

## Restructuring & Insolvency Alert

# Seriously! - When are PPSR registrations seriously misleading?

### WHAT YOU NEED TO KNOW

- The Supreme Court of Victoria recently heard an application by a syndicate of lenders seeking a declaration that a PPSR registration made to perfect a general security interest (**GSI**) they collectively held to secure amounts advanced to Wasabi Energy Limited (administrators appointed) (**Borrower**) was not seriously misleading within the meaning of section 164(1)(a) of the *Personal Property Securities Act 2009* (Cth) (**PPSA**).
- The court declared that a registration made to perfect the security interest in question (the GSI) held for the benefit of multiple named secured parties, but which listed only one secured party, was not seriously misleading and so not ineffective by operation of PPSA section 164(1)(a).
- The Supreme Court of New South Wales in *Future Revelation Ltd v Medica Radiology & Nuclear Medicine Ltd* [2013] NSWSC 1741 took a similar approach to the question of "seriously misleading", emphasising that the primary test is whether the registration details are sufficiently complete that a search on PPSR would reveal the registration.

### Background facts

The *Wasabi* matter involved a syndicate of 18 lenders (**Syndicate**) who lent money to the Borrower under a facility agreement (**Loan**) and held a GSI jointly over all-assets of the Borrower – there was no security agent/trustee. The Syndicate held one PPSR registration against Wasabi (**First Registration**) that included all 18 lenders in one secured party group (**SPG**). The registration erroneously included an end date, being the same date as the repayment date under the Loan (**Registration End Date**). The registration lapsed on the Registration End Date, and the Borrower was unable to repay the Loan. The Borrower entered voluntary administration 16 days later.

One lender only realised that the First Registration lapsed, and four days later lodged another registration (**Second Registration**), but only listed itself as secured party (not, in addition, the other 17 lenders in the Syndicate). This lender then sought to argue that only it benefited from the Second Registration as secured party, and could take the entire benefit of the GSI. This solitary lender then made a court application seeking orders under *Corporations Act* (**CA**) 588FM for the extension of the time to make the Second Registration for the purposes of CA 588FL, the

Second Registration clearly not being made (as is required under CA 588FL) within 20 business days of the grant of the GSI.

The potential consequences of this argument for the other 17 (unregistered?) lenders in the Syndicate were enormous given Wasabi had entered voluntary administration, meaning that unperfected (in this case, unregistered) secured parties see their security interest "vest" in the Borrower, that is, unenforceable against the Borrower.

### One, or multiple, GSIs?

The court found on the facts, accepting arguments put by the 17 "unregistered" lenders, that all lenders shared the benefit of a single GSI. Once this was established, it naturally flowed that any orders under CA 588FM should be in favour of all lenders in the Syndicate, and the validity (or invalidity) of the Second Registration should be determined in relation to all lenders in the Syndicate and the GSI, not one particular lender.

### Was the Second Registration seriously misleading?

Part 5.4 of the PPSA (sections 159 to 168) deals with when a registration made on PPSR is effective, or ineffective. PPSA section 159 relevantly states:

"A registration is only ineffective because of a defect if there is a seriously misleading defect in data relating to the registration, or one of a number of particular defects set out in section 165 exists."

Putting aside the particular defects listed in s 165, section 164(1)(a) relevantly states that "a registration with respect to a security interest that describes particular collateral is ineffective because of a defect in the register if, and only if, there exists a seriously misleading defect in any data relating to the registration".

The PPSA does not define what a "seriously misleading" defect in a registration is, but leaves the matter to general interpretation. The word "defect" is defined in PPSA section 10, as follows "defect, in relation to a registration, includes an irregularity, omission or error in the registration."

PPSA section 164(2) and paragraph 5.74 of the explanatory memorandum to the *Personal Property Securities Bill (EM)* establish that the test of whether a defect is seriously misleading is an objective test. This also reflects the position under the personal property securities law in Canada, where it is said that it is an objective question whether an error is seriously misleading from the viewpoint of a hypothetical searcher of the system: *Cuming, Walsh and Wood, Personal Property Security Law*, p206, 269.

