

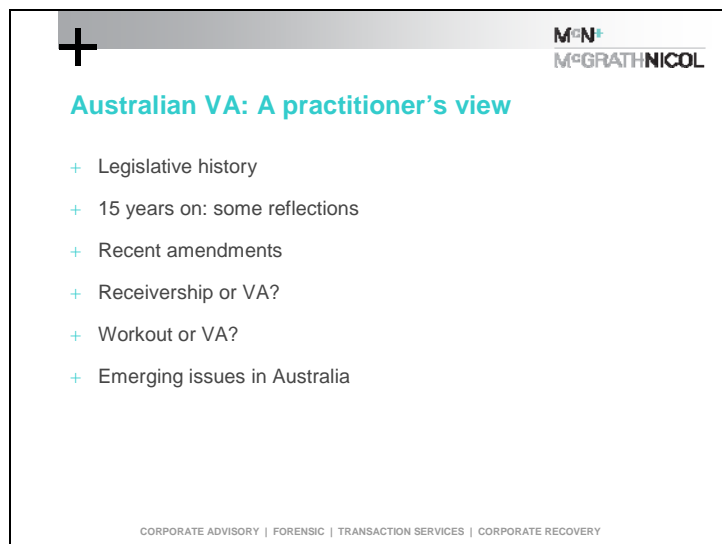
## Colin Nicol, Partner, McGrathNicol, Melbourne

### The Australian Voluntary Administration Experience - A Practitioner's View

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### Legislative history

- 1988 • Harmer Report recommended implementation of VA procedures
- 1993 • VA regime commenced
- 2003 • Corporations and Market Advisory Committee ("CAMAC") review considered implications for large & complex corporate recovery cases
- 2004 • Parliamentary Joint Committee on Corporations & Financial Services report to Parliament ("PJC Report") on the operation of Australia's insolvency laws
- 2007 • Reform of Australian insolvency laws including the finetuning of existing VA procedures

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### 15 years on: some reflections

**All External Administrations: 1999 – 2008**  
(no statistics available 1998 – 1999)

Year	Voluntary Administrations	Receiverships/Control Orders	Other Appointments	Total
1999	1,800	200	3,000	5,000
2000	2,000	200	3,000	5,200
2001	2,800	400	4,000	7,200
2002	2,500	400	4,000	6,900
2003	2,800	400	4,000	7,200
2004	2,500	400	4,000	6,900
2005	2,800	400	4,000	7,200
2006	2,800	400	4,000	7,200
2007	2,500	400	4,000	6,900
YTD 2009	500	100	2,000	2,600

Source: ASIC insolvency statistics

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### 15 years on: some reflections

- + High market acceptance from inception
- + Embedded in corporate life
- + Wide support across business community
- + Nature of Deed of Company Arrangements ("DOCA") proposals has evolved
  - Sale of business - quasi liquidation
  - Returns from profit of trading on
  - Pooling of assets and liabilities in corporate groups
  - "Holding" DOCAs
  - Creditors' trusts

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### 15 years on: some reflections

- + Fast and flexible means of dealing with corporate insolvency
  - Not Court reliant in the vast majority of cases
- + Successfully applied in the largest of corporate collapses (although generally with assistance from the Courts)
  - Brashs Pty Ltd
  - ION Limited Group
  - Henry Walker Eltin Group Limited
  - Ansett Australia Group
  - Sons of Gwalia Limited

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### 15 years on: some reflections

- + Problems with VAs
  - Owner managed businesses
    - can frequently be rehabilitated with new capital and a composition of creditors
  - Large companies
    - needs a new owner to survive
    - recapitalising/regearing companies out of VA is difficult/rare
  - Could therefore argue suits SME's better than large corporate collapses
  - Moratorium limited in comparison to US Chapter 11 automatic stay
  - No "Debtor in Possession" finance market

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### Recent amendments: PJC Report

<b>Submissions advocating reform</b>	<b>Conclusions of 2004 PJC report</b>
<ul style="list-style-type: none"><li>+ Statutory timeframes too tight and impractical</li><li>+ Open to abuse (e.g. lack of independence of Administrator; DOCA used to aid phoenix activity)</li><li>+ DOCA used as a mechanism for directors to avoid consequences of liquidation (investigations, insolvent trading claims)</li><li>+ Arguments that it does not adequately support large/complex company failures</li></ul>	<ul style="list-style-type: none"><li>+ General view that VA process useful and valuable procedure</li><li>+ Strikes reasonable balance between liquidation and reorganisation</li><li>+ Flexibility adequately protects interests of debtors and creditors</li><li>+ No general support for a change to a US Chapter 11 regime</li><li>+ Range of reforms recommended</li></ul>

