

Joint Committee on Corporations and Financial Services

QUESTION ON NOTICE Date of hearing: 1 March 2023

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ23-000022

Senator Paul Scarr on 01 March 2023, Proof Hansard page 46-47

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Question

Senator SCARR: Just one last question, was that issue around the PPSA considered as a part of the Whittaker review and did that review make some recommendations to clear that up?

Mr Carr: I don't believe that the Whittaker review, amongst all those many recommendations, went to the heart of some of the issues that we experience in section 561, but we will check that answer and take that one on notice.

Answer

The Attorney-General's Department has responsibility for the *Personal Property Securities Act 2009* and has provided the following answer:

The Whittaker Review did not comment directly on policy considerations relating to section 561 of the *Corporations Act 2001*, noting at page 434:

The desirability or otherwise of protecting employee entitlements from an employer's insolvency, and the most appropriate way of doing this, continues to be a topic of discussion as a matter of corporations law policy.

I do not believe that it is the role of this review to express a view on the policy behind s 561 of the Corporations Act. It is however within the remit of this review to consider the content of ss 340 to 341A, because they are in the Act.

The Whittaker Review did consider the content of sections 340 to 341A of the *Personal Property Securities Act 2009*, which define the concept of a circulating asset and related terms. The Whittaker Review made six recommendations concerning these provisions:

1. That ss 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 (**recommendation 356**)¹;
2. That ss 340 to 341A, in whatever form they may ultimately take, be removed from the Act and relocated to the Corporations Act (**recommendation 357**)²;

¹ Whittaker B (15 March 2018), [Review of the Personal Property Securities Act 2009 final report](#) ('Whittaker Review'), 434.

² Ibid.

3. If ss 340 to 341A are not amended in accordance with Recommendation 356, 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 s 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 s 340 (**recommendation 358**)³;
4. If ss 340 to 341A are not amended in accordance with Recommendation 356, that s 341(3)(b) be amended so that a secured party will have control of an account if it satisfies the other requirements of the section, unless it is shown that the grantor's usual practice is not to deposit the proceeds into the ADI account and that it has the express or implied consent of the secured party to not do so (**recommendation 359**)⁴;
5. That ss 341(3)(d) and 341A(1)(b) be deleted (**recommendation 360**)⁵; and
6. That s 341(1)(a)(i), and the corresponding reference in s 341(1)(a)(ii) to "specifically appropriated" inventory, be deleted (**recommendation 361**)⁶.

³ Ibid, 435.

⁴ Ibid, 436.

⁵ Ibid, 437.

⁶ Ibid, 438.