7 December 2023

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

By email: PPSAreform@ag.gov.au

Dear Sir/Madam

Public Consultation on the Government's response to the statutory review of the *Personal Property Securities Act 2009*

Thank you for the opportunity to provide a submission in response to the Government's proposed legislative response to the recommendations of the Final Report of the 2015 Statutory Review of the *Personal Property Securities Act 2009* (**PPSA**) (**Whittaker Review**) issued on 22 September 2023.

We also acknowledge and thank the Department for providing ARITA with an extension of time to make this submission.

ARITA is the preeminent professional body for professionals practicing in the area of financial distress and has considered the proposed reforms from the perspective of the stated purpose of the PPSA, which is to provide "more certain, consistent, simpler and cheaper arrangements for personal property securities for the benefit of all parties".[1]

While the PPSA and its intention may be reasonably clear, in practice the conduct of parties and the PPS Register itself does not afford liquidators the benefit of clarity in relation to PPS claims. Insolvency practitioners can spend considerable time and cost in determining such claims from the PPS Register, in trying to obtain information from PPS claimants about their interests, and in dealing with those who claim to have interest, but whose interest cannot be readily verified.

[1] Personal Property Securities Bill 2009 Explanatory Memorandum p 10

This submission focuses on the proposed reforms (or lack thereof) to recommendations in the Whittaker Review that have a direct impact on insolvency practitioners' ability to simply, effectively and efficiently undertake their obligations to identify secured creditors that have priority and can stand outside the insolvency process.

While we commend the current Government on its response to the Whittaker Review, we note that the review report was issued in February 2015 and regard should be had to any judicial developments and guidance provided in the intervening eight years which has clarified some complexities based on current provisions.

With this in mind, we suggest that only amendments that offer significant benefit to the overarching purpose of the PPSA should be considered and care must be taken to avoid inconsequential changes that may undermine current interpretations, particularly in relation to technical amendments.

Key points

ARITA provides the following summary of the key points addressed in the body of this submission, in order of importance:

- we disagree with the Government's response to recommendations 86, 110, 149, 241, 365
- we disagree with the Government's response to recommendations 287, 362 and 363 and believe they should be further considered as part of a comprehensive review of insolvency
- we agree with the Government's response to recommendation 369 but do not believe that the proposed amendment has been affected
- we believe that the Government has incorrectly actioned recommendation 101 and believes further consultation is required
- we generally agree with the Government's response to recommendation 166 but recommends changing all relevant periods in the PPSA to business days
- we agree with the Government's response to recommendations 43 and 366.

Lack of awareness

While ARITA acknowledges the excellent work of the Australian Financial Security Authority for its guidance and education on the PPSA, ARITA agrees with the Australian Institute of Credit Management's (**AICM**) submission that a 'lack of awareness' is hindering the effective use of the PPSA.

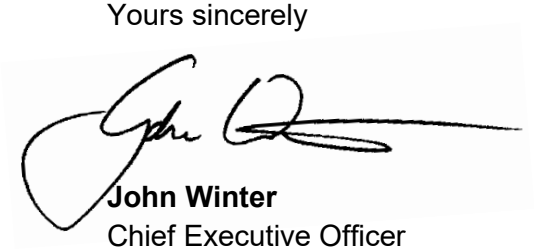
While no legislative amendment is required, we urge the Government to progress the development and implementation of a campaign to increase understanding among businesses and their advisers of the detailed effect of the PPSA, and take other steps that could assist businesses on an ongoing basis to understand how the PPSA affects them and

how best to take advantage of it as set out in recommendation 392, which has been accepted.

Educating directors about the PPSA is linked to the need for greater investment in educating company directors in proactively managing financial distress which was a recommendation in ARITA's submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Corporate Insolvency in Australia Inquiry (**PJC Inquiry**).[2]

As always, we look forward to continuing to work closely with the Attorney-General's Department and should you wish to discuss any aspect of our submission, please contact me on 02 8004 4355 or Ms Narelle Ferrier, ARITA's Technical & Standards Director, on 02 8004 4350.

