



Promoting Responsible Consumer Lending

www.nfsf.org.au

National Financial Service Federation Ltd

Submission
to

**Regulations to the Personal Property
Securities Bill 2008**

Attorney-General's Department
Robert Garron Offices
National Circuit
BARTON ACT 2600

Submitted via email to
pps@ag.gov.au
October 2008

Prepared by

Robert Legat
Vice Chairman
National Financial Services Federation Ltd
PO Box 140
Redcliffe QLD 4020
P 07 3284 3246
F 07 3009 0606
M 0412 509010
E ceo@nfsf.org.au

CONTENTS

<u>Section</u>	<u>Topic</u>	<u>Page No.</u>
A	What is the National Financial Services Federation?	1
B	Answers to specific questions in the Commentary Paper	
1	Should other applicable laws be prescribed under section 16?	2
2	Should any regulations be prescribed under section 18...?	2
3	Are there any other days that should be prescribed as not being a “business day” for the purposes of the Bill?	2
4	General comment regarding section 19.	2
5	Are there species of fish that should be excluded from the definition of fish?	2
6	Are there any types of leased property that should be excluded from the definition of lease for a term of more than one year?	2
7	Section 75(1)(d) circumstances.	3
8	Section 76(1)(d) circumstances.	3
9	Section 86 – Definition of motor vehicle.	3
10	Class of persons to which section 86(2) applies.	3
11	Section 134 circumstances.	3
12	Section 154 notice requirements.	3
13	Extension of Part 5.2 of the Corporations Act.	4
14	Section 166 comment.	4
15	Consumer Credit Code crossover.	4
16	Section 177 notice requirements.	4
17	Section 182 notice requirements.	4
18	What other interests in personal property should be recorded on the register?	5
19	Prohibited registrations.	5
20	Collateral described by serial number.	5
21	Aircraft.	5
22	Boats.	6
23	Classes of collateral.	6
24	Proceeds of collateral.	6
25	Subordination agreements.	6
26	Other matters for regulation.	6
27	Ineffective registration and defects.	6
28	Demands for amendment under section 212.	6
29	Section 227 – search results and withheld data.	6
30	Search criteria.	7

Personal Property Securities Bill 2008 - Regulations **Submission by National Financial Services Federation Ltd**

The National Financial Services Federation welcomes the opportunity to contribute to the Attorney-General's department in their discussion of the Regulations to the Personal Property Securities Bill 2008.

A. What is the National Financial Services Federation?

The National Financial Services Federation Limited is the peak industry body representing micro-lenders and payday lenders in Australia. It is governed nationally by a board of directors representing each of the states.

Our members are non-bank, non-ADI lenders and their market can generally be described as providing loans up to \$5,000 over terms of up to 2 years. The National Financial Services Federation represents over 300 credit provider outlets nationally from this market segment. All members are required to subscribe to, and abide by, the National Financial Services Federation's own Code of Ethics.

Over the past few years, the National Financial Services Federation has been conducting research and providing submissions and recommendations at state government level. These recommendations include major credit reforms including;

1. Licensing of all credit providers;
2. External dispute resolution as an industry requirement;
3. Membership of a professional industry body with code of Ethics such as the National Financial Services Federation as an industry requirement;
4. Promotion of a worlds best practice model to protect consumers as opposed to an unworkable capping of fees and interest rates which cannot stop debit spirals;
5. Positive credit reporting to help reduce the level of over-indebtedness being experienced by consumers;
6. Regulators working closely with industry representatives to manage beneficial outcomes rather than waiting for problems to arise; and
7. A truly Uniform Consumer Credit Code (Commonwealth control).

The Federation has also heavily campaigned against the interest rate caps in the New South Wales and ACT (legislated in Queensland and mooted in South Australia), which we feel relies on a false perception of the industry, its practices and returns.

