A Comparative Analysis of Anglo-Australian Pre-packs: Can the Means Be Made to Justify the Ends?

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Abstract

Whereas pre-packaged administrations have been prevalent in the UK for years, Australia’s voluntary administration regime has been more restrictive of the practice. This article analyses the evolution of UK pre-packs, why UK-style pre-packs are not prevalent in Australia and the challenges for UK and Australian lawmakers in striking the right balance with pre-packs in their respective administration regimes. Building upon this analysis, the article proposes a mechanism that might make ‘connected-party’ pre-pack business sales work more fairly for stakeholders—that is, by obligating a connected-party purchaser to make a future-income contribution in favour of the insolvent company whose business has been ‘rescued’ by a pre-packaged sale in administration. Copyright © 2012 INSOL International and John Wiley & Sons, Ltd.

Well, at first sight it strikes us as dishonest,
But if it’s good enough for virtuous England—
The first commercial country in the world—
It’s good enough for us.

King Paramount in Utopia Limited by Gilbert and Sullivan (towards the end of Act I)

1. Introduction

Pre-packs are spreading like wildfire around the world. Different forms of what are being described as ‘pre-packs’ are developing in a number of jurisdictions.1 The UK version of a pre-pack appears to be largely unique in that the entire process is dealt with

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outside of court with no requirement to obtain the prior consent of different classes of creditor. It would appear to be the market leader. The relative popularity of the UK pre-pack can be seen in the keenness of some companies to relocate to the UK specifically for the purpose of entering into a pre-pack administration. Such relocation has led to the accusation that the UK has become the ‘bankruptcy brothel’ of the world.\(^2\)

In the UK, a pre-pack has been defined as ‘an arrangement under which the sale of all or part of a company’s business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment’.\(^3\) As with all definitions, there are likely to be cases on the borderline, which arguably do or do not fall within its terms, but for present purposes, it gives a clear indication as to what will be discussed below.

Against the tide of the pre-pack contagion, Australia’s voluntary administration law and practice appear to have remained resistant to the UK brand of pre-packaged sales. The voluntary administration regime in Australia and the administration regime in UK share many common features, and each have drawn on the other throughout their evolution and refinement over the last 20 years. Australia’s voluntary administration regime originated in 1993 as a procedure commenced exclusively by an out-of-court appointment of an administrator—something that the UK did not embrace until the Enterprise Act 2002 reforms a decade later and that arguably kick-started the UK pre-pack trend. Despite the parallels of the two regimes, differing customs and standards have emerged, which warrant reflection by policymakers and practitioners in both jurisdictions.

The pre-pack question in both the UK and Australia sits at the forefront of an ongoing debate as to the appropriate balance between ‘creative insolvency’ outcomes and stakeholder participation (or due process) in insolvency procedures. It is fair to say that too much of the latter must necessarily compromise the former. At the risk of drawing too creative an analogy, it might be said that UK practitioners advocate a ‘benevolent dictatorship’ approach to pre-packaged insolvency solutions, exercising their significant powers of sale immediately upon their appointment (invariably with the very best of intentions for the company’s creditors). On the other hand, the Australian approach is generally to eschew early business sales in voluntary administrations without creditor or court approval, appearing to subscribe to the view of one of the mother country’s renowned former prime ministers who famously declared that ‘democracy is the worst system, except for all others’.

As with many of these sorts of debates, it is difficult to declare that one jurisdiction has got it all right or all wrong. The purpose of this paper is to consider the criticisms to which pre-packs have been subject in the UK, to consider why UK-style pre-packs have not been readily adopted in Australia (and how they might be embraced) and

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\(^2\) A comment attributed to Bertrand des Pallieres, one of the junior creditors aggrieved by ‘the largest pre-pack in UK history’, that of Wind Hellas (Times, 18 January 2010). There has been much publicity adverse to pre-packs (see the references in footnote 2 of Finch ‘Pre-Packaged Administrations and the Construction of Propriety’ (2011 JCLS 1). Parliamentary reports have also questioned their efficacy (see, e.g. the Sixth Report of the House of Commons Business and Enterprise Select Committee—HC199).

\(^3\) Paragraph 1 of Statement of Insolvency Practice 16 (SIP16).
finally to propose one way in which a pre-pack regime could be modified or designed to work to the advantage of all stakeholders without the controversies that have haunted its early years in the UK.

II. The Development of the Pre-pack in the UK

It is widely accepted that although pre-packs were used to a limited extent, in the context of receivership, prior to the changes brought about by the Enterprise Act 2002, it was this Act that proved to be the catalyst for their burgeoning popularity. The reasons for this can be stated simply. The Enterprise Act introduced a new system of administration under Schedule B1 of the Insolvency Act 1986 (‘the Act’). The Act contains no mention of a pre-packaged version of administration. It is the ability under Schedule B1 to appoint an administrator out of court with minimal formality, which has led to the recent widespread adoption of the pre-pack version of administration. The statutory regime is used in this way: a deal is agreed to buy the company’s business, the buyer is often a person connected to the company, the company is put into administration out of court, and immediately the administrator transfers the business to the buyer for a pre-agreed price without the need for a creditors’ meeting to be called to consider the terms of the deal. The process is quick and, in the right circumstances, arguably brings about the best possible resolution for all stakeholders in the company. The business survives, jobs are saved and more money is raised for the creditors than would have been the case in an immediate liquidation.

