CHARACTERISTICS OF COMPANIES IN VOLUNTARY ADMINISTRATION: AN EMPIRICAL REVIEW[1]

Abe Herzberg*, Mark Bender† and Lee Gordon-Brownˇ

ABSTRACT

This paper contains an overview of data collected and key findings of an empirical study undertaken into voluntary administrators reports to creditors. Aspects of the study include: administrators suspected reasons for insolvency, administrators suspected breaches of the Corporations Act (directors duties, insolvent trading, unfair preferences, uncommercial transactions, record keeping) and returns to unsecured creditors and employees.

I	Introduction	1
II	Legislative framework	3
III	Sample and Methodology	7
IV	Findings	9
V	Conclusion	22

I INTRODUCTION

There will be an inevitable increase in business failure as a result of the onset of the global financial crisis and the consequent downturn in economic activity. In Australia, commentators have begun to refocus attention on the appropriateness of the various forms of external administrations, particularly voluntary administration, for dealing with insolvent companies.[2]

Australia's voluntary administration scheme has proved to be an extremely popular form of external administration for insolvent companies since it came into effect in

****WORKING PAPER ONLY – PLEASE CONTACT AUTHORS PRIOR TO CITING****

*BEc, LLB, GrDipComLaw, Barrister-at-Law (High Court of Australia and Supreme Court of Victoria), Senior Lecturer, Department of Business Law and Taxation, Monash University
† BBus, LLB(Hons), LLM, GrCertTMLP, GrCertHE, Barrister, High Court of Australia, Legal Practitioner, ACT Supreme Court, Trade Marks Attorney, Lecturer, Department of Business Law and Taxation, Monash University.
ˇBEng, PhD, Lecturer, Department of Econometrics and Business Statistics, Monash University.

[1] Funding for this research was provided by the Department of Business Law & Taxation, Monash University. The assistance of the Insolvency Practitioners Association of Australia (IPAA) in gathering the sample of voluntary administrators reports is gratefully acknowledged, as is the the work of research assistants, Julian Szafranic and Adam Herzberg, in tabulating the data from the s 439A reports.

[2] See James Eyers and Patrick Durkin,'Boards warned on insolvent trading risks' *The Australian Financial Review* 14 January 2009, 1 and 44.

1992. It originated from recommendations made by the Australian Law Reform Commission in its 1988 *General Insolvency Inquiry*[3] that the legislation should provide for a procedure that encouraged a creative approach to corporate insolvency.

The aim[4] of the scheme is to maximise the chances of an insolvent company or its business remaining in existence. If survival is not possible, the scheme aims to achieve a better return to creditors than would result from an immediate winding up. These aims are largely achieved if it is agreed that the company become subject to a deed of company arrangement (DOCA). Creditors have the final say in deciding whether the company's liquidation or a DOCA produces a better outcome for them. They may also decide that administration should end, in which case the company's directors and shareholders resume control over it.

Even though the voluntary administration scheme has been the subject of a number of government reviews and inquiries,[5] which largely supported the overall thrust of the legislative scheme, there have been relatively few empirical studies of how the scheme operates.[6] In the main, the focus of the previous empirical studies has been on companies that entered into DOCAs. The authors have not identified any other empirical studies that consider the characteristics of companies that enter into voluntary administration. This paper, intended to be the first of a series, attempts to fill that gap through a detailed analysis of s 439A(4) administrators' reports to creditors of 335 companies that went into voluntary administration over a seven-year period between 2001 and 2007. Hopefully the analysis will inform the debate on whether the voluntary administration scheme needs further reform.

The legislative overview of the voluntary administration scheme and the requirements with respect to s 439A(4) reports are discussed in Part II. Details about the companies in the sample and a brief overview of the methodology employed are discussed in Part III. Part IV describes the findings arising from this empirical analysis and Part V has the conclusions. There were several noteworthy findings. Administrators recommended a DOCA for about one quarter of the companies in the sample. A winding up was recommended for the remainder. Surprisingly, the study found that an overwhelming majority of the sampled companies maintained adequate books and

---

[3] Australian Law Reform Commission, *General Insolvency Inquiry* (1988) ALRC 45.
[4] *Corporations Act 2001 (Cth)* s 435A.
[5] Attorney-General's Working Party, *Review of the Regulation of Corporate Insolvency Practitioners* (June 1997); CAMAC Report, *Corporate Voluntary Administration (1998)*; CAMAC Report, *Rehabilitating Large & Complex Enterprises in Financial Difficulties* (2004); Parliamentary Joint Committee on Corporations & Financial Services Report, *Corporate Insolvency Laws: A Stocktake* (2004); CAMAC Discussion Paper, *Issues in External Administration* (2008).
[6] Australian Securities Commission, Research Paper 98/01, *A Study of Voluntary Administrations in New South Wales* (1998); James Routledge, 'An Exploratory Empirical Analysis of Part 5.3A of the Corporations Law (Voluntary Administration)' (1998) 16 *Company and Securities Law Journal* 4; James Routledge & David Gadenne, 'Financial Distress, Reorganisation & Corporate Performance' (2000) 40 *Accounting & Finance* 233; Amanda Frost-Dury, Andrew Greinke and Gregory EP Shailer, 'Distinguishing distressed companies choosing voluntary administration' (200) 6 *Accounting, Accountability & Performance* 19; James Routledge & David Gadenne, 'An Exploratory Study of the Company Reorganisation Decision in Voluntary Administration' (2004) 16 *Pacific Accounting Review* 31; James Routledge & David Gadenne, 'Financial Information & Voluntary Administration Outcomes – Evidence from Australian Listed Public Companies' (2005) 11 *Accounting, Accountability & Performance* 74; James Routledge, 'The Decision to Enter Voluntary Administration: Timely Strategy or Last Resort?' (2007) 6 *Journal of Law & Financial Management* 8.

financial records with cash flow problems, poor management and low profitability being the most statistically significant predictors of business failure. There was a high frequency of suspected insolvent trading and unfair preference activity. The frequencies of these occurrences were similar whether administrators recommended a DOCA or winding up. The analysis indicated that while unsecured creditors would, as a general rule, obtain better returns in companies where a DOCA was recommended, higher than average returns were associated with the industry sector of the sampled companies. Employees fared significantly better in a voluntary administration than the general body of unsecured creditors and in most instances were anticipated to receive repayment of nearly all amounts owed to them.

II LEGISLATIVE FRAMEWORK

A *The voluntary administration scheme*

The voluntary administration scheme has two distinct phases. The first phase begins with the appointment of a voluntary administrator who takes complete control of the company. This phase operates for a relatively short period of time[7] during which a moratorium comes into effect in respect of creditors' claims against the company and its guarantor officers.[8] The duration of voluntary administration of the companies in the sample is discussed below.