The National Financial Services Federation has recently held seats at these conferences and committees:

1. Griffith University – Regulating the Cost of Credit 7 December 2006

2. Ministerial Payday Lending Working Party – SA November 2006 to March 2007
3. Consumer Credit Code Amendment Bill – Roundtable Discussion April 2008
4. Roundtable Small Amount Cash Lending Inquiry – Vic June 2008

The National Financial Services Federation holds a wealth of industry information that can assist with the discussion to be undertaken. This information includes statistics, facts and relevant further research into the industry and represents large amounts of input from many industry stakeholders over the past two years. The information we are able to provide will accurately reflect the realities of our industry and the members of the community who choose to be its customers.

B. Answers to specific questions in the Commentary Paper

Question 1: Should other applicable laws be prescribed under section 16?

The regulation should include the Motor Vehicles and Boats Securities Act 1986 (Qld).

Question 2: Should any regulations be prescribed under section 18...?

None that we are aware of.

Question 3: Are there any other days that should be prescribed as not being a “business day” for the purposes of the Bill?

None that we are aware of.

Question 4: General comment regarding section 19.

Items 11, 12, 14 and 16 should require that the correct name of the entity be recorded along with the registration number. This will decrease the possibility of confusion and mistake caused by erroneous recording of registration numbers, and allow for quicker and easier identification of entities.

Question 5: Are there species of fish that should be excluded from the definition of fish?

None that we are aware of.

Question 6: Are there any types of leased property that should be excluded from the definition of lease for a term of more than one year?

None that we are aware of.

Question 7: Section 75(1)(d) circumstances.

We are not aware of any other circumstances that would require coverage by regulation.

Question 8: Section 76(1)(d) circumstances.

We are not aware of any other circumstances that would require coverage by regulation.

Question 9: Section 86 – Definition of motor vehicle.

Our comments here center on the definition of “unregistrable motor vehicle”. We cannot offer any examples, but consider that there may be circumstances in which a proposed security may not have a VIN or identifying number. By the proposed definition, not having either of these would preclude it from being identified as a motor vehicle.

Of course, that does not preclude it from being able to be taken as security.

Question 10: Class of persons to which section 86(2) applies.

In our submission on the Bill, we commented that we are opposed to the effect of section 86(2). Our members have circumstances in which motor vehicle dealers have bought and attempted to sell (and in some cases, actually sold) motor vehicles over which there have been registered encumbrances.

The continuity of the security encumbrance has been all that has salvageable for our members in this case.

To create legislation that would allow motor vehicle dealers to ignore security interests, or deal inconsistently with the rights of security holders, is unfairly prejudicial. The proposed Bill and commentary are silent on what recourse interest holders may pursue. Any common law action would be compromised because the action of the Bill in allowing the action may give rise to a sense of entitlement.

Accordingly, we do not support any of the listed class of persons as appropriate.

Question 11: Section 134 circumstances.

We are not aware of any other circumstances that would require coverage by regulation.

Question 12: Section 154 notice requirements.

It may be worth considering adding a requirement to give a proposed course of action for the secured goods under section 154(3). While this shouldn't be held as the only

available course of action, it may help the grantor and other security interest holders to know the intentions of the reposessor. This may ultimately help the decision making of all parties on how to proceed.

Question 13: Extension of Part 5.2 of the Corporations Act.

Yes, for the purposes of consistency with the Corporations Act. Allowing the extension will negate any cross-jurisdictional arguments concerning competing interests in secured property where both the Bill and the Corporations Act apply.

Question 14: Section 166 comment.

We are not aware of any provision in state legislation concerning land that may interfere with section 166. Further, despite the conferral of jurisdiction over personal property security by the states to the Commonwealth, an attempt by the Commonwealth to amend provisions of state law concerning land may be ultra vires.

Question 15: Consumer Credit Code crossover.

We consider that the notice and time limit provisions noted are sufficient provisions of the Code for inclusion in the regulations.

Question 16: Section 177 notice requirements.

We do not consider that the notice requires any further inclusions. However, we have concerns with the requirement for a time and place of proposed disposal. There is no notation that shows if, or how, a secured party will be held to the information provided in the notice.

We understand that the method of disposal is required to be produced. This requirement differs in that quite often a reposessing party will have a good idea of the preferred methods of disposal of a good, being familiar with its nature.