Yours sincerely



John Winter
Chief Executive Officer

[2] Recommendation 29, ARITA Submission, 30 November 2022

About ARITA

The Australian Restructuring Insolvency and Turnaround Association (**ARITA**) represents professionals who specialise in the fields of restructuring, insolvency and turnaround.

We have close to 2,300 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

We are a not-for-profit, incorporated professional association run for the benefit of our members.

Around 82% of Registered Liquidators and 86% of Registered Trustees choose to be ARITA members.

ARITA's ambition is to lead and support appropriate and efficient means to expertly manage financial recovery.

We achieve this by providing innovative training and education, upholding world class ethical and professional standards, partnering with government and promoting the ideals of the profession to the public at large. In 2022, ARITA delivered 82 professional development sessions to over 5,000 attendees.

ARITA promotes best practice and provides a forum for debate on key issues facing the profession.

We also engage in thought leadership and public policy advocacy underpinned by our members' knowledge and experience. We represented the profession at 14 inquiries, hearings and public policy consultations during 2022.

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1 Schedule 1: The reach of the Act

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 43: That ss 8(1)(a) and (b) be deleted, and that s 109 be amended to provide that Chapter 4 does not apply to security interests of the type described in s 8(6).	Accept	Agree

ARITA supports amendments that improve consistency and clarity in the PPSA, including the recommendation to bring pawnbrokers within the scope of the PPSA.

Bringing security interests held by pawnbrokers within the scope of the PPSA not only enhances the objective of increased consistency of treatment for secured transactions but also provides greater transparency where the customer is subject to a personal or corporate insolvency appointment.

2 Schedule 2: Creating an effective security interest

ARITA does not have any comments in relation to recommendations 51 to 84 of the Whittaker Review on reforms relating to practical aspects of the creation of an effective security interest and its interaction with other security interests.

3 Schedule 3: Dealings in collateral

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 241: That s 62(2)(c), and item 7 of the table in s 153(1), be deleted.	Accept	Disagree

ARITA has concerns over the removal of the PMSI box and suggests that alternatives be considered to mitigate the chance of inadvertent errors which may invalidate registration.

The Whittaker Review correctly noted that the PMSI box may help an insolvency appointee to sort through the registrations of an insolvent grantor, in order to decide how to proceed with the insolvency administration'[3] but was 'not convinced that this is sufficient reason by

[3] Whittaker Review, section 7.7.8.11.2

itself to require all secured parties to decide whether or not their security interest might be a PMSI and to reflect this in their registration'.[4]

As noted in our cover letter, ARITA acknowledges that there is a lack of awareness in relation to the PPSA which negatively impacts its operation. A lack of aptitude in this regard should not be a basis for the removal of the PMSI box which provides clarity and, if used correctly, can reduce the time and cost involved in verifying PMSI claims at the most important time – when the grantor is insolvent or likely to become insolvent.

We would suggest that a more effective amendment would be to make consideration of whether the security is a PMSI a mandatory question, with clearer information about what it relates to.

This position extends to any other Whittaker Review recommendations or proposed amendments that relate to the removal of the PMSI box, such as recommendation 127 proposing that section 165(c) of the PPSA be deleted.

4 Schedule 4: Enforcement of security interests and insolvency of a grantor

ARITA does not have any comments in relation to recommendations 274 to 335 of the Whittaker Review on reforms relating to the rules for enforcement of security interests and grantor insolvency, with the exception of recommendation 287 which is addressed in the Other recommendations below.

5 Schedule 5: Perfection by registration

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 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 Regulations if it has a vehicle identification number.	Accept	Disagree, Government has incorrectly actioned the recommendation

[4] Whittaker Review, section 7.7.8.11.2

Like the Law Council of Australia and AICM, ARITA has significant concerns regarding the change and limitation of the definition of 'motor vehicle' to those that have a vehicle identification number (**VIN**).