While the company is under voluntary administration the administrator must investigate the financial position and circumstances of the company,[9] form an opinion about whether it would be in the creditors' interests for the company to execute a DOCA, for the company to be wound up or that administration should end.[10] The administrator must then convene a creditors' meeting[11] and, to assist creditors in making an informed decision about the company's future, give them various statements and a report about the company's business, property, affairs and financial circumstances.[12]

In most cases, the creditors also determine the administrator's remuneration at the second creditors meeting.[13] To assist them in making an informed assessment whether the proposed remuneration is reasonable, administrators must prepare and give

---

[7] Voluntary administration commences on the date a voluntary administrator is appointed. The end date depends on when the meeting of creditors that decides the company's future is held and the decision creditors make at that meeting

[8] *Corporations Act 2001 (Cth)* ss 440A-440J.

[9] *Corporations Act 2001 (Cth)* s 438A(a).

[10] *Corporations Act 2001 (Cth)* s 438A(b).

[11] *Corporations Act 2001 (Cth)* s 439A(1). This meeting is commonly referred to as the second creditors meeting. Section 436E requires the administrator to convene a first creditors meeting within eight business days of the administrator's appointment. The main purpose of the first meeting is to give creditors an opportunity to replace the administrator and appoint a committee of inspection. The court determines an administrator's remuneration if there is no such agreement or creditors resolution.

[12] *Corporations Act 2001 (Cth)* s 439A(4).

[13] *Corporations Act 2001 (Cth)* s 449E(1). As a result of amendments made by the *Corporations Amendment (Insolvency) Act* 2007, an administrator's remuneration may also be determined by agreement between the administrator and the committee of inspection (if any).

creditors a report that sets out a summary description of the major tasks performed or likely to be performed by the administrator as well as the costs associated with each of those major tasks.[14]

The second phase of the scheme commences at the conclusion of a creditors meeting that decides the company's future. Depending on the decision the creditors make at this meeting, the company moves in a smooth transition from voluntary administration to either a creditors' voluntary winding up or subject to a deed of company arrangement controlled by a deed administrator. While creditors also have the power to decide that administration should end, this rarely occurs in practice. Creditors are likely to select this option if the administrator raises sufficient funds to meet creditors claims during phase one.

B *Administrators' reports to creditors*

Section 439A administrators' reports and statements to creditors play a crucial role in the creditors' decision-making process and are intended to provide them with sufficient information to make an informed decision on how they should vote when deciding the company's future.[15] Under s 439A(4) the notice convening the crucial creditors' meeting must contain the administrator's report about the company's business, property, affairs and financial circumstances.[16] To provide guidance to creditors, the notice must also include a statement of the administrator's opinion on whether it would be in their interests

- for the company to execute a DOCA
- for the company to be wound up
- for the administration to end.[17]

Creditors are not obliged to adopt the administrator's recommended option for the company's future and may vote as they see fit.

Administrators are obliged to give reasons for their statements of opinion on the possible future outcomes for the company.[18] While they must give reasons for their opinions, these do not have to be in detail. Their statement must involve a comparison of their favoured option with the other two. To minimise the risk of something being overlooked, administrators are required to deal separately with each of the three different proposed courses of action.[19]

If a DOCA is proposed, administrators must not only explain why they favour this option, s 439A(4)(c) also requires them to give creditors a statement setting out *details* of the proposed deed as 'it is fundamental to their decision-making process that they know specifically what it is they are being asked to approve.'[20] It is not necessary to include every detail of a proposed DOCA. The statement need only

---

[14] *Corporations Act 2001 (Cth)* s 449E(7). This provision was inserted as a result of amendments made by the *Corporations Amendment (Insolvency) Act* 2007.
[15] *In the matter of Ansett Australia Ltd and Mentha* [202] FCA 2 per Goldberg J at 36.
[16] *Corporations Act Corporations Act 2001 (Cth)* s 439A(4)(a).
[17] *Corporations Act Corporations Act 2001 (Cth) s 439A(4)(b).*
[18] *Corporations Act Corporations Act 2001 (Cth)* s 439A(4)(b)(iv).
[19] *Deputy Commisoner of Taxation v Comcorp Australia Ltd* [1996] FCA 848 per Lockhart J at x.
[20] *Cadwallader v Bajco* [2001] NSWSC 1193, per Austin J at 257.

include those details of a proposed DOCA that would be material to creditors in deciding whether to vote in favour of a resolution that the company execute the DOCA.[21]

Where a proposed DOCA alters employees' statutory priorities, a separate meeting of eligible employee creditors must agree to the alteration at a meeting held prior to the s 439A meeting.[22] Amongst other things, the administrator must advise the employee creditors whether, in the administrator's opinion, the alteration of the statutory priorities would be likely to result in the same or a better outcome than would result from an immediate winding up.

As well as giving creditors the administrator's opinion on which of the three possible outcomes for the company's future best serves their interests, s 439A(4)(a) also requires the notice convening the crucial creditors' meeting to include a report about the company's business, property, affairs and financial circumstances. Due to the tight time constraints imposed for preparation of the report, the information in it need not be as extensive as is required for an explanatory statement for a scheme of arrangement. However, it should contain sufficient information as can reasonably be expected to be material to creditors in all the circumstances.[23]

Administrators' s 439A reports have been criticised for not providing creditors with sufficient information to enable them to make an informed decision on whether a DOCA or liquidation would be better for them.[24] Apart from the minimal guidance in the *Corporations Regulations* the legislation does not prescribe the content of the report.[25] In its 1998 research paper on voluntary administration the ASC suggested that reports should set out a mandatory checklist of information.[26] Even though the Corporations and Markets Advisory Committee (CAMAC) rejected the notion of a mandatory checklist approach arguing that a prescriptive content requirement could reduce administrators' flexibility in preparing reports appropriate to the particular company's circumstances,[27] it recommended that the legislation should require administrators reports to include 'any other matter material to the creditors' decision.'[28] While it took a number of years, the government eventually accepted CAMAC's recommendation. The *Corporations Amendment (Insolvency) Act* 2007 added a legislative requirement that the administrator's statement of opinion must also include such other information known to the administrator as will enable the creditors to make an informed decision about each of the three possible outcomes.[29]

---

[21] *Deputy Commisoner of Taxation Dep Comm Tax v Comcorp Australia Ltd* [1996] FCA 848 per Lockhard J.
[22] *Corporations Act 2001 (Cth)* s 444DA.
[23] *Deputy Commisoner of Taxation v Comcorp Australia Ltd* [1996] FCA 848 per Lockhart J.
[24] ASC Research Paper 98/01 *A Study of Voluntary Administrations in NSW* at para 1.301. See also CAMAC *Voluntary Administration Report (1998) at* para 2. 62; CAMAC *Report on Rehabilitating Large & Complex Enterprises in Financial Difficulties* (2004) at para xxx; and ASIC Report 129, *Review of s 439A Reports for Voluntary Administrations* (June 2008) at 5.
[25] Corporations Regulations reg 5.3A.02 requires administrators to specify whether there are any transactions that appear to be voidable transactions, such as unfair preferences or uncommercial transaction, in respect of which money, property or other benefits may be recoverable by a liquidator under Part 5.7B of the *Corporations Act*.
[26] ASC Research Paper 98/01 *A Study of Voluntary Administration in New South Wales* at para 1.301.
[27] CAMAC *Voluntary Administration Report* (1998) at para 2.62.
[28] CAMAC *Voluntary Administration Report* (1998) recommendation 5.
[29] *Corporations Act 2001 (Cth)* s 439A(4)(b)(v).

