

3 February 2023

Dr Sean Turner
Committee Secretary
Parliamentary Joint Committee on Corporations
and Financial Services

Dear Dr Turner

Parliamentary Joint Committee on Corporations and Financial Services – inquiry into corporate insolvency – response to questions on notice

Thank you for your letter of 22 December 2022, inviting me to respond to a number of questions on notice from the chair of this Committee, Senator Deborah O’Neill, by way of follow-up to my appearance before the Committee on 13 December 2022.

My responses are attached. If the Committee would like me to expand on my responses, please let me know.

Yours sincerely

Bruce Whittaker
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Parliamentary Joint Committee on Corporations and Financial Services – inquiry into corporate insolvency

Response to questions on notice – Bruce Whittaker

1. Are there any barriers to implementing the recommendations of your review of the PPS Act?

I am not aware of any barriers to the implementation of the recommendations that I made in my *Review of the Personal Property Securities Act 2009* (delivered to the then Attorney-General and the then Parliamentary Secretary to the Prime Minister on 27 February 2015), in the sense of obstacles that would make it impossible to implement the recommendations.

A number of preliminary steps will need to be taken, however, before the reforms can be implemented. For a small number of the recommendations, those steps may be impractical or difficult to complete in a timely manner. If that is the case, however, this does not need to delay implementation of the other recommendations.

To help the Committee to understand this, I have set out below a brief description of the key steps that should be taken before the reforms can come into effect. Most of these steps will need to be taken sequentially in the order I have described them. Some, however, can be taken concurrently, at least in part.

(a) Policy approval by the Attorney-General

The policy outcomes contemplated by the reforms will need to be approved by the Attorney-General.

(b) Drafting of amendments to legislation and regulations to implement the recommendations

Legislation will then need to be drafted to implement the reforms. The *Personal Property Securities Regulations 2010* will also need to be rewritten.

(c) Consultation with other Government Departments

Some of the reforms may need approval from other Government Departments (eg Treasury).

(d) Interaction with the States

The development of the PPSA was a COAG initiative, and the enactment of the PPSA was supported by a referral of powers by each of the States pursuant to paragraph 51(xxxvii) of the Constitution. This ensured that the operation of the PPSA was not at risk of challenge because it might otherwise reach beyond the limits of the Commonwealth Parliament's legislative powers under article 51 of the Constitution.

The referrals of power by the States were made pursuant to a Personal Property Securities Law Agreement made between the Government and the States on 2 October 2008.

Each of the States then enacted legislation that referred power to the Commonwealth Parliament to enact the PPSA in the form that was attached to that State's referral of power legislation. The referral legislation also authorised the Commonwealth Parliament to make certain amendments to the PPSA without the need to obtain a fresh referral of power.

As I understand it, nearly all of my recommendations are able to be implemented without fresh referrals from the States. Government would need to engage with the States, however, in relation to a small number of recommendations. For example, engagement with the States would be required in relation to:

- **Recommendation 31**, which recommended that Government explore with the States whether the operation of the PPSA could be extended to apply to security interests over statutory licences
- **Recommendation 40**, which recommended that Government explore with the States whether the operation of the PPSA could be extended to apply to security interests over some types of water rights.
- **Recommendation 42**, which recommended that Government explore with the States whether the operation of the PPSA could be extended to security interests over fixtures.

If it is not possible to progress these recommendations in a timely manner, then I would urge that they be put to one side for now, and that the implementation of the other amendments proceed without them.

(e) Release of draft legislative package for public consultation

The PPSA is a complex piece of legislation. It affects financial institutions, businesses and consumers in many (often complex) ways.

I would strongly recommend that the proposed legislative package (amending legislation, revised regulations and explanatory memorandum) be released for public comment before it is finalised. This would provide financial institutions, businesses and consumer protection groups with an opportunity to consider the implications of the proposed changes before they are set in stone, and to propose refinements to the changes where this may be warranted. This would be consistent with the approach taken by Government in relation to the drafting of the PPSA itself.

Given the complexity of the proposed changes, I would recommend that a period of at least three months be allowed for comments.

The Attorney-General's Department and the OPC will then need to revise the amending legislation and draft regulations to reflect the outcomes of this consultation process.

(f) Passage of the amending legislation and adoption of the revised regulations

The amending legislation will need to be passed, and the revised regulations adopted.

(g) Amendments to the PPS Register

When the text of the amending legislation and revised regulations has been finalised, the software that drives the PPS Register will need to be revised to reflect the changes being made.

(h) Preparation period for users of the PPSA

Financial institutions, other businesses and their advisers will need to be given a period of time, after the amending legislation and regulations have been finalised, to update their documentation, systems and processes to reflect the changes. Users of the Register will also need to be given time, once the amendments to the Register have been completed, to update their systems to reflect the changes to the Register. This will particularly be the case for B2G users of the Register, who may need to redesign aspects of their own IT systems to ensure that they can continue to communicate effectively with the Register.

(i) Awareness-raising

As a general proposition, businesses and their advisers are much more aware of the existence and implications of the PPSA than was the case when the PPSA came into force in 2012. (I will return to this in my response below to question 2.) Government will however need to conduct an awareness-raising campaign to ensure (as best it can) that potential users of the PPSA are made aware of the changes being made to it.

2. Have there been any developments in Australia since your review, that would affect or require changes to your recommendations?

Subject to the next paragraph, I am not aware of any developments in Australia since the review that would affect or require changes to my recommendations.

Two of my recommendations have potentially become less necessary:

- **Recommendation 19**, relating to the definition of “PPS lease” in section 13 of the PPSA, has already been implemented, by the *Personal Property Securities Amendment (Deregulatory Measures) Act 2015*.
- **Recommendation 238**, which was aimed at clarifying the meaning of the term “grantor” in the PPSA, has arguably been superseded by case law. See *Samwise Holdings Pty Ltd v Allied Distribution Pty Ltd* [2018] SASFC 95.

For completeness, I should also mention **recommendation 220**, which seeks to clarify how the PPSA resolves competitions between multiple security interests over the same collateral by specifying the point in time at which the priority ranking between them should be determined.

There are a number of points in time which could be chosen for this purpose, and the one I recommended in the review was based on US and Canadian practice at the time. Thinking in Canada has shifted since the review, however, and I would now lean towards a different solution to the one that I recommended in the review.

The core of the recommendation is still valid, in that it continues to be desirable for the PPSA to nominate a point in time for resolving priority disputes. The only potential change is to the question of how that point in time is determined.

(a) One of your findings related to awareness of the PPS Act – Has awareness significantly changed since your review?

My understanding (without having undertaken investigations) is that general awareness of the PPSA and its implication for businesses and consumers is continuing to improve. However, I am not in a position to quantify the extent to which it has improved since the review.

I suggest that you put this question to industry organisations such as the Small Business Development Corporation or the Australian Small Business and Family Enterprise Ombudsman, if you have not already done so. They would be far better placed than me to assist you on this question.

3-14. Additional general questions

My expertise is in the field of secured transactions law, rather than insolvency law. With one exception I am not well placed to provide you with a response on your more general questions.

The exception is question 11, to the extent that it relates to the PPSA. For completeness, my responses are as follows:

- a. I have commented above on potential barriers to implementation of the PPSA.
- b. Subject to my response above to your question 2, I do not believe that there are any recommendations in my review that should not be implemented.

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