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### Recent amendments: 31 December 2007 reform

- + Key changes for VA
  - Independence and remuneration – increased disclosure requirements
  - Option to appoint alternative administrator of ensuing DOCA or liquidation
  - Timeframes – longer convening timeframes and consistent referencing to business days
  - Entrenched protection of employee entitlements
  - Borrowing capacity – confirmation of indemnity and priority position
- + Concurrent legislative changes which may impact VA use
  - Fast track creditors voluntary liquidation process
  - Limited pooling of assets and liabilities in liquidations of corporate groups

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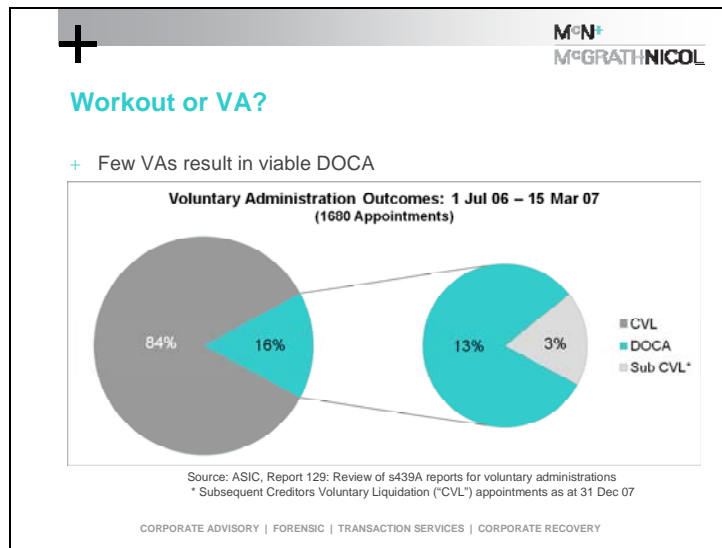


### Receivership or VA?

- + Australian secured creditors are generally supportive of VAs
  - Independence of VA
  - Supporting customers and other creditors to find solutions
  - No indemnity required to be given
  - Not seen as bank driven (PR benefit)
- + When they won't support
  - Concerns about administrator's skills, independence or integrity
  - Contentious issues between creditor classes
  - Cost and publicity of creditor meetings
  - No money for lower ranking creditors

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- ### Workout or VA?
- + Few DOCAs rehabilitate existing company
    - VAs can keep viable business going, but frequently under new ownership
  - + Why so few restructurings via DOCA?
    - Profound impact on company operations
    - Competitive position
    - Ability to maintain customers/market share
    - Costly
    - Obtaining credit is difficult
    - VAs focus on creditors not shareholders
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### Workout or VA?

- + The Workout alternative
  - Workouts are less damaging to company's external standing
  - Large companies will usually exhaust workout options first
  - Key difficulties for distressed companies when deciding appropriate course are funding and solvency
  - Some workouts can be stymied by the difficulty in binding all creditors

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### Emerging issues: International cases

- + Increase in distressed cases post credit market turmoil
  - Many of these are financed and/or have assets located internationally
  - UNCITRAL framework
    - Adopted in Australia on 1 July 2008; untested in Australian courts
    - Concept of COMI ("Centre of Main Interests") fundamental to the determination of where creditor rights can and can't be enforced

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### Emerging issues: Shareholders as creditors

- + Sons of Gwalia decision established shareholders' rights to prove as creditors in relation to claims of deceptive or misleading conduct
- + Significant expansion in creditor numbers/class action lawyers
  - Impacts on meetings, voting as well as returns
    - e.g. ION Limited Group of Companies (Subject to DOCA)  
Provable unsecured creditors (excl s/h claims) \$433 m  
3,200 shareholder claims (as at May 08) \$122 m
- + Increased difficulty in identifying creditors and resolving claims
  - Basis for proof of claim unresolved legally - Causation/reliance or fraud on the market
  - How to deal with nominees and custodian holdings
  - Slow and costly with uncertainty of final outcome
- + CAMAC report on recommended legislative response anticipated in 2008

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### Conclusions

- + Hard to remember life before VA
- + Much needed procedure, strongly adopted and largely successful
- + Not a panacea, particularly for large/complex cases
  - Courts have generally assisted where called upon whilst upholding the principles
  - Not the only solution – workouts are usually preferable where possible

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