The IPAA's *Code of Professional Practice for Insolvency Practitioners*[30] in a practice note, provides guidance to administrators in fulfilling their statutory responsibilities in preparing s 439A reports. The Practice Note recommended that s 439A reports should deal with the following seven broad matters:

1. Purpose of the report and summary including a statement of the administrator's recommendation.
2. Background information to provide creditor with an understanding of the company's history and the circumstances leading to the appointment of an administrator. This part should include
    a. Details of the company's shareholders, officers and charges
    b. The administrator's opinion on whether the company's books and records were maintained in accordance with s 286.
    c. Financial statements
    d. Historical financial performance
    e. The administrator's prior involvement with the company
    f. Directors' report as to affairs
    g. Directors' and administrator's respective explanations and opinion of the reasons for the company's financial difficulties.
    h. Outstanding winding up applications
    i. Details of the claims of related entity creditors of the company.
3. Information about suspected offences, voidable transactions, insolvent trading, directors' personal financial position
4. Estimated return from a winding up
5. Proposal (if any) for a DOCA
6. The administrator's opinion, with reasons, on whether it is in the creditors' interests that the company execute a DOCA, be wound up or that administration should end.
7. Other material information relevant to the creditors decision-making.

Failure to strictly comply with the practice note does not necessarily mean the report is defective. The courts recognise that the content and scale of s 439A reports will vary according to the circumstances and the scale of the administration.[31] Compliance with every aspect of the IPAA's practice note may not always be relevant. The main requirement is that the report should 'include all matters necessary for it to answer the statutory description of a report about the company's business, property, affairs and financial circumstances.'[32]

---

[30] Insolvency Practitioners Association of Australia, *Code of Professional Practice for Insolvency Practitioners,* Part 22. The Code was revised in 2008 and represents the IPAA's response to ASIC's critical *Review of s439A Reports for Voluntary Administrations* (Report 129 – June 2008). ASIC's key finding was that many reports failed to give creditors enough information required by s 439A(4)(a) to enable creditors to make a fully informed decision.

[31] *ASIC v Edge* [2007] VSC 170 at 331.

[32] *id* per Dodds-Streeton J.

III SAMPLE AND METHODOLOGY

Voluntary administrators s 439A(4) reports to creditors were collected in respect of 335 companies that went into voluntary administration between July 2001 and June 2007. It is acknowledged that the companies in the sample were not randomly selected. The reports were obtained from 10 insolvency firms via a request for reports advertised in the *Australian Insolvency Journal*[33] and direct contact with senior partners of insolvency firms.[34] The insolvency firms self-selected which s 439A reports to provide. They were specifically requested not differentiate between 'successful' or 'unsuccessful' voluntary administrations.

The reports were then reviewed and relevant data was extracted, coded and entered into a database. Correlation analysis was employed to assess whether two data variables tended to move together and analysis of variance was used to identify significant differences in the tables of data. In subsequent research, multivariate analysis will be undertaken to enable predictions to be made of administration outcomes. Information about lodged forms in respect of each of the companies in the sample was also obtained from ASIC. This data will be analysed in a subsequent paper to determine the extent to which creditors go along with the administrator's recommendations about the company's future and whether there is evidence of serial insolvencies.

There were 8 public companies (2.4% of the sample) and 327 proprietary companies (97.6%) in the sample. They operated in the following geographical locations:

Table 1 – Sample breakdown by state

	Number of Reports	% of sample
NSW	139	41.5%
QLD	83	24.8%
VIC	102	30.4%
WA	3	0.01%
Not stated	8	2.4%

The sample companies operated in a range of industry sectors[35] as shown in Table 2 below.

[33] The assistance of the Insolvency Practitioners Association of Australia in advertising this study in its journal is gratefully acknowledged.
[34] While s 439A(4) reports are supplied to creditors of companies in voluntary administration, there is no legislative requirement for them to be lodged with ASIC.
[35] Australian New Zealand Standard Industry Classification (ANZIC) codes obtained from the Australian Bureau of Statistics (http://www.abs.gov.au/ausstats/ABS@.nsf/66f306f503e529a5ca25697e0017661f/41C470CAC6B940 54CA25697E0018FB58?opendocument) 3 January 2009.

Table 2 – Sample breakdown by industry

	Number of Reports	% of sample
A – Agriculture, Forestry and Fishing	5	1.5%
C – Manufacturing	36	10.7%
E – Construction	48	14.3%
F – Wholesale Trade	12	3.6%
G – Retail Trade	80	23.9%
H – Accommodation, Cafes and Restaurants	19	5.7%
I – Transport and Storage	17	5.1%
J – Communication Services	3	0.9%
K – Finance and Insurance	2	0.6%
L – Property and Business Services	47	14.0%
N – Education	4	1.2%
O – Health and Community Services	2	0.6%
P – Cultural and Recreational Services	5	1.5%
Q – Personal and Other Services	17	5.1%
Not listed	38	11.3%

One of the tasks of an administrator is to provide an opinion on whether it would be in the creditors' interests for the company to execute a DOCA, for the company to be wound up or that administration should end. The recommendation of the administrators in relation to the companies in the sample is set out in the table below.[36]

Table 3 –Voluntary Administrator Recommendations

	Number of reports	% of sample
DOCA	92	27.5%
Wind Up	243	72.5%
Total Sample	335	100%

Table 4 - Voluntary Administrator Recommendations by State

	NSW	Qld	Vic	WA	Not stated
DOCA	32.1%	14.6%	31.4%	100.0%	0.0%
Wind Up	67.9%	85.4%	68.6%	0.0%	100.0%

[36] See Amanda Frost-Dury, Andrew Greinke and Gregory EP Shailer, 'Distinguishing distressed companies choosing voluntary administration' (2000) 6 *Accounting, Accountability & Performance* 19, for an investigation, using financial accounting variables, to determine whether distressed companies entering voluntary administration are distinguishable from those directly entering into liquidation.

