

Empirical studies of voluntary administration

Jason Harris

Associate Professor, UTS Faculty of Law

PhD candidate-Adelaide Law School

jason.harris@uts.edu.au

Visit my insolvency blog: <https://australianinsolvencylaw.com>

OVERVIEW OF VA

- 24 years since introduction of Pt 5.3A (following Harmer Report 1988)
- Procedure remained largely static:
 - Length of procedure amended in 2007 (change from 'days' to 'business days')
- Used by both SME and large businesses (eg Ansett, ABC Learning, Dick Smith, Arrium)
- Viewed as being a useful procedure, broadly supported by stakeholders (including financiers)
- Overlapping appointments (VA and receivership) becoming more common
 - Using VA to support a receivership sale process

REVIEWS OF VA

- ASIC (1998)
- CASAC (1998)
- CAMAC (2004)
- PJC (Stocktake) (2004)
- Senate (Liquidators) (2010)
 - Partially implemented by ILRB 2015 (Cth)
- Senate (ASIC) (2014)
- Financial System Inquiry (2015)
- Productivity Commission (2015)

PC-Business set-up, transfer and closure (2015)

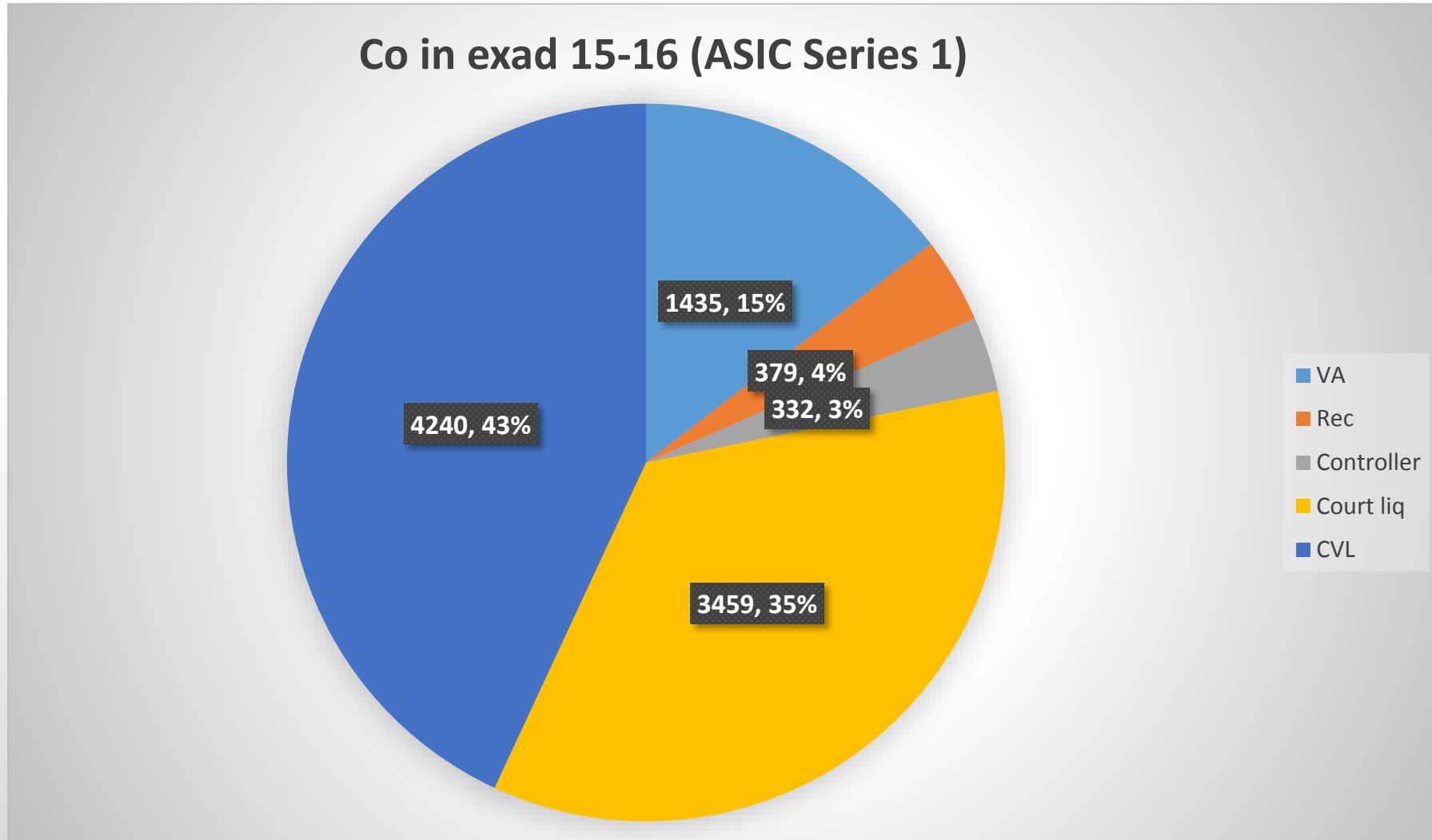
Finding 13.1

‘The current culture, incentives and legal framework around voluntary administration inhibit its effectiveness as a genuine restructuring mechanism.’