In New Zealand, in *Service Foods Manawatu Ltd (in rec & liq) v NZ Associated Refrigerated Food Distributors Ltd* (2006) 9 NZCLC 263,979, [32] the Court said that the real mischief to which the concept of seriously misleading (in the context of the PPSA) must be directed is the prevention of a searcher from being able to find a financing statement because of error in either the grantor's name or the collateral's serial number. This decision is important because searching on the Australian PPSR is similar, being by either the grantor's name (here, the Borrower) or by serial number for serial numbered property (for example, consumer motor vehicles). Importantly, searching on the PPSR is not by the secured party's name or details.

Paragraph 5.73 of the EM relevantly states:

5.73 *This policy approach has been adopted to promote the reliability of PPS Register data. This rule would not necessarily make a registration defective on the basis of a simple mistake, such as a typographical error in a free text field. Nor would it be likely to capture errors of a more substantive*

*kind that do not seriously mislead a person. For example, the omission of the name of one secured party in a consortium would not be seriously misleading whereas an incomplete or inaccurate collateral description would be likely to be so.*

In the United States, the commentary to Article 9 of the Uniform Commercial Code (the US equivalent to the PPSA) relevantly states that "*Inasmuch as searches are not conducted under the secured party's name... an error in the name of the secured party or its representative will not be seriously misleading*": Selected Commercial Statutes for Secured Transactions, (2013 Edition, West), Commentary to Article 9-506 of the Uniform Commercial Code.

The Second Registration was made correctly against the Borrower as grantor, and listed the collateral class "all present and after-acquired property - no exceptions". Accordingly, anyone who searched the PPSR against the Borrower on or after the date of the Second Registration would have found the Second Registration, and realised that a security interest was granted, or claimed, over all present and after-acquired property of the Borrower.

Further, interested parties who searched the PPSR and found the Second Registration could have followed the PPSA procedures (set out in Part 8.4 of the PPSA) to request a copy of the underlying security agreement (that is, the GSI agreement itself), or a summary of its details. Had they done so, they would have been provided with fuller details of the GSI and the parties to that security interest (all 18 of them).

The PPSR is only designed to disclose summary details of security interests, and does not record the underlying security agreement (here, the GSI). This is the system that the PPSA and the PPSR establish for due diligence of security interests and security agreements that are registered.

Accordingly, it was submitted, and the court accepted, that the Second Registration was not "seriously misleading" within the context of the meaning of that phrase in the PPSA. Searchers of the PPSR would have discovered the Second Registration upon search, and could have investigated further by requesting a copy of the security agreement from the secured party named in the registration.

## **Future Revelation decision**

The New South Wales Supreme Court in *Future Revelation Ltd v Medica Radiology & Nuclear Medicine Ltd* [2013] NSWSC 1741 has taken a similar approach to the question of "seriously misleading", citing Canadian authority with approval and emphasising that the primary test is whether the registration details are sufficiently complete that a search on PPSR would reveal the registration in question. In *Future Revelation*, a registration was made against a grantor listing the ABN instead of the A.C.N. of the secured party. The court held that the registration was not seriously misleading, emphasising that a search of PPSR against the grantor would have revealed the registration.

## **Conclusion**

The Supreme Courts of Victoria and New South Wales have followed the approach adopted in United States, Canadian and New Zealand decisions in relation to "seriously misleading" registrations. This approach interprets the issue objectively, placing emphasis upon defects in registrations that would prevent searchers of PPSR from finding the registration. This necessarily places primary focus upon errors in the grantor's details (given that most searches of PPSR are by reference to the grantor's details), or serial numbers where registration/search is by reference to serial number.

## **Contact**



**Lionel Meehan**  
Partner  
Melbourne  
T: +61 3 9679 3242  
E: [lionel.meehan@ashurst.com](mailto:lionel.meehan@ashurst.com)

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