588FL does not invalidate the security interest), but the secured party puts in place a later registration (that is more than 20 business days after the date of the security agreement and within 6 months of the critical time), then section 588FL may arguably provide for the underlying security interest to vest in the grantor (when the security interest would not otherwise vest in the company if the secured party did not put in place the later registration). There are very legitimate reasons why a secured party may need to make a second or subsequent registration relating to the same security agreement. For example, a secured party takes a General Security Deed ("GSD") and registers an ALLPAP within the 20 business days prescribed under section 588FL. The secured party subsequently agrees to lend the grantor money to purchase a vehicle so they register against the motor vehicle using the VIN within 15 business days of the grantor obtaining possession of the vehicle (so it can claim a PMSI) but outside the 20 business days specified under section 588FL. The PMSI for the vehicle arises via the GSD and the fact the secured party has made the further advance to enable the purchase of the vehicle, there is no need for another security agreement to be entered into provided there is sufficient evidence of the advance and its application to purchase the vehicle.

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				Section 588FL(2) could be more clearly drafted (if, contrary to our submission, it remains) to instead provide that it only applies where the security interest is: (a) perfected by a registration that has a registration time that is after the times set out in section 588FL(2)(b); and (b) not perfected by any other means (including an earlier registration). Another problem with section 558FL is that the 20 business days starts from when "the security agreement that gave rise to the security interest came into force". This is inconsistent with the PPSR being a notice register rather than a document register and it does not have regard to different security interests arising in respect of different collateral under the one document from time to time. This constraint also does not sit well with supply, lease and other commercial agreements that are signed (and come into force at that time) but have a long lead time before equipment or goods are actually delivered (which is when the security interest attaches/arises). Many commercial parties have been tripped up by not registering within 20 business days of signing a document even though they register before the security interest attaches and within the period for claiming a PMSI under the PPSA. **Recommendation: That section 588FL of the Corporations Act be repealed.**
363	If section 588FL of the Corporations Act is retained despite Recommendation 362, that it be amended: • to remove references to "deeds of company	**Accept to consider / consult**	Further consideration will be required on this recommendation given the proposed response to recommenda	If section 588FL is retained, then we consider further amendment of the section will be required to address other complications that can and have arisen. As we note in our comments at [362] above, section 588FL(2) could be more clearly drafted (if, contrary to our submission, it remains) to instead provide that it only applies where the security interest is: (a) perfected by a registration that has a registration time that is after the times set out in section 588FL(2)(b); and

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	arrangement"; • to allow for the possibility that a security interest can be perfected by means other than registration; and • so that it does not apply to deemed security interests, consistent with section 267.		tion 362.	(b) not perfected by any other means (including an earlier registration). The reference in section 588FL(2)(a) to "or, if the security interest arises after the critical time, when the security interest arises" should be removed, and a new subsection (3) should be added that: "This subsection does not cover a PPSA security interest if it is created after the critical time." Such an amendment would avoid the extra expense incurred by a liquidator, voluntary administrator or deed administrator when applying to fix a later time under s 588FL(2)(b)(iv) in any corporate insolvency rehabilitation, as occurred in *KJ Renfrey Nominees Pty Ltd (Trustee), in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd* [2017] FCA 325 (Davies J) and other Federal Court decisions. This accords with the view of Brereton JA in *Re Antqip Pty Ltd (in liq)* [2021] NSWSC 1122. However, even such an amendment is not entirely satisfactory, as it does not cater for security interests that attach after the critical time as result of a security agreement "granted" prior to the critical time? See *Antqip Hire Pty Ltd (in liq)* [2021] NSWSC 1122 at [48]. One suggestion could be to amend the provision as follows: "(2) This subsection covers a PPSA security interest which arises under a security agreement which came into force before the critical time"… Unfortunately, retaining section 588FL is problematic and would require a far more detailed analysis to try to resolve how the provision could be made to work satisfactorily. **Recommendation: If section 588FL is retained, then further consultation should be made to consider how the provision could be improved.**
366	That the arm of	**Accept to**	The	The Court has found that a trustee's lien falls within the existing ambit of section 73:

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	Government responsible for insolvency law reform be asked to consider whether the law should be amended to clarify the extent to which an administrator's equitable lien should rank ahead of security interests.	**consider / consult**	department is seeking stakeholder input in relation to this recommendation. Please refer to part 4 of the discussion paper for further information.	refer *Frances, in re Fotios v Helios Corporation Pty Ltd* [2022] FCA 199, [43]–[61] (Colvin J). It is more difficult for a voluntary administrator to fall within this section as they may not be providing services in the ordinary course of business and will have knowledge of the security. Equitable principles sufficiently protect the interests of administrators if such principles are left to deal with such situations. **Recommendation: A new provision be enacted to the following effect:** **An interest (the priority interest) in collateral has priority over a security interest in the collateral if:** **(a) the priority interest arises (by being created, arising or being provided for):** **(i) under a law of the Commonwealth, a State or a Territory, unless the person who owns the collateral in which the priority interest is granted agrees to the interest; or** **(ii) by operation of the general law; and** **(b) the priority interest arises in favour of an External Administrator in relation to the "costs, charges and expenses incidental to the caring for, preservation or realisation of secured assets" incurred by the External Administrator.**

Annexure B: About the Business Law Section of the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; and promotes the administration of justice, access to justice, and general improvement of the law.

The Business Law Section of the Law Council furthers the objects of the Law Council on matters pertaining to business law.

The Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

The Business Law Section has approximately 900 members. It currently has 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee

- Taxation Law Committee
- Technology in Mergers & Acquisitions Working Group

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

The members of the Section Executive are:

- Professor Pamela Hanrahan, Chair
- Mr Adrian Varrasso, Deputy Chair
- Dr Elizabeth Boros, Treasurer
- Mr Philip Argy
- Mr Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Mr Chris Pearce
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech

The Section's administration team serves the Section nationally and is part of the Law Council's Secretariat in Canberra.

The Law Council's website is www.lawcouncil.au.

The Section's website is www.lawcouncil.au/business-law.