A review of the 'discussion of stakeholder feedback' on this issue in the Whittaker Review[5] notes that only '[o]ne response suggested in this context that the definition of a motor vehicle could perhaps be determined by whether or not it has a [VIN]' and concludes that:

> The time available for completion of this report has not allowed me to look more closely into the suggestion that the meaning of motor vehicle be determined by whether the goods in question have a VIN, in particular to understand how broad a net this proposal would cast. Care would also need to be taken with any transitional measures, as security interests would continue to be taken over older vehicles that did not have a VIN but did have a chassis number or manufacturer's number (as they are currently permitted to be used as a serial number, if a vehicle does not have a VIN). I do believe, **however, this is worth further consideration**.[emphasis added]

The implementation of an amended definition of 'motor vehicle', which concerningly also appears to have been shortened to 'vehicle' in the exposure drafts,[6] is not only premature but also inconsistent with Whittaker Review recommendation that the **Government explore** changing the definition. We believe that this issue must be deferred for further consultation.

This is particularly so, given the Whittaker Review notes that he did not have information before him that would enable him to assess the effects of the change to the definition of 'motor vehicle' that was narrowed on 1 July 2014 and was not in a position to express a view on it.[7]

This position extends to any other Whittaker Review recommendations or proposed amendments that relate to the amendments of the definition of "motor vehicle".

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 86: That the Act be amended so that: • a registration does not need to indicate whether the collateral is consumer property or commercial property; • all registrations against individuals, or against serial-numbered property that may not identify the	Accept	Disagree

[5] Whittaker Review, section 6.6.3.2
[6] Exposure draft Personal Property Securities Amendment (Framework Reform) Bill 2023, Items 6, 8, 35, 99
[7] Whittaker Review, section 6.6.3.1

grantor because the grantor is an individual, must have a maximum term of 7 years; and • a registration that is made against only serial-numbered property and that identifies the serial number may not identify the grantor, if the grantor is an individual.		

While ARITA does not express an opinion regarding the requirement to indicate whether collateral is consumer or commercial property, we note the AICM's submission regarding the impact it may have on the ability of sole traders to obtain finance and their concerns regarding the limitation of the registration period to 7 years.

Of particular concern to ARITA is the proposal that registration that is made against serial-numbered property and that identifies the serial number may not identify the grantor, if the grantor is an individual. We believe that this may significantly hinder the identification of property and secured parties in a personal insolvency appointment.

We are firmly of the view that any perceived benefit of making this amendment due to privacy concerns does not outweigh the lack of clarity that would result. In this regard we note the following comments on this point from the Whittaker Review:

> 'I do not have any evidence before me that might substantiate how great the privacy concern would be if the grantor's details needed to be included in a registration against serial-numbered property that is consumer property. The Act already accepts that the grantor's details need to be included if serial-numbered property is commercial property (such as a tradesperson's utility vehicle). Section 172 of the Act also restricts who is allowed to search the Register against an individual, and for what purposes. For these sorts of reasons, it might be argued that it is unnecessary to provide that a security interest from an individual over serial-numbered property may only be registered against the serial number, if the collateral is consumer property.'[8]

This position extends to any other Whittaker Review recommendations or proposed amendments that relate to the change that a registration that is made against only serial-numbered property and that identifies the serial number may not identify the grantor, if the grantor is an individual.

[8] Whittaker Review, section 6.2.1.1.1

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 110: That the Regulations be amended so that a registration to perfect 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.	Accept	Disagree

It is often difficult for liquidators to know or identify that the company to which they have been appointed is a trustee. Like the AICM, ARITA believes that any perceived simplicity from the proposed change will not be realised and registration over trust assets should continue to be made against the ABN for the trust.

We believe that this practice would better protect stakeholders who undertake or engage in business with trusts and could be complemented by the establishment of a register to increase the transparency of trading trusts, as was supported by the PJC Inquiry.[9]

Enabling registration against the trust ABN is consistent with security being given directly over the trust assets. Such security may be enforced even if the trustee's right of indemnity against the trust fund is or becomes ineffective. An unsecured creditor of a trustee must rely on the trustee's right of indemnity to recover against trust assets, whereas a secured creditor can have direct access to those assets. Also, while a trust is not a legal entity, many non-lawyers do not appreciate this issue. To a commercial person a trust is often perceived to be the "entity" they are dealing with. The ability to register against the trust ABN (despite the trust not being a legal entity per se) adds transparency to commercial arrangements involving trust assets. Allowing registration by reference to a trust's ABN will also give greater certainty in situations where the trustee of a trust is changed. In such a case, the ABN for the trust remains the same so the registration is maintained.

