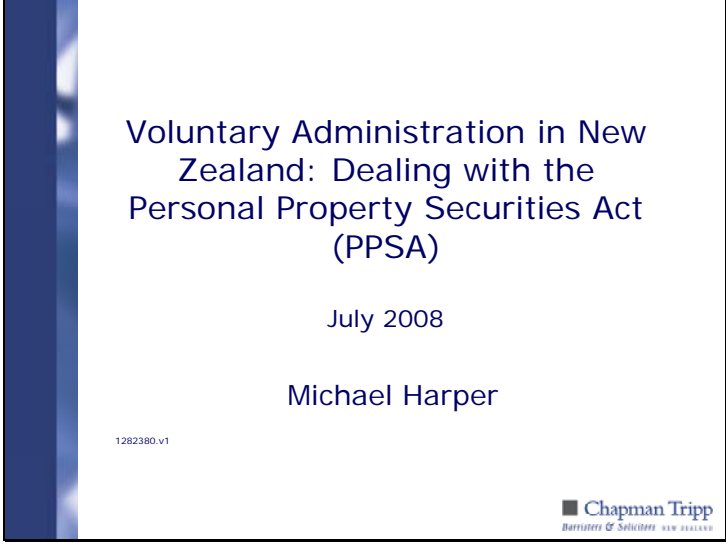


## Michael Harper, Partner, Chapman Tripp, Auckland Voluntary Administration in New Zealand: Dealing with the Personal Property Securities Act (PPSA)

Slide 1




Voluntary Administration in New  
Zealand: Dealing with the  
Personal Property Securities Act  
(PPSA)

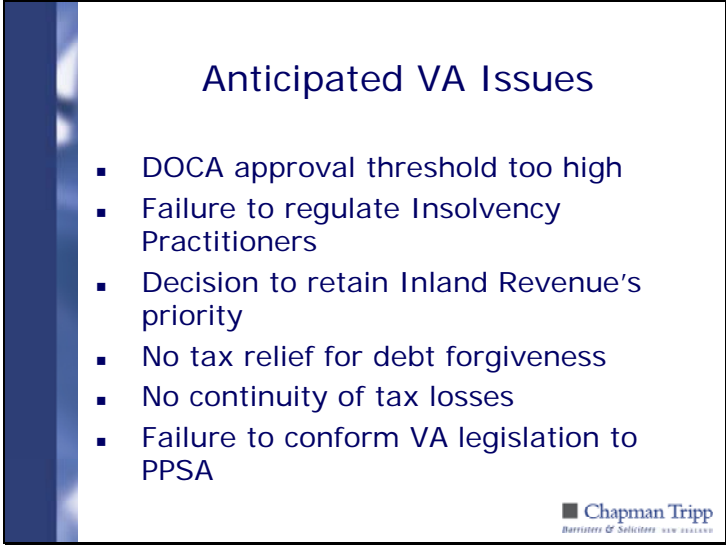
July 2008

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Slide 2



Anticipated VA Issues


- DOCA approval threshold too high
- Failure to regulate Insolvency Practitioners
- Decision to retain Inland Revenue's priority
- No tax relief for debt forgiveness
- No continuity of tax losses
- Failure to conform VA legislation to PPSA

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Slide 3

**“Super Priority” PMSIs**

- ROT suppliers will hold PMSI s74 (*inventory*) if:
  - ROT security interest has attached (ROT supplier has supplied goods, Debtor has rights in the goods and there is a valid security agreement); and
  - ROT security interest has perfected (by registering a financing statement on PPSR)
    - Such creditors obtain “super priority” ranking ahead of GSA holders for goods supplied **after** the date of the PPSR registration

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Slide 4

**Icon Digital Entertainment Ltd**

- Company established 2006
- Owned *Sounds*, *Blockbuster* and *Games Plus* stores
- Franchisor for further 15 stores
- No cash reserves – monthly losses
- 1<sup>st</sup> GSA \$13m, 2<sup>nd</sup> GSA \$2.7m
- Unsecured debts \$14m + landlords
- November 2007 unable to trade further