Table 5 - Voluntary Administrator Recommendations by State

	A - Agriculture, Forestry and Fishing	C - Manufacturing	E - Construction	F - Wholesale Trade	G - Retail Trade	H - Accommodation, Cafes and Restaurants	I - Transport and Storage	L - Property and Business Services	P - Cultural and Recreational Services	Q - Personal and Other Services
DOCA	0.0%	55.6%	25.0%	33.3%	15.0%	15.8%	35.3%	17.0%	40.0%	17.6%
Wind Up	100.0%	44.4%	75.0%	66.7%	85.0%	84.2%	64.7%	83.0%	60.0%	82.4%

Only industries with 5 or more reports in the sample are represented in the table above.

There were no recommendations that administration should end for any of the sampled companies. In 27% of sampled companies administrators recommended a DOCA. This proportion was consistent with patterns evident from ASIC data on all insolvency appointments in the same period as the sample. According to ASIC insolvency statistics there were 15,953 appointments of voluntary administrators in the period between July 2001 and June 2007 in Australia. In the same period there were 3,971 appointments of administrators of DOCAs.

IV FINDINGS

A *Appointment of administrators and committees of creditors*

Voluntary administration commences on the day an administrator is appointed.[37] Administrators may be appointed by resolution of the directors if they believe that the company is insolvent or is likely become insolvent at some future time.[38] The company's liquidator[39] or a person entitled to enforce a charge over the whole or substantially the whole of a company's property may also appoint an administrator.[40] While the sample of administrator's reports did not indicate who appointed the administrator, a 1996 survey of voluntary administrations carried out by the Australian Society of Certified Practising Accountants' Centre of Excellence for Insolvency and Reconstruction[41] indicated that most voluntary administrations were initiated by directors, with secured creditors appointing their own administrator in 2% of voluntary administrations and liquidator initiated voluntary administrations in 12% of cases.

[37] *Corporations Act 2001 (Cth)* s 435C(1).
[38] *Corporations Act 2001 (Cth)* s 436A(1).
[39] *Corporations Act 2001 (Cth)* s 436B(1).
[40] *Corporations Act 2001 (Cth)* s 436C(1).
[41] Copies of the voluntary administration survey results can be obtained from the Australian Society of CPA's Centre of Excellence for Insolvency & Reconstruction 1 Mill Street Perth WA 6000.

One of the initial tasks of an administrator is to convene a meeting of creditors.[42] Section 436E requires the administrator to hold a first creditors meeting within eight business days of the commencement of administration.

Across the sample, the average time between the commencement of the voluntary administration and the first creditors meeting was 8.4 calendar days, with the vast majority (86%) of companies in the sample having less than 8 calendars days between the administrators appointment and the first creditor's meeting indicating generally widespread compliance with the requirements of s 436E.

Table 6 - Time between VA appointment and first creditors meeting[43]

	<8 days	8-15 days	>15 days	Average days (mean)
	%	%	%	days
DOCA	86.3%	9.8%	3.9%	15.2
Wind Up	86.2%	12.7%	1.1%	6.6
Total Sample	86.3%	12.0%	1.6%	8.4

The main purpose of the first meeting is to give creditors an opportunity to replace the administrator and appoint a committee of creditors. The committee's function is to consult with the administrator and to receive and consider reports by the administrator.[44]

The frequency with which creditors decided to replace the administrator at the first creditors meeting is set out in the table below. The sample of companies was broken down into two groups, those where the administrator recommended a DOCA and those where a winding up was recommended. It is evident that creditors decided to replace the administrator in a minority of the companies in the sample.

Table 7 – First Creditor Meeting Outcomes

	Administrator replaced	Committee appointed
DOCA	39.6%	36.5%
Wind Up	18.0%	32.5%
Total Sample	27.5%	33.5%

As is evident from the table below it was more common to find that the first creditors meeting decided to form creditors committees in the sampled companies, rather than replace the administrator. There was no statistical difference between the two groups of companies (DOCA proposed or windup proposed) in this regard.

[42] *Corporations Act 2001 (Cth)* s 436E.
[43] It should be noted the data depicted in the table above is calendar days, not business days, meaning that average business days would be lower than the days depicted.
[44] *Corporations Act 2001 (Cth)* s 436F(1).

B *Duration of voluntary administration*

A company is under voluntary administration for a relatively short period of time. The short duration means that administrators must act speedily to investigate the company's affairs and prepare the required reports, particularly their recommendation about the company's future. In this legislatively imposed pressure cooker environment, administrators must endeavour to negotiate the possibility of the company entering into a DOCA. Creditors and the company's directors are also subject to time constraints to decide whether a DOCA or liquidation suits their interests.

The end date of voluntary administration depends on when the date of the creditors meeting that decides the company's future is held and the decision creditors make at that meeting. The administrator is required to convene the crucial creditors meeting within the 'convening period'.[45] The meeting must be held within 5 business days before, or within 5 business days after, the end of the convening period.[46]

As a general rule, the 'convening period' is the period of 20 business days beginning the day after the commencement of administration. However, if administration began in either December or in the lead up to Good Friday, the convening period is extended to the period of 25 business days beginning the day after the commencement of administration.[47] The court has power to extend the convening period.[48] Creditors also have the ability to adjourn the meeting for a period not exceeding 45 business days.[49] One would expect that adjournments or court ordered extensions would most likely occur if the company's business affairs or DOCA negotiations were complex.

Administration ends on the day of the crucial creditors meeting if they resolve that the company be wound up.[50] If the creditors decide that the company execute a DOCA, the administration ends and the company becomes subject to the terms of the DOCA which must be executed within 15 business days after the end of the creditors meeting.[51] If the company fails to execute the DOCA within the 15 business day period, administration ends and the company is deemed to have entered into a creditors voluntary winding.[52] Administration may also end if the creditors so resolve.[53] In this situation, directors resume control of the company.

The table below sets out the number of days from the beginning of voluntary administration of the companies in the sample to the crucial creditors meeting.[54] The sample of companies was broken down into two groups, those where the administrator recommended a DOCA and those where a winding up was

---

[45] *Corporations Act 2001 (Cth)* s 439A(1).
[46] *Corporations Act 2001 (Cth)* s 439A(2).
[47] *Corporations Act 2001 (Cth)* s 439A(5).
[48] *Corporations Act 2001 (Cth)* ss 439A(6) or 447A.
[49] *Corporations Act 2001 (Cth)* s 439B(2).
[50] *Corporations Act 2001 (Cth)* ss 439C(c) and 446A(1).
[51] *Corporations Act 2001 (Cth)* s 444B(2).
[52] *Corporations Act 2001 (Cth)* s 446A(1).
[53] *Corporations Act 2001 (Cth)* ss 439C(b).
[54] Meaningful data on this point was only available in relation to 271 of the companies in the sample.

recommended. The duration of voluntary administration was 30 days or less in the overwhelming majority of companies in the sample. While the summary statistics suggest that administrations longer than 60 days are associated with companies where a DOCA was recommended, an analysis of variance indicates that the difference with companies recommended to be wound up was not statistically significant.