Once the pre-pack has been executed, the administrator will distribute the proceeds of sale. There is frequently no money in the pot for the unsecured creditors, in which case the administrator may immediately file a notice at Companies House to dissolve the company. If there is some money for the unsecured creditors, the administrator will usually be appointed as liquidator to make the distribution to the

4. This statement is based upon practitioner comments made at a panel discussion held at the London offices of Ernst & Young on 20 November 2006 entitled ‘Prepacks: The Good, the Bad and the Ugly’.
5. See for example Harris ‘The Decision to Pre-Pack’ Winter 2004 Recovery 26, 27.
6. Either by the holder of a qualifying floating charge under Sch B1, para 14 of the Act or by the directors or the company under Sch B1, para 22 of the Act.
7. There are detailed provisions within the Act that deal with the administrator’s duty to prepare a proposal to put to creditors and to call a creditors’ meeting to have that proposal voted upon. In a pre-pack, any proposal and creditors’ meeting by definition occur after the pre-pack has already been executed. In addition, there is no requirement for the administrator to call a creditors’ meeting under Sch B1, para 52, where he or she thinks that, inter alia, no payment will be made to the unsecured creditors (apart from under the prescribed part provisions of s176A of the Act). The court has held, in Re Transbus International Ltd [2004] 2 All ER 911, that the effect of these provisions is that, even where para 52 does not apply, the administrator is permitted to exercise any statutory powers available under Sch 1 of the Act, including the power to sell company assets, without first calling a creditors’ meeting or applying for directions from the court.
8. For early support for careful use of pre-packs, see for example Harris ‘The Decision to Pre-Pack’ Winter 2004 Recovery 26 and Ellis ‘The Thin Line in the Sand—Pre-Packs and Phoenixes’ Spring 2006 Recovery 3. For a less positive view of pre-packs, see Moulton ‘The Uncomfortable Edge of Propriety—Pre-Packs or Just Stitch-Ups?’ Autumn 2005 Recovery 2.
9. Frisby A preliminary analysis of pre-packaged administrations—Report to The Association of Business Recovery Professionals August 2007 (the ‘Frisby Report’) at p. 63. In approximately 80% of pre-packs, there is no money available to unsecured creditors apart from under the prescribed part provisions of s176A of the Act. The Sixth Report of the House of Commons Business and Enterprise Select Committee (HC190) suggests that only 1% of unsecured debt is paid in pre-packs.
10. Sch B1, para 84.
unsecured creditors and then takes steps to dissolve the company. In either post-pre-pack scenario, no independent insolvency practitioner is likely to be appointed to assess the pre-pack unless disgruntled junior creditors decide to take action against the administrator, which will be expensive and by no means guaranteed to be successful.

Difficulties experienced in traditional trading administrations are sometimes suggested as a further reason for the widespread adoption of pre-packs. Suppliers to companies that enter a traditional administration appear to change the terms and conditions of that supply, which makes the administrator’s task of trading the company more difficult. Complexities in the law relating to employees’ rights and expenses including pension contribution notices, rent, and business rates have encouraged a move away from traditional trading administrations. Estimates as to how many pre-packs occur each year vary from 27% to 29% of the total number to between 50% and 80%. Either way, there are quite a lot of them, and they are not going away.

As there is no mention of pre-packs within the Act, it is not surprising that the insolvency profession, the courts and the UK government have struggled to come to terms with them. The following is a summary of the principal contributions made by those respective bodies to the pre-pack procedure.

A. The profession—managing conflicts in a pre-pack

As from 1 January 2009, the insolvency profession adopted a new Insolvency Code of Ethics (‘the Code’). A breach of the Code may lead to professional disciplinary proceedings but will not necessarily be grounds for the removal by the court of the administrator. The Code sets out five fundamental principles of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour. The Code sets out a framework enabling insolvency practitioners to identify actual or potential threats to any of the fundamental principles. If a threat is identified, the insolvency practitioner must then consider if the threat may be

11. Sch B1, para 83.
12. See the comments made to the House of Commons Business, Innovation and Skills Committee on Tuesday, 24 January 2012, available at http://www.parliamentlive.tv/Main/Player.aspx?meetingId=9951 (last accessed on 7 March 2012) where an extension of s233 of the Act was suggested.
13. See for example Key2Law (Surrey) LLP v DeAntiquis [2011] EWCA Civ 1567.
15. See for example Goldacre (Offices) Ltd v Nortel Networks UK Ltd [2010] Ch 455.
17. See the comments made to the House of Commons Business, Innovation and Skills Committee on Tuesday, 24 January 2012, available at http://www.parliamentlive.tv/Main/Player.aspx?meetingId=9951 (last accessed on 7 March 2012).
20. The Code replaced the previous Insolvency Ethical Guide (dating from January 2004). It was produced by the Joint Insolvency Committee, which was formed in 1999 to facilitate discussion between the Recognised Professional Bodies (RPBs) and to ensure, as far as is possible, that each RPB is governed by the same ethical standards. Each of the RPBs is represented on the Committee. The Code is intended to align ethical guidance to insolvency practitioners more closely with the International Federation of Accounting Bodies’ Code.
neutralised by putting in place appropriate safeguards. If no appropriate safeguards are available, the insolvency practitioner must not act or continue to act in the matter.23

One obvious threat to the objectivity of a pre-packing administrator is where the administrator has advised either or both the company and any secured creditor in the planning stage of the pre-pack.24 Once appointed as administrator, a duty is owed to all the company’s creditors.25 This duty might be seen as conflicting with the decision that has already been made to pre-pack the business. Paragraph 51 of the Code specifically highlights that ‘where the assets and business of an insolvent company are sold by an Insolvency Practitioner shortly after appointment on pre-agreed terms, this could lead to an actual or perceived threat to objectivity’. The Code suggests that the threat to objectivity in these circumstances may be managed by, for example, obtaining an independent valuation or considering other potential purchasers.