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Slide 5

### The Icon Administration


- 19 November – directors appointed BDO
- 20 November – Court approval granted
- Stores closed for stock-take, some permanently
- 30 November – 1<sup>st</sup> creditors meeting
- BDO sought buyers of stores
- Convening period extended by Court
- 31 January – Watershed meeting appointed BDO as liquidators

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Slide 6

### ROT Creditors (Inventory)


- Late registrations – PMSI has priority over GSA only for deliveries after registration
- Practical problem of identifying stock
- Slow responses by ROT creditors to supply security agreements, invoices and claim amounts
- Legal impact of VA and moratorium

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Slide 7

### ROT Creditors (Inventory)


- ROT allows sales in the ordinary course of business
  - Goods ordinarily sold as part of usual trading
  - Goods sold subject to terms and conditions agreed between ROT supplier and the company
- Australia – sales in Administration are in ordinary course if contract complied with
- Administrators may therefore sell if contract allows it (must comply with contract (express or implied terms))
- Unless express provision, ROT creditor will have to revoke authority to sell if it doesn't want sales to occur
- Moratorium prevents repossession of goods supplied but not paid for (without the administrators' written consent or the permission of the courts) but does not give administrators mandate to sell
- Negotiate terms or seek court directions
  - Cost price? Retail price?

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Slide 8

### *Osborne Computer Corporation Pty v Riddell* (1995) 13 ACLC 1210


- *Issue: Whether administrator can sell goods subject to ROT clause, despite ROT suppliers requesting return of goods?*
- Administrator entitled to sell goods subject to ROT claims in "the ordinary course of business"
- Sale not in "the ordinary course of business" if made after owner had demanded their return in accordance with its contractual right to do so
- Administrator entitled to sell goods where sale "not" in ordinary course of business only on the condition that the invoice cost (the "price paid") for those goods was paid into a separate account upon receipt and ultimately remitted to ROT supplier
  - Allows business to continue – consistent with purpose of VA
  - Gives adequate protection to interests of suppliers

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Slide 9

## Quantum


- *What if ROT creditors demand repayment of all the proceeds from sale of each good supplied?*
- Australian practice: Administrators can pay only the cost (invoice) price to ROT suppliers with perfected PMSIs in respect of goods supplied **after** the date of their PPSR registration
- To have to apply the entire proceeds of sale:
  - Would starve the company of cash needed to pay for expenses incurred in selling the goods
  - Does not reflect commercial reality. Would not do so in normal business practice
  - Unfairly advantages ROT suppliers at expense of all other creditors
  - Defeats objectives of VA – to permit a company to trade on with a view to maximising returns available to all creditors

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Slide 10

## How should Administrators deal with ROT creditors?

- Treat all ROT suppliers with perfected PMSIs equally (not all ROT suppliers will be aware of need to make demand to bring license to deal to an end)
- Administrators should meet with ROT creditors
  - Discuss terms of payment and retention of monies
  - Set out amounts equal to invoice costs will be retained in separate account and paid to ROT suppliers for goods supplied after the date of each ROT supplier's PMSI registration
- Only sell goods subject to ROT PMSI once:
  - Arrangement agreed with ROT supplier (sales without consent, are not in the ordinary course of business)
  - With the leave or at the direction of the Court

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Slide 11

Can the assets of the Company be sold where there are subordinate security interests?

- *Australia:* Administrator can not dispose of:
  - Property subject to a charge; or
  - Property used, occupied or in the possession of Company but of which someone else is the owner or lessor;

Unless the disposal is:


- In the ordinary course of business;
- With the written consent of the chargee, owner or lessor;
- With the leave of the Court (if the Court is satisfied that arrangements have been made to protect adequately the interests of the chargee, owner or lessor)

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Slide 12

Can the assets of the Company be sold where there are subordinate security interests?

- *New Zealand:* No such provision
- Receivership – s30A subordinate security interests in property are extinguished on disposition of the property
- *Issue: VA does not extinguish subordinate security interests on disposition of the property*
  - Need a release of GSA holders security interests
  - Can negotiate to sell the business subject to ROT creditors security interests
- Same issue whether sell before or after Watershed Meeting
- Option: Seek court approval of sale and extinguishment of subordinate security interest?
  - Factors the Court will consider:
    - Is the sale in the interest of all the creditors
    - Have arrangements been made to protect adequately the interests of the chargee, owner or lessor

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