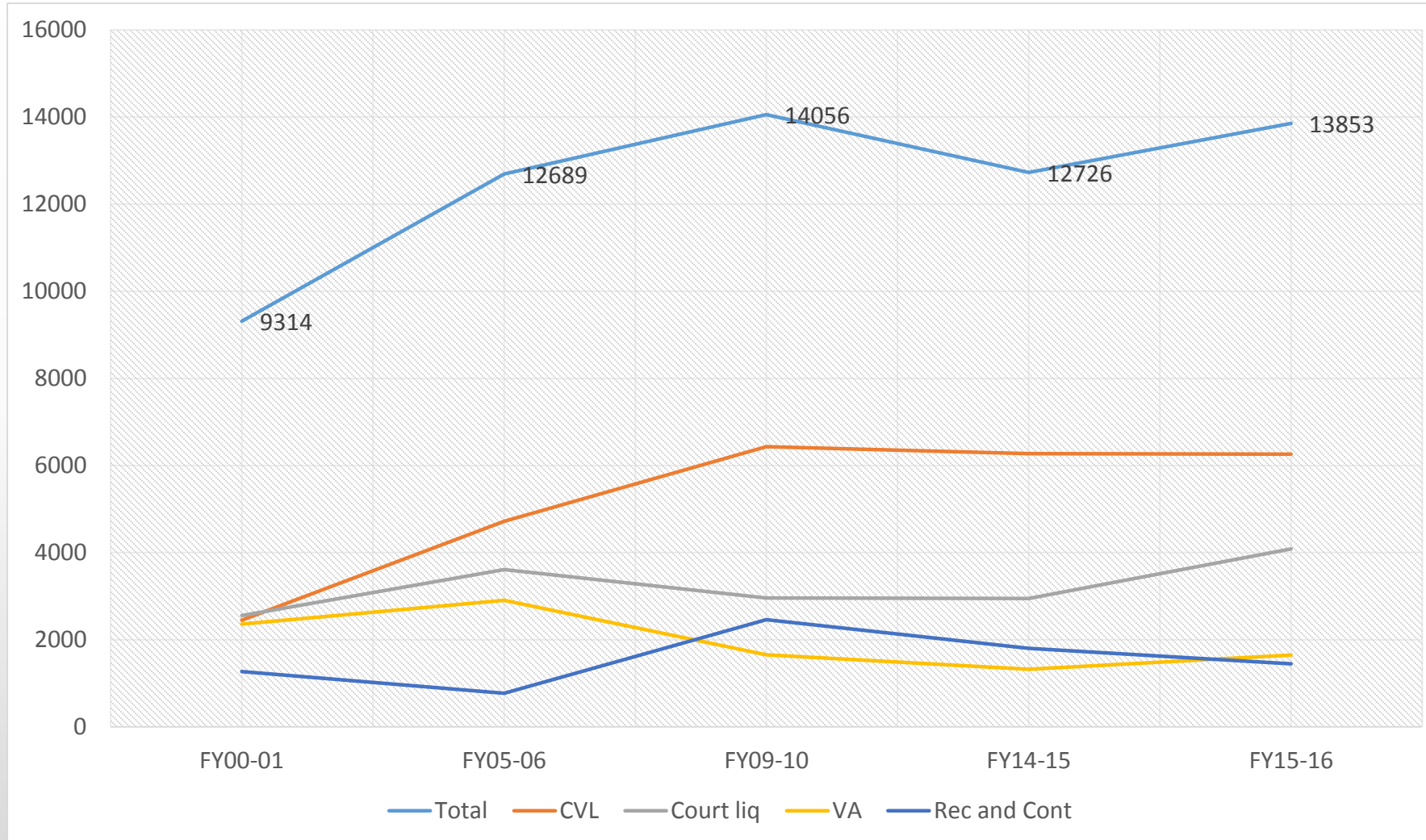
Finding 13.2

‘While some specific reforms are warranted, wholesale change to the Australian insolvency system is not justified.’