Time and place, however, may not be available at the time the notice is required to be given, or may change. This may be due to a decision on behalf of the reposessing party, but it may also be due to circumstance or election of the selling agent (eg auctioneer). If it is intended to hold security holders to the information contained in these notices, then they may breach these requirements where it is not at their election.

Question 17: Section 182 notice requirements.

We see no requirement under section 182 where the reposessing party needs to give any estimate of the worth of the secured item. Circumstances may arise where the secured party wishes to retain collateral and the parties disagree as to the value ascribed to it, particularly where a secured party may feel the value of the goods just outweighs the balance outstanding and grantor has the view that the goods are worth significantly more than that balance.

Alternatively, the secured party may indicate that the secured goods are worth more than the grantor contends, in which case the grantor may be happy with the transaction to proceed and less likely to protest.

Question 18: What other interests in personal property should be recorded on the register?

The register should include any notifications that may affect the rights of a security provider in the property. These should include the matters noted in the Discussion Paper and items such as the following:

1. Wrecking of the property (predominantly for motor vehicles);
2. Reported theft; and
3. Undetermined ownership/interest claims in the property (similar to the caveat system used for real property).

Question 19: Prohibited registrations.

We are not aware of any circumstances that would require coverage by regulation.

Question 20: Collateral described by serial number.

We agree with the information set out in the Discussion Paper concerning the recording of identifying numbers for powered craft. Particularly, in respect of motor vehicles, there can often be up to three identifying particulars, commonly VIN/Chassis, engine number and registration number. Engines can be removed and replaced, making this method of identification unreliable. Registrations can be changed easily, and without regard to existing registered encumbrances. VIN/Chassis identification remains stable, and is the best identifier to use.

That is not to say that it is not useful to collect and make use of the other identifiers, just that they are often inferior to the VIN/Chassis.

In respect of other items, it is possible that other forms of collateral can be identified by serial number. Examples of these are the engraving of serial numbers onto household goods, which numbers are then recorded into police databases, and Datadot technology.

The register should have the capacity to record these examples of serial numbering to allow better tracking of items.

Question 21: Aircraft.

We have no input into this area, as it is outside our industry's field of expertise.

Question 22: Boats.

We consider this rationale to be effective and practical.

Question 23: Classes of collateral.

The classes of collateral detailed in the proposed regulation, by and large, sufficiently classify the types.

Although this may not be the best place for the distinction to be made, it may be worth a further classification (for certain classes) into consumer or investment classes. This would assist all parties in knowing, for example, whether a particular security needs to be dealt with under the Consumer Credit Code.

Question 24: Proceeds of collateral.

We have already made comments about the proposed rules regarding attachment to proceeds of collateral in our submission concerning the Bill.

In respect of the proposed regulation, we are in favour of a system of notification in the register.

Question 25: Subordination agreements.

Our industry will not generally make use of subordination arrangements, however we consider the proposed regulation and rationale to be sufficient.

Question 26: Other matters for regulation.

We concur with the proposed regulations and rationale given in the Discussion Paper.

Question 27: Ineffective registration and defects.

We are not aware of any other defects that should be prescribed in the regulations.

Question 28: Demands for amendment under section 212.

We consider that the proposed particulars for a demand for amendment to the Registrar are sufficient to both sufficiently identify the record in particular and prompt the Registrar to investigate the matter correctly.

Question 29: Section 227 – search results and withheld data.

We do not have any information on other circumstances where it would be appropriate to withhold data.

However, we have some comment on the way in which data will be withheld, which is not stipulated. Rather than having the Register fail to provide a response (ie a nil

return), it would be more useful for a response to be returned that there is information that is being withheld.

A nil response may give a false impression that a searching party may continue with a transaction when, in fact, there may be relevant information that would dissuade them from doing so. Instead, a statement showing that information from the search results is withheld would put the searcher on notice. From there, they can make a decision to either not proceed with their action or make alternate enquiries.

Question 30: Search criteria.

Provided that there are sufficient methods to refine searches as noted in paragraph 187 of the Discussion Paper, we do not see that any other criteria is needed.