It is quite permissible for an administrator to act subsequently as liquidator of the same company. Indeed, the Act assumes this process to be commonplace.26 Such sequential appointments contain an inherent threat to the fundamental principle of objectivity, and this is accentuated with a pre-pack administration. The Code states that sequential appointments should not be accepted unless: disclosure is made of the threat to objectivity to either the Court or the creditors on whose behalf the practitioner would be acting, and no objection is made to the appointment; and safeguards are put in place to eliminate or reduce the threat to an acceptable level.27

A new Statement of Insolvency Practice, SIP16, was introduced by the profession in an attempt to head off complaints that creditors were not being informed of how and why the pre-pack was entered including details as to any valuations of the business.28 SIP16 requires detailed information to be provided to creditors and so makes the process more transparent. On the downside, this information is only provided once the pre-packaged deal has been completed.29 SIP16 does not require the administrator to hold a creditors’ meeting30 to explain what has happened and why. The government has been monitoring compliance with SIP16 and has found that full compliance increased from 62% in 2009 to 75% in 2010. Although a significant number of insolvency practitioners have been referred to their respective Recognised Professional Bodies in relation to breaches of SIP16, few such breaches have been found serious enough to warrant regulatory action.31

24. For a detailed consideration of how the terms of the Code might impact upon a pre-pack, see the discussion in Walton “Pre-Packing in the UK” [2009] International Insolvency Review 86.
25. Sch B1, para 3(2) of the Act.
26. Sch B1, para 83.
28. SIP16 requires the administrator to explain to the creditors, inter alia, how the administrator came to be involved, the extent of his or her involvement prior to appointment, a full explanation of any attempt to market the business, any valuations, alternative courses of action that were considered, why a pre-pack was decided upon, whether major creditors were consulted and full details of the sale including the price and the identity of the buyer. A breach of SIP16 will be prima facie evidence of professional misconduct.
29. SIP16 appears to be based upon the idea that as long as the pre-pack process is explained in detail after the deal is done, the creditors should accept that the provision of information to them is a sufficient quid pro quo for their losing their statutory right to participate in the process and to vote on the administrator’s plans.
30. SIP16 does not require a creditors’ meeting to be held but requires that when one is held that it is held as soon as possible after the appointment.
The profession therefore sees potential conflicts, which might arise in a pre-pack situation, as generally capable of being managed. This applies to insolvency practitioners who, in a pre-pack, will invariably be involved in advising the company in the run-up to the pre-pack’s execution and also pre-pack administrators who frequently take on the subsequent role as liquidator. Compliance with SIP16 is designed to assist in managing these conflicts. Full information as to the terms of the pre-pack deal will be provided to creditors who can therefore consider whether the insolvency practitioner has effectively managed threats to objectivity. The Code’s pragmatic approach is reflected in the context of a pre-pack administration in favour of connected parties. In advising the company, prior to the administration, the administrators (consistently with para 5 of SIP16) would stress that they are advising the company (or its lenders) but not the company’s directors. There will be no conflict when the pre-pack is subsequently executed in favour of the company’s directors. The relative subtlety of this argument might be lost on the unsecured creditors who merely see the insolvency practitioner advising on and executing the pre-pack deal in favour of the management team and then acting subsequently as liquidator.

B. The courts—from early sales to pre-packs

The courts have moved away from a position that emphasised the importance of creditors having a say in any plan of the administrator to one where the courts see the financial bottom line as being the most important factor. Concerns that the statutory regime is not designed for this type of procedure have been largely swept aside in favour of achieving the best price possible for the business. The commercial decision of the practitioner is seen as all-important, and it is very difficult for unsecured creditors to attack that commercial judgment.

Once an administrator has decided that rescuing the company as a going concern is not reasonably practicable, he or she must next consider realising the company’s assets in the most efficient manner possible. If the only realistic possibility of achieving a good price for the business is a buyer (often connected to the company) who requires the sale to be completed quickly, the administrator will wish to go for an early sale. This desire appears to conflict with the statutory requirement to send a proposal to the company’s creditors (within 8 weeks of appointment) and to call a creditors’ meeting (within 10 weeks of appointment) to consider that proposal. If the administrator waits for the green light from the creditors, the buyer may have left the scene. The creditors might then understandably complain that

32. See for example Peter J Gibson in Re Consumer and Industrial Press Ltd (No2) (1988) 4 BCC 72 at 73 and 74.
35. See for example Shean ‘Administrators: above the law?’ (2011) 6 Corporate Rescue and Insolvency 184.
36. Sch B1, para 3 of the Act.
37. Sch B1, para 49.
38. Sch B1, para 51 (no meeting need be called if the criteria in para 52 are satisfied—this includes the situation where the company has insufficient property to make any payment to unsecured creditors (apart from under the prescribed part provisions of s176A)).
the administrator has been negligent. To go ahead with a quick sale clearly negates the views of any subsequent creditors’ meeting, which might equally upset the creditors. The courts were initially reluctant to allow such early sales without creditor consent, recognising that any subsequent creditors’ meeting would be entirely powerless.\textsuperscript{39} Despite such early reservation, the courts have now concluded that early sales are entirely permissible. \textit{Re T \& D Industries Limited} \textsuperscript{40} clearly established that as long as the administrator’s decision to sell early is reasonable, he or she will not be liable for breach of any duty. It is purely a matter for the commercial and professional judgment of the administrator.\textsuperscript{41}