There are some companies that are trustees of multiple trusts, and the ability to limit security to the assets of a particular trust referable to its ABN is, in our view, very useful.

As noted in our earlier submissions, section 73 of the PPSA should not enable a trustee's right of indemnity and lien to rank ahead of a secured party with direct security in the trust assets perfected by registration against the trust ABN. This is particularly important if a person/company is granting some securities in its personal capacity only, some in its capacity as trustee of a trust (but not its personal capacity) and some in both capacities.

[9] PJC Inquiry, paragraph 14.54

This position extends to any other Whittaker Review recommendations or proposed amendments that would remove the need to register against the ABN of a trust.

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 166: That: • the definition of "business day" in s 10 not be amended; and • the Registrar be asked to maintain a "business day calendar" on the Registrar's website.	Accept	Agree, but recommend changing all relevant periods to business days

ARITA notes that the current and proposed PPSA uses a combination of business and 'ordinary' days.

This can lead to confusion and, noting the Government's acceptance of the recommendation that the Registrar be asked to maintain a "business day calendar" on the Registrar's website, we suggest that consideration be given to changing any and all relevant periods in the PPSA from ordinary days to the equivalent number of business days.

6 Schedule 6: Regulatory powers amendments

ARITA does not have any specific comments in relation to the proposed amendments to expand the current regulatory powers of the PPS Registrar under the PPS Act, other than to support measures that assist the PPS Registrar with monitoring PPSR compliance and taking action against misuse.

7 Schedule 7: Interaction with other laws and other matters

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 362: That s 588FL of the Corporations Act be repealed.	Reject	Disagree, with further consultation to be part of comprehensive review of insolvency

ARITA understands that there are divergent views of whether section 588FL of the *Corporations Act 2001* (Cth) (**Corporations Act**) performs a useful function or has been overtaken by the operation of section 267 of the PPSA. It is our understanding that some

maintain that while both sections deal with the registration of security interests, they apply in different situations and should be retained, others including the Business Law Section of the Law Council of Australia (**LCA**) disagree and recommend that the section be repealed on the basis that it unnecessarily complicates commercial transactions for no obvious benefits.

It is our position that given the divergent views any proposal to repeal section 588FL should be deferred and considered as part of the comprehensive and independent review of Australia's insolvency law as recommended by the PJC Inquiry.[10]

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 365: That the arm of Government responsible for insolvency law reform be asked to consider whether the law should be amended to allow an insolvency practitioner to give notice to claimants on the Register to verify their claims within a set period (such as 21 days), on the basis that unverified claims could then be treated as unsecured.	Reject	Disagree

Whilst the PPSA and its intention may be reasonably clear, in practice the conduct of parties and the PPS Register itself does not afford liquidators the benefit of clarity in relation to PPS claims. Insolvency practitioners can spend considerable time and cost in determining such claims from the PPS Register, in trying to obtain information from PPS claimants about their interests, and in dealing with those who claim to have interest, but whose interest cannot be readily verified.

These problems arise from the unsatisfactory state of the PPS Register, creditors' inadequate use of it, and the fact that the register allows 'stale' interests to persist.[11] We contrast that with land title registers, acknowledging the more stable nature of land as collateral. The case of the Hastie Group provides an interesting example.

> ***Hastie Group***
>
> In the administration of the Hastie Group, there were 995 registrations noted against the Group's companies in the PPS Register. The Group's records inadequately described the nature and location of all the plant and equipment, some of which had been moved between companies within the Group, and between different building sites, without records being kept.

[10] PJC inquiry, Recommendation 1

[11] This appears to arise from inattention to the obligation of a secured party to remove the PPS registration if there are no (or no longer) reasonable grounds for the secured party to believe that it has a security interest (s PPS Act s151). We also note the amendment demand regime allows a person with interest in the collateral to demand the registration be removed if there is no longer a security interest (s187).