Table 8 - Time between VA appointment and second creditors meeting[55]

	<30 days	31-60 days	60+ days	Average (mean)
	%	%	%	days
DOCA	76.19%	14.29%	9.52%	36.9
Wind Up	82.52%	14.56%	2.91%	30.4
Total Sample	81.18%	14.39%	4.43%	32.0

C *Reasons for company failure*

While there is no specific legislative requirement to do so, s 439A(4) reports should outline the company's history and articulate reasons for its failure. The IPAA recommends that the reports should include both the directors' explanation for the company's difficulties as well as the administrator's opinion of the reasons for the companies difficulties.[56]

Identification of the reasons for failure is particularly important for a number of reasons. First, if a DOCA were proposed whose success depends on successful future business operations, creditors decision-making would be enhanced by the administrator's identification of the reasons for the company's failure. If liquidation is proposed, identification of the reasons for the company's failure may indicate suspicions of insolvent trading or other malfeasance by directors that could lead to recovery money or other assets in a liquidator's action.

Administrators identified a number of reasons for the failure of the companies in the sample and in most cases there were several reasons for a particular company's difficulties, with 59.3% of reports indicating multiple reasons for failure.

Table 9 – Number of Administrators' reasons for failure

	0	1	2	3	4	5
DOCA	16.3%	22.8%	16.3%	15.2%	8.7%	9.8%
Windup	16.0%	24.7%	23.9%	15.6%	13.6%	2.1%
Total Sample	16.1%	24.2%	21.8%	15.5%	12.2%	4.2%

[55] It should be noted the data depicted in the table above is calendar days, not business days, meaning that average business days would be lower than the days depicted.
[56] Insolvency Practitioners Association of Australia, *Code of Professional Practice for Insolvency Practitioners,* para 22.6.2(g).

The reasons contained in the reports were consolidated into the list of reasons shown in the table below.

Table 10 - Administrators' reasons for failure

	Profitability	Market Conditions	Management	Debt	Other	Legal Issues	Cashflow	Tax	Staff Issues	Records	Related Entity Issues	Health of Director/s
	% of reports citing the reason as the (or one of the) reasons for failure											
DOCA	29%	40%	34%	18%	25%	14%	24%	8%	3%	5%	4%	2%
Wind Up	42%	29%	19%	21%	14%	17%	11%	9%	5%	4%	4%	4%
Total Sample	38%	32%	23%	20%	17%	16%	14%	8%	5%	4%	4%	3%

The table above shows the incidence of the most common reasons for failure cited by voluntary administrators. The percentages represent the proportion of reports where a particular reason was cited. As noted above, most reports cited more than reason.

While adverse market conditions and poor profitability were the most common reasons cited for failure in the sample reports, cash flow problems, poor management and low profitability were observed to be statistically likely to be present together as reasons for failure.[57] It is interesting to note that there was a negative correlation between legal disputes as an administrator's reason for failure and poor profitability. In other words, companies whose reason for failure was the existence of legal disputes did not also identify poor profitability as a reason for failure. This suggests that the

[57] The following eight factors were cited as being the most significant predictors of the administration outcome in James Routledge, 'An exploratory empirical analysis of Part 5.3A of the Corporations Law (Voluntary Administration)' (1998) 16 *Company and Securities Law Journal* 4

- Premature Expansion
- Undercapitalisation at Start Up
- Inadequate Sales
- Lack of Product Development and Market Analysis
- Union Interference and Problems
- Industry Wide Turndown
- Financial Planning
- Inflation
- Unproductive Use of Assets
- Inability to Borrow Needed Funds

existence of significant legal disputes may trigger insolvency even where the company is otherwise profitable. Further, legal disputes were identified as the only reason for failure in 14 of the companies where this factor was cited. This contrasts with the general position where multiple reasons were identified.

There was also a significant negative correlation between staff issues as a reason for failure and poor profitability. This suggests that staffing problems may trigger voluntary administration for otherwise profitable companies.

D *Section 222AOE notices*[58]

It has been suggested that s 222AOE notices served by the Australian Taxation Office on directors of companies with outstanding tax liabilities have the effect of alerting directors of their company's precarious financial state and trigger their decision to put the company into voluntary administration. [59]

Under the penalty provisions of Pt VI Div 9 of the *Income Tax Assessment Act 1936 (Cth)* directors have an obligation to ensure that the company's tax liability is paid; an agreement for payment is entered into with the ATO; or the company is put into either voluntary administration or liquidation.[60] Directors who fail to comply may be made personally liable to pay the ATO the amount of their company's tax liability by way of penalty[61] provided the ATO serves a notice under s 222AOE[62] on the directors giving them 14 days to ensure compliance.

Section 222AOE notices did not appear to be particularly frequent in the sample. Service of s 222AOE notices on directors was referred to in only 30 (9.3%) of administrators' reports in the sample and there was no significant difference between the companies where the administrator recommended a DOCA and the companies where a winding up was recommended. Notwithstanding the relatively low frequency of s 222AOE notices, it is noteworthy that there was a statistical correlation between service of such notices and the identification of tax liabilities as a reason for the company's failure.

E *Adequacy of books and records*

All companies must keep written financial records that correctly record and explain its transactions, financial position and performance.[63] Non-compliance is a strict liability offence and directors who fail to take all reasonable steps to ensure compliance contravene a civil penalty provision.[64]

---

[58] *Income Tax Assessment Act 1936 (Cth)* s 222AOE.
[59] Abe Herzberg, 'Why are there so few insolvent trading cases?' (1998) 6 *Insolvency Law Journal* 77 at 85.
[60] *Income Tax Assessment Act 1936 (Cth)* s 222AOBA.
[61] *Income Tax Assessment Act 1936 (Cth)* s 222AOC.
[62] *Income Tax Assessment Act 1936 (Cth)* s 222AOE.
[63] *Corporations Act 2001 (Cth)* s 286.
[64] *Corporations Act 2001 (Cth)* ss 344(1) and 1317E(1).

Adequate records are essential for an administrator to conduct the required investigation into the company's business, property, affairs and financial circumstances.[65] Further, because a company in liquidation is presumed to be insolvent for the period that it failed to keep adequate financial records for purposes of the insolvent trading actions against directors or recovery of unfair preferences,[66] an administrator's opinion on whether the adequate books and records have been kept is a relevant factor in ensuring that creditors can make an informed decision about whether to accept a DOCA or wind up the company.

Administrators commented on the adequacy of books and records in 79.8% of the companies in the sample.[67] Surprisingly, most companies in the sample (83%) complied with s 286. Of the reports that mentioned the matter, the administrators indicated that the keeping of books and records was inadequate in only a relatively small proportion of cases - 18.4% contained a view that the books and records were inadequate and 26% said that s 286 had not been complied with. There was no statistical difference between these two percentages.