It was a relatively small step, it would appear, for the courts to move from approving early sales in administration to approving the idea of a pre-pack. If a trading administration is seen as likely to destroy goodwill or to reduce significantly the sale price,\textsuperscript{42} a pre-pack may be seen by the insolvency practitioner as the only feasible option.\textsuperscript{43}

The courts have on a number of occasions given their approval to such pre-packs.\textsuperscript{44} It seems it is now too late to argue that they are inherently inconsistent with the fiduciary position of administrators or the statutory code.\textsuperscript{45} But the courts have not found it easy to identify the grounds upon which a pre-pack should be assessed. Indeed, Lewison J has commented: ‘It is not entirely easy to see precisely where in the statutory structure the court is concerned with the merits of the pre-pack sale.’\textsuperscript{46} There is no doubt that administrators are fiduciaries, but their fiduciary character does not prevent them advising the company prior to and then executing the pre-pack. It would seem that the courts might be alive to complaints about pre-packs where the administrator has acted where there is an actual or potential conflict of duty. The problem facing any complainant is that the courts have tended to approach the issue of insolvency practitioner conflicts of duty in a flexible manner not obviously dissimilar to that found under the profession’s Code.

Adopting an essentially pragmatic approach, the courts have shown themselves loath to replace conflicted insolvency practitioners, largely because of a desire to ensure efficiency and save money.\textsuperscript{47} The courts have, in addition, shown a willingness to permit administrators to be appointed by the court even where the insolvency

\textsuperscript{39}. See for example \textit{Re Consumer and Industrial Press Ltd (No. 2) (1988) 4 BCC 72} and \textit{Re NS Distribution Ltd [1990] BCLC 169.}
\textsuperscript{40}. \textit{Re T \& D Industries Limited [2000] BCC 956.}
\textsuperscript{41}. See also \textit{Re Transbus International Ltd [2004] 2 BCLC 550} where the court followed \textit{T \& D Industries.}
\textsuperscript{42}. For a list of the grounds relied upon by pre-packaging administrators justifying the decision to pre-pack, see the analysis by R3 entitled ‘Pre-packs and SIP 16’, March 2010.
\textsuperscript{43}. See for example the court’s approval of a pre-packaged deal in \textit{DKLL Solicitors v HMRC [2008] 1 BCLC 112.}
\textsuperscript{45}. For arguments that the pre-pack procedure is inconsistent with the statutory scheme, see Walton ‘Pre-packaged Administrations—Trick or Treat?’ (2006) 19 \textit{Insolvency Intelligence} 113.
\textsuperscript{46}. \textit{Re Hellas Telecommunications (Luxembourg) II SCA (in administration) [2009] EWHC 3199 (Ch), [2010] BCC 295 at .}
\textsuperscript{47}. See for example \textit{Sisu Capital Fund Ltd v Tucker [2006] BCC 463.} Even if the courts do not remove an administrator, they may still report a lack of objectivity to the administrator’s professional body for the consideration of disciplinary action: see for example \textit{Mourant v Sixty UK Ltd [2011] 1 BCLC 303} in the context of a lack of objectivity in advice on a company voluntary arrangement.
The practitioner has disclosed prior relationships with the company, suggesting potential conflicts of interest and duty. The court has even approved a pre-pack where a majority of unsecured creditors were steadfastly against the plan.

It may be that because of the relatively small number of very large firms of accountants specialising in insolvency work that the courts and the profession have had to be pragmatic about how they deal with conflicts of interest. The idea that a significant proportion of conflicts might be capable of being managed does arguably lead to a more cost-effective result for all concerned. If there is a potential conflict but none yet in existence, it is pragmatic to wait and see whether one does arise and then deal with it if it does. Cases such as *Re Arrows Ltd* 51 *Re Maxwell Communications Corporation plc* 52 and *Parmalat Capital Finance Ltd v Food Holdings Ltd* 53 highlight the courts’ willingness to cope with a conflict, should one arise, by, for example, the appointment of an additional independent practitioner or to require independent legal advice on a particular issue.

The courts’ flexible approach in the context of pre-packs appears to have some limits. It has been recognised, in certain circumstances, that a pre-pack does need the benefit of a review by an independent insolvency practitioner. *Clydesdale Financial Services Ltd v Smaites* 54 involved a pre-pack administration sale of a solicitors’ practice. The court ordered the replacement of the administrators. A majority of the creditors supported this move. The court expressly stated that there was no suggestion that the administrators who were removed had acted in any improper manner. The principal issue was that on the evidence available to the court, there was a significant issue raised by the majority of creditors as to whether or not the sale of the business was at a significant undervalue. As part of this determination, it appeared that the administrators had not fully complied with SIP16 in terms of providing full information about the sale. Although not a typical management buyout pre-pack, the main participator in the solicitors’ practice was subsequently employed by the purchaser on attractive terms. The court found that the terms of the pre-pack sale constituted a legitimate matter for an independent review. This independent review required an independent administrator to be appointed.