> The voluntary administrators wrote to all creditors who had an interest recorded in the PPS Register but 80% failed to respond, and many of the responses received were of little assistance to the administrators. The administrators also wrote to a number of financiers who appeared to have a secured claim in respect of the plant and equipment, and they placed advertisements in newspapers across Australia.
>
> The administrators were able to identify approximately $2 million worth of assets, but the end result was that 77% of the total number of items of plant and equipment remained unclaimed. This necessitated court intervention and directions to allow the administrators to sell the assets despite the PPS interests.[12]

Once a company enters external administration, insolvency laws take over, with their different focus and policy approach, in particular to ensure the efficient and prompt winding up of the company's affairs. Existing security interests and priorities are recognised, but on terms and under processes applied by insolvency law. However, insolvency laws do not currently allow external administrators to deal efficiently or effectively with PPSA securities to determine their status.

Whilst it is generally incumbent upon creditors to prove the validity of their claim, practically, it will often be the liquidator with the skills and access to available company records who is called upon to either prove or disprove such claims. As is apparent from the Hastie Group administration, dealing with PPS claims can involve considerable time, and therefore remuneration accrued by the external administrator, to the diminution of funds available for creditors generally.

We suggest that insolvency law allow an external administrator, whether in a liquidation or voluntary administration, to give notice to claimants on the PPS Register to verify their claims within a set period, say 15 business days, failing which their claims will be treated as unsecured or not at all.

There is precedent for this approach in the Corporations Act in respect of creditors proving their unsecured claims. Corporations Regulation 5.6.65 provides that a liquidator must give notice of an intention to declare payment of a dividend from the company's funds and, relevantly, a creditor that does not respond with proof of its claim within the set time is excluded from participating in the dividend.

While we acknowledge that the PPSA has an existing process to seek amendment of the register, this process is predicated on an assumption that it relates to the amendment of an

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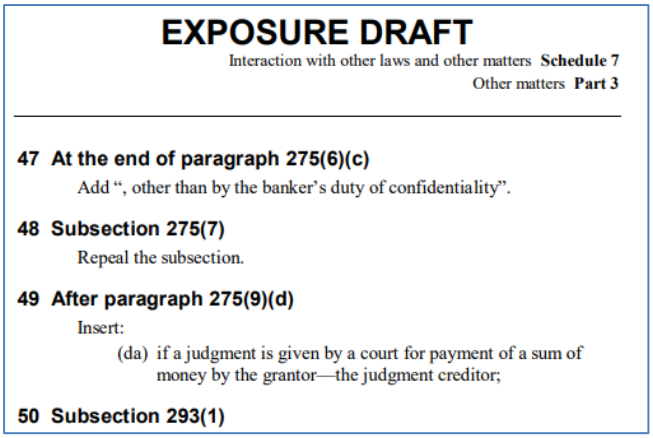
[12] See *Carson, in the matter of Hastie Group Limited (No 3)* [2012] FCA 719. The correctness of that decision and the utility of such directions was questioned as "unsound" in PPS Register – Unclaimed good and the decision in Hastie Group (2013) 25 (1) A Insol J 20, David Walter.

individual registration and does not recognise the time and cost pressures in an external administration.

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 369: That Government investigate further whether it is sufficiently clear that company receivers, and insolvency officials such as administrators or liquidators, that have been appointed to a grantor are able to make use of the information-gathering powers in s 275, and that the section be amended, if necessary, to ensure that this is the case.	Accept	Agree, but do not believe the proposed amendment has been affected

ARITA welcomes the clarification that company receivers, and external administrators such as administrators or liquidators, that have been appointed to a grantor are able to make use of the information-gathering powers in section 275, and that the section be amended, if necessary, to ensure that this is the case.

That said, we note that the 'Index of recommendations made by the Whittaker Review and the Government's response' provided as part of this consultation indicates that this technical amendment was affected by Item 49 of Schedule 7 of the Personal Property Securities Amendment (Framework Reform) Bill 2023. With respect, we do not believe that this is correct and Item 49, extracted below, appears to give effect to Whittaker Review recommendation 368 and we have not identified an amendment that effects this recommendation.