There was a statistical correlation between suspected contraventions of s 286 and administrators' suspicions of insolvent trading. About 60% of the companies where the administrators reported suspected breaches of s 286, they also suspected insolvent trading activity. As one would expect, there was also a statistical correlation between suspected contraventions of s 286 and inadequate record keeping as an identified factor in a company's failure.

In the table below the incidence of non-compliance with s 286 is broken down into industry sectors.

Table 11 - Non-compliance with s 286[68]

	Number of reports indicating s 286 breach	Total number of reports for industry group	%
C - Manufacturing	9	36	25.0%
E - Construction	7	48	14.6%
F - Wholesale Trade	3	12	25.0%
G - Retail Trade	22	80	27.5%
H - Accommodation, Cafes and Restaurants	2	19	10.5%
I Transport and Storage	1	17	5.9%
L - Property and Business Services	14	47	29.8%
Q - Personal and Other Services	5	17	29.4%

---

[65] *Corporations Act 2001 (Cth)* s 438A.
[66] *Corporations Act 2001 (Cth)* s 588E(3).
[67] This is similar to ASIC's findings in its 2008 *Review of s 439A reports for voluntary administrations,* Report 129. This Report examined 275 administrators' reports of companies that entered into voluntary administration between 1 July 2006 and 15 March 2007 when the administration resulted in a DOCA. It found that 74% of the sampled reports incorporated an administrator's opinion on compliance with s 286 of the *Corporations Act*.
[68] Only those industries where there were reported occurrences of non-compliance with s 286 were included in the table.

It is noteworthy that poor record keeping was identified as a reason for company failure in only 14 (4.2%) of the reports in the sample.

The relatively low incidence of inadequate record keeping was unexpected. Reading the reported insolvent trading cases, one would have assumed that inadequate financial record keeping was a common characteristic of insolvent companies. Explanations for the high incidence of adequate financial record keeping may be the fact that companies, particularly those operating small businesses, are required to comply the record keeping obligations imposed by the goods and services tax regime as well as the prevalence of relatively cheap financial software packages, such as MYOB and Quicken.

Table 12 – Adequacy of records and VA Recommendation Size of total debts owed to unsecured creditors ($000s)

	Where records considered adequate	Where records considered poor	Entire sample
Where DOCA recommended	26.73%	30.88%	27.46%
Where Wind Up recommended	73.27%	69.12%	72.54%

F *Insolvent trading, unfair preferences and uncommercial transactions*

Identification of administrators' suspicions of insolvent trading,[69] unfair preferences and uncommercial transactions[70] are particularly important matters in ensuring that creditors can make an informed decision about whether to accept a DOCA or wind up the company. With this information creditors are able to compare their expected returns from successful outcomes in insolvent trading, unfair preferences and uncommercial transactions litigation if the company goes into liquidation[71] with their expected returns if the company is subject to a DOCA.

Insolvent trading[72] was suspected in nearly half (159 of 335 or 47.4%) of all the companies in the sample. About 24% of the reports that identified suspected insolvent trading also quantified the amount involved. The average amount in these cases was $506,000. Further, in 38 or 27.7% of the companies in this group of 159, the

[69] While reporting on insolvent trading is not legislatively required, cases such as *Hagenvale Pty Ltd v Depela Pty Ltd* (1995) 17 ACSR 139 and *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd* [1997] FCA 395 indicate that courts expect administrators to report to creditors their suspicions on this.

[70] Corporations Regulations reg 5.3A.02 requires voluntary administrators reports to specify whether there are any transactions that appear to be voidable transactions, such as unfair preferences or uncommercial transactions, in respect of which money, property or other benefits may be recoverable by a liquidator under Part 5.7B of the *Corporations Act*.

[71] Unfair preference and uncommercial transaction litigation is possible only if the company is in liquidation. Under s 588M of the *Corporations Act 2001 (Cth)* insolvent trading actions against directors also require the company to be in liquidation. Note that under ss 588 J and 588K of the *Corporations Act 2001 (Cth)*, ASIC initiated insolvent trading cases do not require the company to be in liquidation.

[72] See *Corporations Act 2001 (Cth)* s 588G for the definition.

administrators also identified both inadequate books and records as well as suspected breaches of s 286.[73]

The table below breaks down the reported suspicions of insolvent trading by industry sector.[74]

Table 13 - % of reports identifying suspected insolvent trading by industry

	% incidence of suspected insolvent trading	Number of reports with suspected insolvent trading
A - Agriculture, Forestry and Fishing	20.0%	1
I - Transport and Storage	29.4%	5
H - Accommodation, Cafes and Restaurants	31.6%	6
F - Wholesale Trade	41.7%	5
Q - Personal and Other Services	47.1%	8
E - Construction	47.9%	23
G - Retail Trade	52.5%	42
L - Property and Business Services	55.3%	26
C - Manufacturing	58.3%	21
P - Cultural and Recreational Services	80.0%	4

Of the reports where a DOCA was recommended, there were suspicions of insolvent trading in 54.3% of cases. Of the reports where a wind up was recommended, the administrator suspected insolvent trading in 44.8% of cases.

It has been suggested that directors may be tempted to ensure their company moves from voluntary administration to a DOCA to avoid a greater personal liability for insolvent trading if the company were to be wound up. [75] Similarly, creditors who received unfair preferences may be prepared to accept a DOCA in which they obtain a smaller return instead of facing repaying a greater amount to a liquidator. This appears to be borne out in the sample.

Of the 159 reports where there was suspected insolvent trading, 14 or 8.8% contained the administrator's view that directors had proposed a DOCA to avoid potential insolvent trading actions if the company were wound up. Of more significance is the finding that in the 92 instances where the administrator recommended a DOCA, directors indicated they would pay into the deed fund in 38.5% of cases. If there were reported suspicions of insolvent trading, directors' personal contribution to a deed fund occurred in 40.8% of cases. Directors also agreed to provide personal security to deed administrators in 28.6% of the DOCAs that were proposed where there were also suspected insolvent trading. There were no instances of directors claiming in any of the proposed DOCAs.

Administrators referred to suspected unfair preferences[76] in 43.8% of the reports in the sample. As a general rule, the reports did not disclose whether the creditors who

[73] Under s 588E(3) of the *Corporations Act 2001 (Cth)* a company is presumed to be insolvent for purposes of s 588G if it has failed to comply with s 286 in relation to financial record keeping.
[74] Only industries with 5 or more companies in the sample are shown.
[75] See Abe Herzberg, 'Why are there so few insolvent trading cases?' (1998) 6 *Insolvency Law Journal* 77 at 84.
[76] See *Corporations Act 2001 (Cth)* s 588FA for the definition.

were given suspected unfair preferences were directors or other related entity creditors.

The incidence of suspected unfair preferences was approximately the same in companies where a DOCA was recommended and where a winding up was recommended. Unfair preferences were suspected in 44% of the reports where a DOCA was recommended and in 43.8% of the reports recommending winding up.

