National Farmers' Federation

Submission to the
Statutory Review of the
Personal Property Securities Act

13 June 2014

NFF Member Organisations

Executive Summary

The introduction of the Personal Property Securities Register (PPSR), under the *Personal Property Securities Act 2009* (PPS Act), was intended to result in "more certain, consistent, simpler and cheaper arrangements for personal property securities for the benefit of all parties"[1] and to make it easier to identify who is entitled to what assets or unpaid money when a business is declared insolvent.

By overhauling a complex set of federal, state and territory laws and systems for using personal property as collateral when obtaining finance, the National Farmers' Federation (NFF) understands that the PPSR was intended, among other things, to make it easier for farmers and agricultural producers to borrow against crops, livestock, farm machinery, agricultural products and other personal property assets.

While there are clearly benefits in streamlining complex laws, simplicity should not come at the cost of fairness. Governments introducing legislation have a duty to ensure that those affected by the legislation are able to understand it. Otherwise, the familiar refrain of 'ignorance is no excuse' can carry serious consequences.

The farming community remains unclear about what security they have over their personal property and when, at any given time, personal property interests should be registered. This confusion, compounded by the already heavy burden of regulation on farmers and a lack of industry specific, plain English guidance material has limited the sector's ability to realise the potential value of the PPSR. Indeed a lack of knowledge of the existence of the PPSR, and when and how to use it, is likely to cause ongoing issues for the sector into the future.

[1] Explanatory Memorandum to the Personal Property Securities Bill 2009

1. Introduction

The NFF was established in 1979 as the peak national body representing Australian farmers. The NFF now represents a broad cross section of the agriculture sector across Australia, encompassing the breadth and the length of today's supply chain. The NFF's membership comprises all of Australia's major agricultural commodities. Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations collectively form the NFF.

For 35 years, the NFF has engaged in the identification, development and achievement of policy outcomes affecting Australian agriculture. The NFF exists as the single, united voice for the agricultural sector, providing high level advice and guidance on issues of critical importance to the sector. These policy priority areas include, but are not limited to, workplace relations, farm business and productivity, market access and trade, natural resource management and education.

The Australian agriculture sector is a critical contributor to the Australian economy. In 2012-13, farm and fisheries production and processing accounted for approximately two percent of Australia's GDP and 16 percent of the total value of merchandise trade exports.

There are approximately 130,000 farm businesses in Australia, 99 percent of which are family owned and operated. In 2013, Australian farms exported almost two-thirds of their food and fibre to the world. Recent data from the Australian Bureau of Statistics indicates that the number of Australian farmers has fallen by 100,000 over the three decades from 1981, yet at the same time, the value of Australian agricultural exports has grown from $8.2 to $32.5 billion, and is today sitting at approximately $38 billion.

2. The overburden of regulations and requirements

There is no doubt that farmers are overwhelmed with red tape and that this limits their capacity to adequately understand regulatory changes by Government, even where those changes are beneficial.

In 2012, NFF member AgForce Queensland conducted a desktop analysis[2] and found that just at the state level, Queensland farm businesses are regulated through over 55 Acts and Regulations covering over 9,000 pages. This is in addition to federal legislation, local government by-laws and associated codes and regulations.

The story is no better in other states, with the Tasmanian Department of Economic Development, Tourism and the Arts releasing a report in January 2013[3] with some astounding figures. The gross value of production of agriculture, fishing and forestry in

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[2] AgForce submission to Queensland Competition Authority: Reducing the Burden of Regulation, 2012 http://www.qca.org.au/files/OBPR-AQ-sub-MeasuringReducingBurdenRegulation-0812.pdf

[3] Measuring Red Tape: Understanding compliance burden on Tasmanian businesses, a study for the Tasmanian Department of Economic Development, Tourism and the Arts, January 2013 http://www.business.tas.gov.au/__data/assets/pdf_file/0015/3363/Measuring-Red-Tape-Report.pdf

Tasmania is $1.982 billion, of which the agricultural sector accounts for $1.150 billion. The total cost of red tape for those three sectors of the industry is $321.4 million a year. That figure is staggering enough as a standalone number, but it represents 16.2 percent of the value of production. It means that one dollar in every six at the farm/fishery/forest gate is lost on regulatory imposts, meeting the cost of compliance. So where agriculture, fisheries and forestry account for 10 percent of Tasmania's Gross State Product, they wear 25 percent of the total bill for compliance. NFF member, the Tasmanian Farmers and Graziers Association have indicated that this study had a limited scope and that by taking into account the areas that were not measured as part of the report, the actual cost could be double the estimate.[4]

The Productivity Commission's September 2013 Research Report on Regulator Engagement with Small Business[5], found that small businesses feel the burden of regulation more strongly than other businesses and almost universally, their lack of staff, time and resources present challenges in understanding and fulfilling compliance obligations. The report recommended that regulators adopt an approach that is more responsive to small business needs and capacities, including:

- tailoring information requirements around data already collected by businesses;
- greater use of industry associations to disseminate information;
- ensuring regulatory information can be readily found on websites; and
- enabling timely access to staff employed by regulators.

The NFF agrees with these recommendations and argues that this approach should be adopted generally by governments whenever considering the regulatory impost on business. Given the accumulation of regulation and complexity of requirements on farm businesses, it is important that information on any changes to Government policy or regulation are communicated in a clear, concise and industry-specific format.

3. Limited farmer knowledge of PPSR

A lack of knowledge of the PPSR was highlighted in late 2012 by rural media.[6] Recent anecdotal evidence from NFF members indicates that the situation has not improved. For example, grain as a commodity has a long storage life and there are potential benefits for grain growers in using the PPSR to protect their interests, including ensuring that growers are secured creditors alongside banks, rather than unsecured creditors. Although it is worth noting that the PPSR only offers potential benefits for the farm sector in cases of insolvency and administration.