EXPOSURE DRAFT

Interaction with other laws and other matters **Schedule 7**
Other matters **Part 3**

47 At the end of paragraph 275(6)(c)

Add ", other than by the banker's duty of confidentiality".

48 Subsection 275(7)

Repeal the subsection.

49 After paragraph 275(9)(d)

Insert:

(da) if a judgment is given by a court for payment of a sum of money by the grantor—the judgment creditor;

50 Subsection 293(1)

Figure 1 - Extract of Personal Property Securities Amendment (Framework Reform) Bill 2023, page 163

A comparison of the proposed new form of section 275(9) from the 'Draft compilation of the Personal Property Securities Act 2009' provided as part of this consultation and the current section 275(9) of the PPSA is provided below and also indicates that this amendment has not been affected, with section 275(9)(d) being unchanged.

Current PPSA	Proposed PPSA
Interested persons (9) For the purposes of this section, the following persons are interested persons: (a) the grantor in relation to the collateral in which the security interest is granted; (b) a person with another security interest in the collateral mentioned in paragraph (a); (c) an auditor of a grantor mentioned in paragraph (a), if the grantor is a body corporate; (d) an execution creditor with an interest in the collateral; (e) an authorised representative of any of the above.	*Interested persons* (9) For the purposes of this section, the following persons are interested persons: (a) the grantor in relation to the collateral in which the security interest is granted; (b) a person with another security interest in the collateral mentioned in paragraph (a); (c) an auditor of a grantor mentioned in paragraph (a), if the grantor is a body corporate; (d) an execution creditor with an interest in the collateral; (da) if a judgment is given by a court for payment of a sum of money by the grantor—the judgment creditor; (e) an authorised representative of any of the above.

This amendment is particularly relevant given the Government's rejection of Whittaker Review recommendation 365 to give consideration of whether the law should be amended to allow an insolvency practitioner to give notice to claimants on the Register to verify their claims within a set period (such as 21 days), on the basis that unverified claims could then be treated as unsecured.

8 Exposure draft of the new PPS Regulations

To the extent that the proposed new Regulations include amendments which relate to Whittaker Review recommendations commented on elsewhere in this submission, our comments should also be taken to apply to the proposed change to the Regulations.

9 Transitional arrangements

ARITA has significant concerns about the proposed transition to the any new provisions and refer to and commend the LCA's proposed general principles for Government's consideration.

10 Other recommendations

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 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	Disagree

Like the AICM and LCA, ARITA disagrees that a separate register for construction and heavy industry should be established. As the Whittaker Review noted 'the [PPSA] established a single, national set of rules for secured credit using personal property'[13] and it would be a step backwards to consider establishing a separate register.

One issue in changing the definition of 'motor vehicle' to only capture those with VINs and to refer to them as 'vehicles' (which ARITA opposes) 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 'vehicles'. The issue is that a serial number search of such construction equipment is no longer relevant or appropriate.

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 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 s 116 be retained or deleted in accordance with Government's conclusion.	Accept to consider / consult	Agree, but consultation to be part of comprehensive review of insolvency

Since the release of the Whittaker Review, the PJC Inquiry recommended 'that as soon as practicable the government commission a comprehensive and independent review of Australia's insolvency law, encompassing both corporate and personal insolvency'[14] and 'that the proposed comprehensive review consider and report on the current system of corporate insolvency pathways from a holistic systems analysis perspective.'[15]

While the Government is yet to respond to the PJC Inquiry report, we believe that consideration of this Whittaker Review recommendation is more appropriately considered as part of a comprehensive review.

A comprehensive review could also consider the related concerns expressed by recognised PPSA expert Mr Nicholas Mirzai[16] regarding section 588FA of the Corporations Act.