The table below breaks down the reported suspicions of unfair preferences by industry sector.[77]

Table 14 - % of reports identifying suspected unfair preferences by industry

	% incidence of suspected unfair preferences	Number of reports with suspected unfair preferences
F - Wholesale Trade	5.4%	8
Q - Personal and Other Services	5.4%	8
I - Transport and Storage	6.1%	9
E - Construction	12.2%	18
C - Manufacturing	13.6%	20
L - Property and Business Services	13.6%	20
G - Retail Trade	23.8%	35

Administrators identified suspicions that 11.3% of the companies in the sample were parties to uncommercial transactions.[78] The incidence of suspected uncommercial transactions was approximately the same in companies where a DOCA was recommended and where a winding up was recommended. Uncommercial transactions were suspected in 8.8% of the reports where a DOCA was recommended and in 12% of the reports recommending winding up. Uncommercial transactions were most common in the property and business services and retail trade industry sectors with suspicions of uncommercial transactions in 8 (or 21.1%) of the companies in the property and business services sector and 11 (or 28.9%) of the companies in the retail trade sector.

There was a strong coincidence of suspected unfair preferences given to creditors and suspicions of insolvent trading, with 60.5% of the reports that identified suspected unfair preferences also identified suspected insolvent trading. There was a similarly strong coincidence of reports suspecting the trio of insolvent trading, unfair preferences to creditors and uncommercial transactions. Of the companies where both unfair preferences and uncommercial transactions were suspected, 83.3% were also suspected of insolvent trading.

G *Suspected Corporations Act offences*

Administrators are under an obligation to report to ASIC if they suspect company officers may have committed offences, misapplied or retained property of the

---

[77] Only industries with 5 or more companies in the sample are shown.
[78] See *Corporations Act 2001 (Cth)* s 588FB for the definition of uncommercial transaction.

company or breached a duty owed to the company.[79]Identification administrators' suspicions in s 439A reports that directors may have committed corporate law offences may also assist creditors in making an informed decision about whether to accept a DOCA or wind up the company. This will especially be the case if the contraventions are civil penalty provisions. Successful prosecution by ASIC may lead to the courts imposing civil penalty compensation orders[80] that may ultimately flow to creditors of companies in liquidation.

Apart from suspicions of insolvent trading and contraventions of s 286,[81] there relatively few suspected offences were identified in the sample reports. Of the 335 reports in the sample, officers were suspected of contravening the provisions outlined in the table below in only 17 instances. In some instances, officers of a particular company were suspected to have committed multiple offences.

Table 15 – Suspected *Corporations Act* Offences

Suspected Offence	Number of reports indicating suspected offences
ss 180-184	16
s 596AB	3
s 596	3
s 438B	1
s 530	1
s 530A	1
s 530B	1

In 14 of the17 instances of suspected offences, the administrators also suspected contravention of the insolvent trading provision.[82] In 9 of the instances of suspected offences administrators also suspected directors were involved in uncommercial transactions and unfair preferences given to creditors. [83]

Administrators reported suspected offences to ASIC in relation to 29 of the 335 companies in the sample. The suspected offences included those listed in the table above as well as suspected contraventions of s 286 in relation to keeping financial records.

[79] *Corporations Act 2001 (Cth)* s 438D(1).
[80] *Corporations Act 2001 (Cth)* s 1317H.
[81] See discussion of these in paras 5.5 and 5.6 above.
[82] *Corporations Act 2001 (Cth)* s 588G.
[83] Cases such as *Kinsela v Russell Kinsela Pty Ltd* (1986} 4 NSWLR 722, *Grove v Flavel* (1986) 43 SASR 410 indicate that directors involved in uncommercial transactions or the giving of unfair preferences to creditors may have prejudiced the interests of the company's creditors and there by contravene their fiduciary and statutory duty to act in the best interests of the company.

H *Returns to unsecured creditors (including ATO and employees)*

Administrators' comparisons of the potential returns to creditors if the company were to enter into a DOCA or be wound up are perhaps the most critical feature of voluntary administrators' reports. To this end administrators report invariably include information about the amount owed to the various classes of creditors, such as the amount owed to secured and unsecured creditors (including employee creditors as well as related entity creditors. They also include information of the administrator and directors' estimates of the net realisable value of the company's property.

The following frequency table indicates the amounts owed to the various classes of unsecured creditors of the sampled companies expressed as a percentage of the total debts owed to unsecured creditors. The table is also broken up into companies in the sample where a DOCA and wind up were recommended.

Table 16 - Size of total debts owed to unsecured creditors ($000s)

	< $50	$50-$100	$100-$200	$200-$400	$400-$800	$800-$2,000	>$2,000
Where DOCA recommended	9.4%	3.1%	4.7%	9.4%	18.8%	17.2%	37.5%
Where Wind Up recommended	20.9%	12.8%	9.0%	14.2%	10.4%	15.6%	10.0%
Entire Sample	20.5%	11.6%	9.3%	16.2%	12.4%	15.8%	14.3%

Table above indicates the percentage of the sample with total unsecured debts in the ranges indicated.

Administrators indicated that unsecured creditors would receive no return in a high percentage (73%) of the companies in the sample. In those companies where the administrators signalled a positive return to unsecured creditors, their average return was 10.1% of the debts owed to them.

The table below indicates that unsecured creditors obtained a better return (14.1%) in the companies where a DOCA was recommended compared with those companies where a windup was recommended (8.5%).

Table 17 - Average return to unsecured creditors

Overall sample	10.3%
Where DOCA Recommended	14.8%
Where Wind Up recommended	8.3%
Where any offence suspected	10.6%
Where 222AOE Notice served	8.1%
Where litigation against company	3.7%
Where insolvent trading suspected	6.5%
Where insolvent trading was not suspected	14.5%
Where unfair preferences suspected	19.4%
Where unfair preferences not suspected	11.1%
Where uncommercial transactions suspected	8.2%
Where uncommercial transaction not suspected	10.6%

Table 18 - Average return to unsecured creditors where DOCA recommended

Where DOCA Recommended	14.8
DOCA where directors propose to purchase assets	28.5
DOCA where directors do not propose to purchase assets	14.2
DOCA where directors propose to pay into deed	16.3
DOCA where directors do not propose to pay into deed	13.9
DOCA where directors propose to provide security	15.0
DOCA where directors do not propose to provide security	14.7
DOCA Where insolvent trading suspected	9.6
DOCA insolvent trading was not suspected	23.1
Where unfair preferences suspected	10.2
Unfair pref not suspected	19.6
Where uncommercial transactions suspected	17.6
Where uncommercial transaction not suspected	14.4

The average returns broken down into industry groups are set out in the table below. Above average returns were obtained by unsecured creditors in the following industry sectors, transport and storage, wholesale trade and construction sectors.[84]

Table 19 - Average returns to unsecured creditors by industry groups[85]

Overall sample	10.3%
F - Wholesale Trade	18.4%
H - Accommodation, Cafes and Restaurants	1.6%
Q - Personal and Other Services	3.7%
I - Transport and Storage	27.4%
C - Manufacturing	9.8%
L - Property and Business Services	4.8%
E - Construction	12.2%
G - Retail Trade	2.7%
H - Accommodation, Cafes and Restaurants	1.6%
Q - Personal and Other Services	3.7%

Employees fared relatively well in the sampled companies. Administrators indicated that employees would receive an average return of 92.0% the debts owed to them. Indeed, employees were projected to receive 100% of their entitlements in 79.4% of the reports with usable data on employee entitlements.