In *Re Hellas Telecommunications (Luxembourg) II SCA (in administration) (No2)*, 56 following a court-ordered pre-pack administration, the court ordered that the company be put into compulsory liquidation. Although the court accepted that the administrators had carried out appropriate investigations into the affairs of

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49. *DKLL Solicitors v HMRC* [2008] 1 BCLC 112.
50. See in particular the comments by Morritt V-C in *Re Barings plc (No 1)* [2001] 2 BCLC 139, where his Lordship considers the problems of having so few large firms who have so many potential conflicts of duty. His Lordship suggested that the official receiver might need to be appointed to avoid conflicts in circumstances similar to those before the court.
55. The court considered the alternative of a creditors’ voluntary liquidation with an independent insolvency practitioner acting as a liquidator but appears to have been swayed by the consequential delay this option would cause and also the majority creditors’ wish for a replacement administrator.
56. [2011] EWHC 3176 (Ch).
the company, the court was persuaded that there remained matters that a
liquidator could potentially investigate. Such matters included the role of a firm
of accountants who were connected to the administrators’ firm whose involvement
had not been disclosed to the court when the administration order was made.
It seems the court regarded the potential conflict of interest and duty of the
administrators as a matter that could only be investigated by an independent
office holder.57

Such appointments appear to be the exception and require a determined effort
by junior creditors. There is no right, unless cause can be shown, to have the
pre-pack assessed by an independent insolvency practitioner. The perceived lack
of independence of the pre-packing administrator, especially where the pre-pack
is in favour of connected persons, is still therefore a significant matter of concern
to disenfranchised unsecured creditors.

C. The government—much ado about nothing

The government supported the introduction of SIP16 and has carried out assessments
of its effectiveness, going as far as referring certain pre-packs to respective Recognised
Professional Bodies for investigation.58

The government has engaged in two consultations, considering if and how con-
trols on pre-packs should be introduced.59 The suggestions made in the consultations
have not been acted upon and appear to have been kicked into the long grass. The
first consultation, launched in March 2010 by the previous government, suggested,
inter alia, that SIP16 should be given statutory force; that following a pre-pack admin-
istration, the company should be placed into compulsory liquidation, so as to achieve
automatic scrutiny by the official receiver of directors’ and administrators’ actions;
that different insolvency practitioners should undertake pre-administration and
post-administration appointment work; and/or that the approval of the court or
creditors, or both, would be needed to approve all pre-pack business sales to
connected parties. The present government has dropped these proposals. The latter
three would have gone a long way to ensuring that an independent assessment of
the pre-pack takes place, either before or after its execution, but would have added
significantly to the costs of the administration.60

With a change of government came a change of approach to reform of pre-packs.
The second consultation, launched in March 2011, was based upon a draft Statutory

57. Sales J also emphasised the wider purposes of a
winding up and cited Lord Millett’s dicta in Re Pantmaenog Timber Co Ltd [2004] 1 AC 158 at where
his Lordship said: ‘I reject the unspoken assumption that the functions of a liquidator are limited to the
administration of the insolvent estate. This is only one aspect of an insolvency proceeding; the investiga-
tion of the causes of the company’s failure and the conduct of those concerned in its management are
another...’
58. See Insolvency Service Report on the First Six Months Operation of Statement of Insolvency Practice
16, Insolvency Service Report on the Operation of Statement of Insolvency Practice 16 July—December
59. The first was issued by the Insolvency Service in March 2010 and was entitled a Consultation/Call for
Evidence on ‘Improving the transparency of, and con-

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Instrument, which, had it come into effect, would have required: administrators to give three days’ notice to creditors where the proposed sale is to a connected party, all pre-pack administrators to file SIP16 information at Companies House and all pre-pack administrators to confirm that the sale price represents the best value for the creditors. Ultimately, the government decided to take no action but to keep the matter under review. The reason given was that it preferred to adhere to its policy of imposing ‘a moratorium on regulations affecting micro-business’. The main criticisms of these proposals were, firstly, that the 3-day notice period would effectively frustrate the whole point of a pre-pack, that is, its speed and secrecy, and secondly, that the declaration that the price represented the best value would impose an onerous duty upon the administrator to the point that pre-packs would be less likely.

D. The result (so far)

The only decisive action taken by the government thus far has been to rush through a statutory instrument ensuring pre-pack administrators could get their pre-appointment fees approved. The courts have fired some warning shots across the boughs of pre-packing administrators in emphasising that the decision to pre-pack is the decision of the insolvency practitioner, and he or she will need to be able to defend the decision to pre-pack. Where the pre-pack is in favour of the incumbent management team, the courts have expressly held, in specific circumstances, that the administration is for the benefit of the management team not the creditors. The profession has introduced SIP16, which is designed to ensure that creditors are given full information as to how and why a pre-pack has been entered. The government has been assessing the profession’s adherence to the requirements of SIP16 and has made a number of references to the professional bodies to look at possible breaches of professional conduct.

Action taken to regulate pre-packs has been somewhat ad hoc and lacks decisiveness. There has been an element of pass the parcel about how the courts, the government and the profession have approached regulating pre-packs.