Despite this, the GrainGrowers' National Policy Group and grain growers generally are constantly seeking advice about how the PPSR works, both in the field and at grower meetings. Despite engaging third party lawyers to assist in providing clarity on how the PPS Act will help growers, GrainGrowers Limited is still not in a position to provide a basic level of advice on how the PPSR operates in practical terms for the farming sector or how it could protect growers in their contractual arrangements with suppliers.

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[4] http://www.tfga.com.au/in-the-news/from-the-ceo/compliance-has-industry-on-edge/
[5] http://pc.gov.au/projects/study/small-business/report
[6] See for example, http://theland.farmonline.com.au/news/nationalrural/agribusiness-and-general/finance/possession-now-10-tenths-of-the-law/2628252.aspx?storypage=0

In a recent case, suppliers of Tasmanian vegetable company Premium Fresh were exposed to significant losses when the company went into voluntary administration in August 2012. Many suppliers were unsecured creditors who did not register their assets in the mandatory 15 day period. One of those, HG & RK House, stood to lose about $70,000 and many others faced closure because of the incapacity to absorb such a loss.

In the submission of NFF member, the Australian Livestock & Property Agents Association Ltd (ALPA) to this inquiry, ALPA confirmed the lack of clarity around when property interests should be registered on the PPSR. ALPA are unclear about when livestock traded through auction sales should be registered. If the industry organization is not clear about how the law applies in this case, it is more than likely that many farmers and farm-related businesses are also unclear and are at risk of loss of property, without compensation, where assets should have been, but were not, registered.

To help reduce the confusion, many of NFF's member organisations, including AgForce, Victorian Farmers Federation and Tasmanian Farmers and Graziers Association, each provide information to members through newsletters and other farmer communication material about when to use the PPS Act. This is not a sustainable approach. Developing and distributing information and guidance material about laws and their consequences is the responsibility of Government. Industry associations are not an arm of government and cost-sharing arrangements for this need to be put in place where it is intended that organisations such as the NFF take on the traditional role of government in communicating with stakeholders, for reasons of efficiency. Further, resources should be targeted to communication with those affected, in line with the Productivity Commission's recommendation that regulators work with industry associations and tailor information specifically for industry sectors.

Currently, the ability for peak farming bodies to provide farmer-specific advice is limited by a lack of information available from government on when the PPSR should (or does not need to) be used by farm businesses. This leaves them vulnerable to feeling that they have no choice but to seek legal advice, and pay a premium for it. If farmers were in a position to understand when to use the PPSR and what to register on it, they would be able to do this without assistance, for a nominal fee. Unfortunately, the lack of awareness means that this is not the practical reality in many cases.

4. Complex language is a barrier to understanding

The NFF acknowledges that this is a technical area of law and that it is difficult to use plain English language because of the risk that simple language will change the meaning of laws. Unfortunately, because the PPS Act is drafted in specialist technical language, it is hard to understand for anyone without professional qualifications in the relevant field. Given the PPS Act's broad scope and its potential to cause individuals to unwittingly lose assets to unrelated third parties, further work is needed to simplify the language in the PPS Act so that it is more accessible to the layperson. This is especially important for small businesses who do not have the resources to source specialist legal advice on a continuing basis. In addition, clear information sheets explaining the effect on particular sectors of the economy that are most likely to be affected are essential.

The language and examples used in any educational material about the PPS Act must be correct, in plain English and as simple as possible. They should include examples of best practice contract terms, for example in relation to ‘retention of title’ to assist farmers who are not in a position to seek legal advice. They should provide targeted advice (for example, “in a drought, a farmer sends cattle/sheep off property for agistment – in what circumstances should PPS registration be considered?”). They should be easy to access both electronically and in hard copy. Many farmers in remote areas have limited access to digital services and for them, mobile technology or service delivery that is exclusively electronic is of little value.

5. Operational issues

While the Government website may make the PPSR seem easy to use, a failure to enter wholly accurate information at the point of registration can result in an invalid PMSI and loss of assets. Invalidity of registration may not become clear until the farmer seeks to rely on registration.

Another operational issue is the requirement for adequate retention of title clauses in the grain contract. A failure to ensure the clause is legally sound and meets the particular needs of the farmer may render the purchase money security interest (PMSI) invalid if a buyer has taken security over a commodity, such as grain, to borrow against.

Finally, registration does not guarantee security in crops held: if stock has been outturned, ultimately the security held by the grower is limited to the remaining assets of the company in liquidation (not over the full value of stock for which payment has not yet been made). The value of security is reduced to the value of assets distributed to creditors after liquidation, which could be only 20 cents in the dollar or even less.

6. Summary

The introduction of the PPSR, under the PPS Act, has led to much confusion among the farming community about what security they have over their personal property and when property or property interests should be registered. This confusion, compounded by the existing burden of regulation on farmers and a lack of clear information about what it means has limited the sectors ability to realise the potential value of the PPSR.

The NFF now recommends that the Government:

- provide for primary producers to take ‘super-priority’ in the line of secured creditors;
- consider whether primary producers could be given default secured creditor status until payment for their goods has been made, regardless of whether there is a valid ‘retention of title’ contract term in operation, if this can be done while still enabling buyers using stock to borrow against it;
- review whether the language in the PPS Act can be further simplified so that as far as possible it is expressed in plain English and is easy to understand; and
- dedicate resources to the development of clear, concise and industry-specific information for farmers about how the PPSR affects them.