[84] For a discussion of the financial and other characteristics of successful administrations see James Routledge, 'An exploratory empirical analysis of Part 5.3A of the Corporations Law (Voluntary Administration)' (1998) 16 *Company and Securities Law Journal* 4 and James Routledge and David Gadenne, 'Financial distress, reorganization and corporate performance' (2000) 40 *Accounting and Finance* 233.

[85] Average unsecured creditors returns for industry sectors with less than 5 companies in the sample are not included.

Table 20 - Total debts owed to employees ($000s)

	< $50	$50-$100	$100-$200	$200-$400	$400-$800	$800-$2,000	>$2,000	Average employee debt
Where DOCA recommended	39.3%	17.9%	8.9%	16.1%	7.1%	7.1%	3.6%	$626,581
Where Wind Up recommended	54.7%	14.6%	17.5%	5.1%	3.6%	2.9%	1.5%	$256,687
Entire Sample	50.5%	15.1%	15.1%	8.3%	4.7%	4.2%	2.1%	$371,115

The average returns to employees expressed as a percentage of the debts owed to them is illustrated in the table below. The average returns to employees were roughly the same whether the administrator recommended a DOCA or a winding up.

Table 21 - Average returns to employees

Overall sample	92.0%
Where DOCA Recommended	92.6%
Where WU recommended	91.7%
Where any other offence suspected	91.6%
Where 222AOE Notice served	83.0%
Where litigation against company	79.8%
Where insolvent trading suspected	89.1%
Where insolvent trading was not suspected	96.2%
Where unfair preferences suspected	91.3%
Where unfair preferences not suspected	92.7%
Where uncommercial transactions suspected	86.2%
Where uncommercial transaction not suspected	93.0%

As is seen in the table below employees obtained average or above average returns in all industry groups apart from those in the property and business services and retail trade sectors.

Table 22 - Average return to employees by Industry group

Overall sample	92.0%
F - Wholesale Trade	100.0%
Q - Personal and Other Services	92.%
H - Accommodation, Cafes and Restaurants	100.0%
I - Transport and Storage	95.8%
L - Property and Business Services	85.2%
E - Construction	90.4%
C - Manufacturing	100.0%
G - Retail Trade	79.8%

Table 23 - Total debts owed to ATO ($000s)

	< $50	$50-$100	$100-$200	$200-$400	$400-$800	$800-$2,000	>$2,000
Where DOCA recommended	12.2%	16.3%	28.6%	22.4%	10.2%	6.1%	4.1%
Where Wind Up recommended	28.1%	23.7%	23.7%	14.1%	7.4%	0.7%	2.2%
Entire Sample	23.9%	21.7%	25.0%	16.3%	8.2%	2.2%	2.7%

Table 24 - Total debts owed to related party creditors ($000s)

	< $50	$50-$100	$100-$200	$200-$400	$400-$800	$800-$2,000	>$2,000
Where DOCA recommended	3.3%	0%	20%	10%	16.7%	36.7%	13.3%
Where Wind Up recommended	17.6%	13.5%	18.9%	17.6%	17.6%	9.5%	5.4%
Entire Sample	13.3%	10.5%	19%	13.3%	19%	17.1%	7.6%

V CONCLUSION

Voluntary administrators reports to creditors were investigated in this preliminary analysis to highlight a number of key characteristics of companies in voluntary administration. There were a number of noteworthy findings, which will require further analysis in subsequent papers. It was observed that administrators recommended a DOCA for about one quarter of the companies in the sample. A winding up was recommended for the remainder. There were no recommendations that voluntary administration should end for any of the companies. Surprisingly, the study found that an overwhelming majority of the sampled companies maintained adequate books and financial records with cash flow problems, poor management and low profitability being the most statistically significant predictors of business failure.

There was an unexpectedly high frequency of suspected insolvent trading in the companies in the sample. While few administrators' reports explicitly indicated that directors initiated voluntary administration and proposed DOCAs to avoid potential personal liability for insolvent trading or other breaches of duty, if the company were wound up, there was some evidence (such as directors' personal contribution to a DOCA fund and personal securities to deed administrators) that would enable such inferences to be drawn. As there was no statistically significant differences in suspicions of insolvent trading between those companies where a DOCA was recommended and those where there was a winding up recommendation it may be worthwhile exploring the possibility of a legislative amendment to allow deed administrators to initiate insolvent trading cases against directors.

Given the very small number of reported court decisions the high frequency of reported suspicions that companies give unfair preferences to creditors was even more surprising than the frequency of insolvent trading activity. As was the case with insolvent trading there was no statistically significant differences in this regard between those companies where a DOCA was recommended and those where there was a winding up recommendation. Administrators' 439A reports did not provide evidence to suggest that creditors who were granted unfair preferences were more likely avoid recapture of their unfair preferences by voting for DOCAs. The general body of unsecured creditors suffer to the extent that some creditors are able to avoid recapture of their unfair preferences. Again, it would be worthwhile considering a legislative amendment to allow a deed administrator to recapture unfair preferences from creditors who fail to adequately compromise their debts.

The analysis indicated that while unsecured creditors would, as a general rule, obtain better returns in companies where a DOCA was recommended, higher than average returns were associated with the industry sector of the sampled companies. Employees fared significantly better in a voluntary administration than the general body of unsecured creditors and in most instances were anticipated to receive repayment of nearly all amounts owed to them.

There are a number of areas where further research is intended. Two significant matters not dealt with in this paper are administrators' remuneration[86] and the characteristics of the DOCAs that the companies in the sample entered into. Very preliminary analysis of the data in the sampled reports appears to suggest that their remuneration is a very high percentage of the value of the insolvent company's net realisable assets.

Data from ASIC was also collected and its analysis will be subject of a subsequent paper. This data will be employed to assess the extent to which companies in voluntary administration avoid liquidation and enter into unviable DOCAs to the detriment of additional groups of creditors.

[86] Amendments made by the *Corporations Aments (Insolvency) Act 2007 (Cth)* increased ASIC and creditors' oversight of the level of administrators' remuneration and imposed legislative requirements that it be reasonable. See *Corporations Act 2001 (Cth)* s 449E.