The problems perceived by critics of pre-packs tend to run together. There is a perception that a conflict of duty exists where administrators have advised the company and recommended the pre-pack, especially where the pre-pack is in favour of the management team; that administrators may have carried out or

63. See for example Re Hellas Telecommunications (Luxembourg) II SCA (in administration) [2009] EWHC 3199 (Ch), [2010] BCC 295.
65. The Institute of Chartered Accountants in England and Wales is currently investigating the Wind Hellas pre-pack triggered by a complaint from a junior creditor, not the government (Daily Telegraph, 28 February 2011).
supervised limited marketing of the business prior to the pre-pack; and that administrators may have commissioned valuations. There may be a perception that full value has not been realised; senior creditors will almost certainly have been consulted; junior creditors will not have been consulted; there is unlikely to be any creditors’ meeting at all, and even if one is held, it will be impotent as it will only happen after the sale is completed; the sale proceeds will be distributed to the senior creditors who will have the power to approve the administrator’s fees (assuming no distribution to the creditors is possible apart from under s176A); no independent assessment is made of the directors’ and administrator’s conduct and decision making; junior creditors are often out of the money and remain so even if the pre-packaged business goes onto success; no independent insolvency practitioner is appointed to consider the pre-pack, either before or after it is executed.66

E. Déjà vu?

The disquiet caused by pre-packs is reminiscent of two former practices: the first known as Centrebinding67 (so named after the case of Re Centrebind Ltd68) and the second as the ‘Phoenix Syndrome’.

Centrebinding involved a company passing a resolution to enter voluntary liquidation and at the same general meeting appointing a friendly liquidator. No creditors’ meeting was ever called, which would have had the power to replace the members’ nominated liquidator. The liquidator would sell the business on, often to a new company formed by the company’s management team at a bargain price. Section 166 of the Act was passed specifically to outlaw this practice by requiring the court’s sanction to any sale by the liquidator prior to the creditors’ meeting.

Centrebinding and pre-packs have a number of similarities. In both, an office holder is appointed without the involvement of the creditors and proceeds to sell the business on, often to a connected party. The only real difference is that Centrebinding could be carried out by unqualified office holders whereas pre-packs must be conducted under the auspices of a licensed insolvency practitioner.69 The practice of Centrebinding was described by the Government White Paper, leading to the passing of s166 in the following terms: ‘[it] effectively wrests control from the creditors and provides scope for the disposal of assets at below

66. It is interesting to note that the Pensions Regulator has announced that it is currently investigating a number of pre-pack administrations in relation to pensions’ liabilities (Daily Telegraph, 31 October 2011).
67. Reference might be made to the debate in the House of Commons on 19 October 1981 where the Centrebinding exploits of Maurice Sidney Caplan, known as ‘Hissing Sid’, and his associates are discussed: http://hansard.millbanksystems.com/commons/1981/oct/19/meetings-of-
creditors-and-centerbinding (last accessed 24 March 2012).
69. It has been suggested that s166 was unnecessary as the requirement for insolvency practitioners to be licensed from 1985 onwards should have prevented the practice in itself. See for example Sealy and Milman Annotated Guide to the Insolvency Legislation (14th ed, 2011, Sweet and Maxwell) at p. 160.
their true value, possibly involving collusion between the liquidator and the company’s directors.\textsuperscript{70}

The Cork Committee described what is colloquially known as the ‘Phoenix Syndrome’ in the following way:

\begin{quote}
[T]he ease with which a person trading through the medium of one or more companies with limited liability can allow such a company to become insolvent, form a new company, and then carry on trading much as before, leaving behind him a trail of unpaid creditors, and often repeating the process several times. The dissatisfaction is greatest where the director of an insolvent company has set up business again, using a similar name for the new company, and trades with assets purchased at a discount from the liquidator of the old company.\textsuperscript{71}
\end{quote}

The Cork Committee recommended a restriction on the directors of failed companies being able to benefit from limited liability in the immediate future:

\begin{quote}
[A] person who, at any time during the period of two years prior to the commencement of its insolvency, has been a director \ldots of a company \ldots which has gone into insolvent liquidation shall, unless the Court otherwise orders \ldots be personally liable for the relevant liabilities of any other company \ldots of which he is or becomes a director \ldots and which commences or continues trading within 12 months after the commencement of the insolvent winding up of the first company and itself goes into insolvent liquidation within three years after such commencement.\textsuperscript{72}
\end{quote}

The government of the day thought this suggestion to be too draconian. The White Paper\textsuperscript{73} outlining the purposes of what became the Insolvency Act 1986 states the following:

\begin{quote}
The Government is concerned to remedy the abuse identified by the Review Committee and has considered the imposition on directors of a measure of personal liability for subsequent failures. It has, however, not been possible to adopt the Review Committee’s proposals because the government considers that they are too far reaching and whilst they would curb the activities of the delinquent director they would, at the same time, deter the genuine entrepreneur from risking his capital in a further venture.\textsuperscript{74}
\end{quote}

The government was of the view that the strengthened powers of disqualification (under the Company Directors Disqualification Act 1986) and possible liability for wrongful trading (under s214 of the Act) would without more deal with the problem of the ‘Phoenix Syndrome’.\textsuperscript{75}

No express provision was therefore made in the Insolvency Bill 1985 for the outlawing of the ‘Phoenix Syndrome’. What are now ss216–217 of the 1986 Act

\textsuperscript{72}. Ibid at para 1827.
\textsuperscript{74}. Ibid at para 55.
\textsuperscript{75}. Ibid at para 56.