Mr Mirzai rightly notes that if an 'unfair preference' is assessed as at the date of winding up, noting that this is subject to live debate, then the reference in subsection 588FA(1)(b) to

[13] Whittaker Review, Letter of Transmittal, 27 February 2015
[14] PJC inquiry, Recommendation 1
[15] PJC Inquiry, Recommendation 6
[16] Barrister practicing in the State of New South Wales from 3 St James' Hall Chambers and co-author of *The Annotated Personal Property Securities Act 2009* (Cth) published by Wolters Kluwer (4th Ed, 2020) and *PPS in Practice* published by Thomson Reuters

‘unsecured debt’ has the potential to produce a curious result because a secured debt does not need to be perfected for the purposes of the PPSA – but an unperfected debt vests in the grantor ‘immediately before the event mentioned in paragraph (1)(a) occurs’ regardless of whether section 267 of the PPSA applies or section 588FL of the Corporations Act applies, as was considered in the matter of *Trenfield v HAG Import Corporation (Australia) Pty Ltd* [2018] QDC 107.

To address this, Mr Mirzai suggests that section 588FA ought to be amended so that the reference to an “unsecured debt” in subsection 588(1)(b) of the Corporations Act also includes debts the subject of an unperfected security interest consistent with the treatment of unperfected security interests elsewhere in the Corporations Act and the PPSA.

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 363: If s 588FL of the Corporations Act is retained despite Recommendation 362, that it be amended: • to remove references to “deeds of company 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 s 267.	Accept to consider / consult	Agree, but consultation to be part of comprehensive review of insolvency

We refer to our comments in relation to Whittaker Review recommendation 287 and believe that consideration of this Whittaker Review recommendation is more appropriately considered as part of a comprehensive and independent review of Australia’s insolvency law.

Whittaker Review Recommendation	Government Response	ARITA Response
Recommendation 366: That the arm of 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.	Accept to consider / consult	Agree

A liquidator has an equitable lien over assets of the company in respect of which claims need to be determined, apart from the statutory priority under section 556 of the Corporations Act. The law in relation to the priority of a liquidator’s and trustee’s remuneration over secured claims is stated in *Universal Distributing*, in relation to work in locating secured assets and realising those assets. The High Court in *Stewart v Atco*

Controls Pty Ltd (in liq) [2014] HCA 15[17] said that the principle "may be more shortly stated as: a secured creditor may not have the benefit of a fund created by a liquidator's efforts in the winding up without the liquidator's costs and expenses, including remuneration, of creating that fund being first met. To that end, equity will create a charge over the fund in priority to that of the secured creditor".

We have some concerns that in dealing with PPS claims, where security interests may or may not be confirmed, there may be uncertainty in some instances that the liquidator's/trustee's remuneration prevails. The work of a liquidator or trustee in dealing with PPS claims is not necessarily involved in realising assets, rather in determining those PPS claims and priorities, many of which may be shown to be security interests.

We note that in clarifying orders made in the earlier judgment, cited above, the Court in *In the matter of Renovation Boys Pty Ltd (admins apptd) (No 2)* [2014] NSWSC 354[18] agreed with the submission of the administrator that a prior security holder would not be able to rely on its priority against the equitable lien available to a voluntary administrator "because to do so would be unconscientious". This applied also to retention of title claimants, the Court saying that it would be "unconscientious for those persons to now take property in the stock, without recognising the efforts that the administrators have made to identify and preserve it, so that it can be made available to them".

While the *Universal Distributing* principle may apply in most cases, we suggest that this be legislatively stated, such that the law provide for a statutory priority for the benefit of the liquidator or trustee in respect of the determination of all security interests, and if, necessary any costs of sale. This would serve to avoid any "unconscientious" outcomes and to avoid the need for court intervention and directions.

The Courts in *Deppeler, in the matter of Moulamein Grain Co-Operative Limited (in liquidation) (No 3)* [2023] FCA 803 and *Re Arcabi* [2014] WASC 310 have, we think, assisted by way of confirming the extent of the lien as we have suggested, broadly, that the work of a liquidator, or receiver, in assessing PPS claims and identifying and returning stock, is work properly forming part of the care and preservation of the property of the company.

[17] (2014) 252 CLR 307 at 320 [22], Crennan, Kiefel, Bell, Gageler and Keane JJ
[18] At [4] to [5]