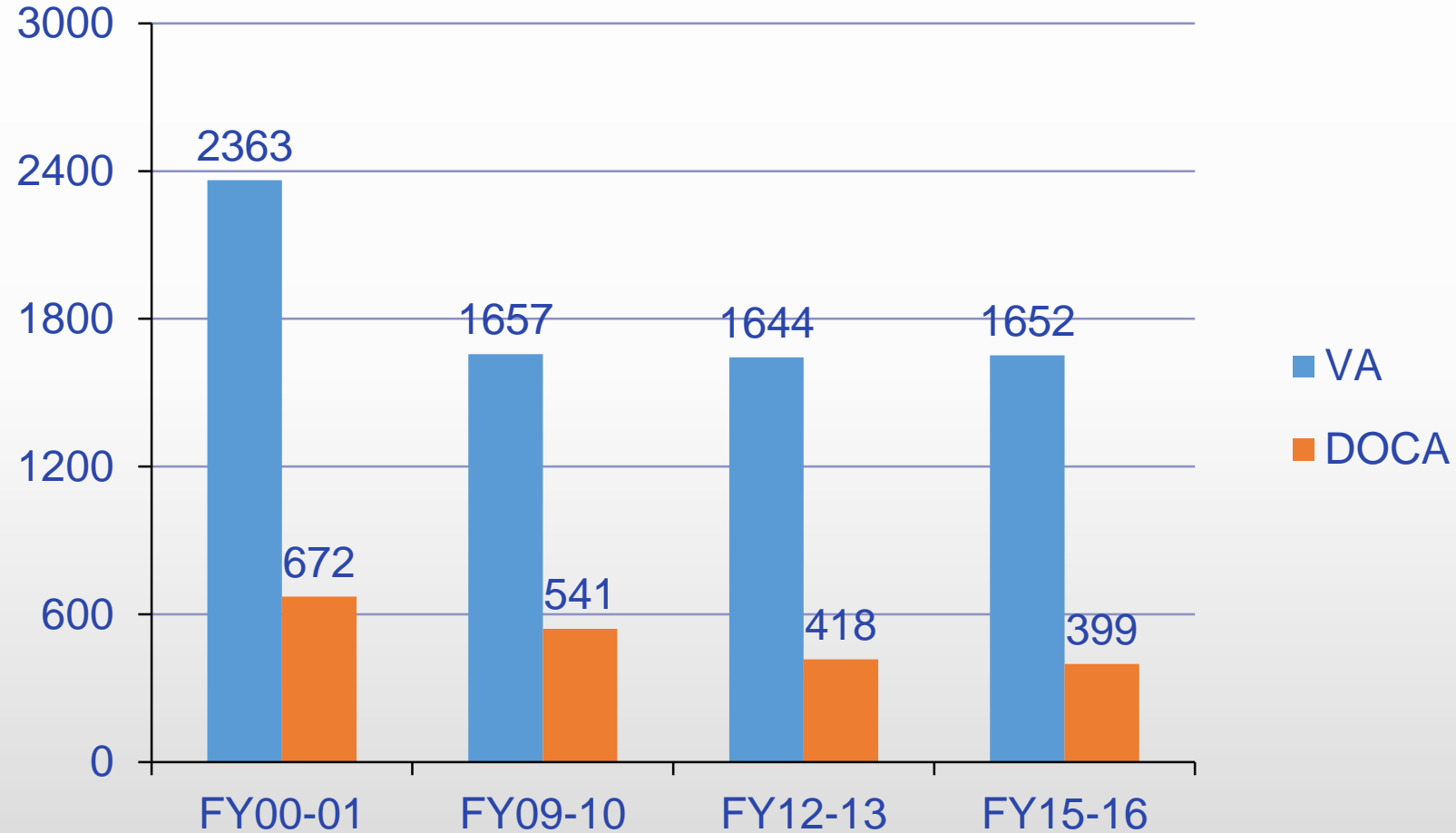
A snapshot of corporate insolvency



Exad appointments-ASIC Series 2



VA and DOCA (Series 2)



DESCRIPTIVE STATISTICS

ASIC statistics (Series 2)

- DOCA appt down from 7% of all corp insol appt in FY00-01 to 2.6% of all appt in FY12-13 (3% in FY15-16)
 - DOCA appt were:
 - 28% of VA in FY00-01
 - 32% of VA in FY09-10
 - 28% of VA in FY14-15
 - 24% of VA in FY15-16
 - Compare Eng/Wales-CVA only 2% of all corp insol appt
- VA appt down from 25% of all corp insol appt in FY00-01 to 10% of all appt in FY12-13 (12% in FY15-16)
- Total corp insol appt up from FY00-01 (9,314) to FY15-16 (13,853)
48% increase-at same time VA appt down from 2363 FY00-01 to 1653 in FY 15-16 (**30% decrease**)

QUANTITATIVE STUDIES

Frost-Drury, Greinke and Shailer (2000)

- 26 unlisted co in VA or liq compared with 26 going concerns (1993-1997)
- Firms with higher asset levels and less assets used for working capital more likely to choose VA

Routledge and Gadenne

(2005)