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were introduced late in the Parliamentary passage of the Insolvency Act 1985. The provisions are a strange way of controlling the mischief as they merely control the re-use of the name (a ‘prohibited name’) of the company that has gone into insolvent liquidation. The provisions, described as an ‘afterthought’ by Professor Milman, provide that a director of a company that has gone into insolvent liquidation cannot be involved in the management of a second company using the same or similar name to that of the failed company for a 5-year period. The provisions have no effect on participation in a successor company that does not adopt the same or a similar name.

A prohibited name is one by which the liquidated company was known at any time in the 12 months immediately prior to the liquidation. The restriction applies to any person who was a director of that company at any time during the 12 months prior to the liquidation. The prohibition may in individual circumstances be lifted with permission of the court. There also exist three specific exceptions. Breach of s216 is a criminal offence and under s217 will lead to the person in breach being held personally liable for the successor company’s debts.

The problem of the ‘Phoenix Syndrome’ has not been solved by ss216–217 as the provisions are relatively easy to navigate around and even when applicable only apply to the re-use of the previous corporate name. Pre-packs in favour of connected parties look extremely similar to the descriptions and concerns articulated by the Cork Committee back in 1982. Sections 216–217 were not and are not the answer to legitimate concerns of unsecured creditors. Even where ss216–217 are breached, there is no remedy for the creditors of the first liquidated company.

The problem of Centrebinding was dealt with by banning the activity. The ‘Phoenix Syndrome’ has in part been discouraged. There is no obvious appetite for outlawing pre-packs in the UK. It remains to be seen whether a solution to concerns about pre-packs can be arrived at, which satisfies all stakeholders. A number of possible compromises have been considered by both the present and
previous UK governments, but none has been adopted. There remains at least one possibility not yet considered by the UK government, which will be considered later.

Prior to that, it is instructive to assess the current situation and debate in Australia as to whether pre-packs can (or should) become a customary feature of insolvency practice.

III. Looking at the Menu but just Cannot Eat: Australia’s Pre-pack Debate

The widespread use of pre-packs in UK administrations has gained the attention of Australian insolvency practitioners, turnaround specialists and commentators in recent years. Given the similarities between the UK regime and the Australian voluntary administration regime, this is unsurprising. However, the cosmetic similarities of the UK and Australian legislation belie significant underlying differences in general law, custom and practice. These distinguishing jurisdictional features explain why the prevalence of UK pre-packaged administrations has not been emulated in Australia. The Australian experience also provides a useful frame of reference for UK policymakers when considering how their brand of pre-packs might be regulated in the future.

A. That’s not a pre-pack, that’s a pre-pack

When Australian insolvency practitioners, lawyers or academics discuss the notion of pre-packs, it is not uncommon for there to be an initial acknowledgment of the conceptual merits of pre-packing. However, somewhat paradoxically, such conversations often turn to the necessity of obtaining creditor approval of such a sale—either by a deed of company arrangement (DOCA)\footnote{Generally speaking, a deed of company arrangement (or DOCA) is the Australian equivalent of the UK’s company voluntary arrangement or CVA.} or at least notifying creditors (e.g. at their first meeting)\footnote{Under Australia’s voluntary administration regime, a first creditors’ meeting must be held within eight business days of appointment. Strictly speaking, the only purpose of that meeting is to determine whether the administrator is to be replaced by creditors (as of right) and whether to establish a creditors’ committee.} of an intention to sell the business with court approval. Of course, the customary UK pre-pack involves no formal creditor participation or court approval and is, at its very core, a procedure that relies on the implementation of a business sale transaction immediately upon the initiation of an out-of-court voluntary administration process.

The emerging commentary upon pre-packs in Australian literature demonstrates that the notion of a ‘pre-pack’ means different things to different people. As Brown has noted, ‘a “pre-pack” is not a legal term of art’.\footnote{Brown’s ‘Unpacking the pre-pack’ (2009), 9(10) Insolvency Law Bulletin 164.} The debate as to whether Australia should embrace pre-packs sometimes appears to avoid illuminating or addressing the garden-variety UK pre-pack ‘warts and all’. In Australia, the concept of ‘acting early’ upon an appointment of an administrator to preserve business value...
is readily grasped, but the procedural reality (i.e., that early action diminishes creditor participation) is where pre-packing begins to meet with dampened enthusiasm or even downright resistance.

In Australian voluntary administrations, the company’s creditors (save for any court extension of the statutory timetable) meet some 15 to 25 business days following the appointment of administrators to determine the fate of the company. Creditors are effectively presented with the choice of either voting for liquidation or alternatively accepting a DOCA, which will address the company’s present insolvency and immediate future. Like the analogous UK company voluntary arrangement (CVA), a DOCA is a flexible instrument subject to negotiation and circumstance. A DOCA may take the form of either (at one end of the spectrum) a complex restructuring/workout/genuine company rescue or (at the other end of the spectrum) a de facto or ‘glorified liquidation’ or anything in between.

Poulos and McCunn contend that pre-packs can be completed through DOCAs in Australia:

From a definitional perspective, the defining feature of a pre-pack is that the transaction is negotiated to near completion such that the desired outcome is known prior to the appointment of the insolvency practitioner. In accordance with that understanding of pre-packs, the timing of the execution of the sale is a factor that only affects whether all of the benefits of pre-packing are achieved. Timing does not determine whether a particular transaction is a pre-pack. In that sense, a pre-pack can be completed under a DOCA.