- 61 listed public co (1999-2003)
 - 36% reorganised; 19% used DOCA for liquidation purposes
 - Co with more long term debt and higher leverage more likely to liquidate from VA

(2007)

- 71 listed public co (1997-2005)
 - 20% reorganised; 48% used DOCA for liquidation purposes
 - Reorganised firms have higher non-current assets prior to VA and higher cash flow from operations compared with liquidating VA firms

Routledge and Morrison

(2009)

- 35 public listed co (1998-2004) assessing amount of performance and 'resource slack' in VA firms
- Drop in both immediately prior to VA appt suggests co leave it too late to appoint (last resort)

(2012)

- 61 public co from 1998-2008 (management characteristics of VA firms)

QUANTITATIVE STUDIES

Herzberg, Bender, Gordon-Brown (2011)

- Covered 323 s 439A reports (July 01-June 07)
- 26% (86 co) recommended DOCA
 - Of those: 67% actually proceeded to DOCA
 - Of those: 45% were still registered in 2010
- Timing between commencement and 2nd creditors meeting:
 - 79% less than 30 days; 10% more than 60 days (for DOCA rec co)
 - 83% less than 30 days; 2.5% more than 60 days (for liq rec co)
- 14c in the dollar expected return to unsecured creditors (for DOCA rec co- only 8c for liq rec co)
- 26% of DOCA rec co had pre-appt litigation/enforcement (75% for liq rec co)

QUANTITATIVE STUDIES

Wellard study (Terry Taylor Scholarship 2014)

- 72 co involved in 'fully effectuated' DOCAs from Aug12-July13
 - Only 48 s439A reports obtained
- 85% of co 'small co' under s 45A
- 77% of co had <\$1.5m in unrelated unsecured creditors
- Weighted average return 5.86c in the dollar (7.9c excl outliers and 0 return)
 - Return for restructuring DOCA was 3 time higher
- 72% of DOCA were quasi-liquidations (28% of DOCA were reorg/workout)
 - 10% involved creditors' trusts
- 64% of co still registered 1 year later
- Median remuneration for deed administrator was \$28,772 (\$31,500 for VA)
- 75% of DOCA provided for return to management control

QUALITATIVE STUDIES

CPA surveys (June93-June94; Nov93 and July95) (Coad, in Lessing and Corkery (eds) *Corporate Insolvency Law* 1995)

- DOCA made up 52% of VA in first 2 years; no of VA almost double CVL

Survey 1 (58% response out of 725 surveys)

- Est mean div 21.5c
- 92% dir appt
- 34% continued trading (48% of remainder resulted in >return than liq)

Survey 2 (60 random practitioners=43% response)

- Time constraints and personal liability listed as concerns with VA

Survey 3 (60 random practitioners=28% response)

- 75% believed VA was helping save businesses, 66% believed it provided better return
- 73% believe VA was cost effective
- Time constraints and personal liability still an issue

INSOLVENCY LAW REFORM ACT 2016 (CTH)

1 March 2017 commencement

- New regulatory architecture:
 - Insolvency Practice Schedule (Corporations) in Corps Act Sch 2
 - Insolvency Practice Rules (Corporations) 2016 (Cth)
- New registration (IPS Div 20) and discipline system (IPS Div 40)
- New reporting obligations (IPS Div 35) (note 2 year retrospectivity)
- New definition of 'relation-back day' (Corps Act s91)
- Directors must report material breach of DOCA (s445HA)
- Lodge DIRRI with ASIC
- Include location of property (if known) under s443B
- Broaden standing to seek court permission to not use former co name
- Clarification of transitioning from VA/DOCA to CVL (s446AA)

INSOLVENCY LAW REFORM ACT 2016 (CTH)

1 September 2017 commencement

- s439A report replaced by IPR (Corps) s75-225 report
- Committee of creditors becomes COI (IPS Div 80)
 - Increased monitoring role, appointment of members changes
- Remuneration approval process changes (IPS Div 60)
- Creditor powers to request information, document or report (IPS ss70-40,45)
- Court powers (including ss447D, 1321) replaced by new IPS Div 90
 - *s447A remains*
 - Change from appointment based powers to 'external administration' powers
- Meeting procedures (convening, notice, conduct) replaced by IPS Div 75
- Removal of administrator by creditors at any time possible (IPS s90-35)
- Appointment of reviewing liquidator possible (by ASIC, Court or creditors)
- New record keeping and periodic reporting (annual admin return; end of admin return) (IPS Div 70)

FUTURE REFORMS?

Waiting for government response to PC report (2015)

- Small liquidations (streamlined process)
- Pre-positioned sales
- Change focus of VA to ‘viable businesses’
- Ipso facto clause protection
 - LAW REFORM AGREED BY GOVERNMENT
- Safe harbour for insolvent trading
 - LAW REFORM AGREED BY GOVERNMENT