However, the reality is that pre-packing as it is understood and practised in the UK very rarely (if at all) occurs through a CVA. Most UK pre-pack sales occur well in advance of any creditors’ meeting, which might be held to consider ‘proposals’ for the administration. A CVA is one possible proposal for achieving the purposes of an administration of a UK company, just as a DOCA can be proposed to creditors (to vote upon in meeting) under Australia’s Part 5.3A voluntary administration regime. However, UK administrators implementing a pre-pack sale customarily exercise their power of sale immediately upon appointment and, in so doing, preclude a CVA as a starter in the way of a proposal for consideration at the creditors meeting held some 10 weeks subsequent to the sale. Indeed, the UK pre-pack itself often ensures that no proposals of any substance are able to be put to creditors at the subsequent meeting because the company has already been divested of its essential value by reason of the business sale.

It is the very absence of creditor (or court) participation, approval or oversight that is the essence of the UK pre-pack and its lauded benefits. UK pre-packs are praised because they deploy an armoury of limited publicity, speed and creditor

84. Sections 439A and 439C Corporations Act 2001 (Cth) provide that at the second creditors’ meeting convened by the administrator, the creditors may resolve that the company execute a DOCA, that the administration end (rare) or that the company be wound up.

disenfranchisement, all in the interests of achieving the efficient closure of a sale and thereby delivering a seamless transition for a company’s business to the successor entity (purchaser). Creditor approval of a pre-packaged sale of a distressed company’s business (for example, by means of a DOCA) is anathema to the customary UK practice where such sales are viewed as ideally completed immediately upon the administrator’s appointment. Waiting several weeks for a creditors’ meeting to approve a sale suffers from the very drawbacks that UK proponents contend are avoided by a pre-pack—namely, substantial delay and publicity, which are both destructive of business value.

Despite maintaining the prospect of pre-packing under a DOCA, Poulos and McCunn concede that “[t]he speed with which pre-pack transactions are effected soon after the formal appointment is the key to their success in reducing the loss suffered by a company.”86 “To put it another way, the more protracted the post-appointment process required to complete a sale, the greater is the risk of destruction of business value (such that the administrator may only be left with a bucket of water, rather than a block of ice, to sell).”87 Poulos and McCunn suggest legislative reform to allow abridgement of the statutory timetable for creditor meetings to facilitate a ‘rapid sale or restructure through a DOCA’.88 Quite apart from the fact that such a mechanism already exists under the present legislation (albeit by application to court),89 an abridged process would still have to contain minimum notice requirements, necessitating at least some ‘delay’ following the administrator’s appointment. It is noteworthy that the UK Government’s 2011 announcement of its intention to mandate three days’ notice to creditors of pre-pack sales to connected parties prompted hue and cry from pre-pack advocates who claimed that even this modest delay would defeat the advantage of speed, which is integral to the customary pre-pack sale.89

86. Poulos and McCunn’s ‘Pre-pack transactions in Australia’ (2011) 19 Insolvency Law Journal 256.
87. Poulos and McCunn’s ‘Pre-pack transactions in Australia’ (2011) 19 Insolvency Law Journal 253. Similarly, the Turnaround Management Association of Australia (TMAA), in its 2 March 2010 submissions (pp. 6–11) in response to the Australian government’s insolvent trading discussion paper, called for legislative amendment to allow the convening of a creditors’ meeting within five business days of appointment to consider a DOCA proposal. TMAA submitted that ‘there is currently no ability for the Court to shorten the convening period [for the second creditors’ meeting] if the circumstances so require’ and that ‘if an administrator wished to implement a sale or restructure almost immediately after appointment through a deed of arrangement arrangement, he or she would need to wait at least 15 business days after the commencement of the administration before putting the proposal to creditors’. (Section 439A of the Corporations Act 2001 (Cth) provides that the second creditors meeting must be held within five business days before or after the end of the convening period, the convening period usually being 20 business days starting on the first business day following the appointment.)

However, this aspect of TMAA’s submission does not accord with Re Sims, in the matter of Destra Corporation Limited [2009] FCA 1199 where Lindgren J of the Federal Court ordered (under s447A) that where the applicant liquidators were proposing to instigate an administration, the first creditors’ meeting could be dispensed with and the second creditors’ meeting could be held at any time during the convening period (subject to the usual five business days’ notice requirement). Lindgren J made the abridgement order so that the administrators would not have to ‘sit on their hands’ until five business days before the end of the convening period.

88. Section 447A Corporations Act 2001 (Cth); Re Sims, in the matter of Destra Corporation Limited [2009] FCA 1199, as to which see footnote 86.
89. On 1 November 2011, the Gazette of The Law Society of England and Wales reported both comment from R3 that a 3 days’ notice requirement would be long enough to ‘deral a rescue’ as well as the opinion of a law firm partner that the ‘concern with putting in three days for creditors to stop the sale going ahead is that you would take away the very reason why pre-packs work’ (see the article at http://www.lawgazette.co.uk/features/pre-pack-administrations-rule-changes-face-trouble).
It can therefore be argued that ‘pre-packing through a DOCA’ is really no pre-pack at all and certainly not in the sense that pre-packs are commonly (and successfully) practised in the UK. The UK naturally provides Australia with an analogous (voluntary) administration regime for comparative purposes. It is the reported success of pre-packs in that jurisdiction that has provided the impetus for the debate in Australia as to their broader use or availability. Accordingly, the manner in which UK pre-packs are customarily practised warrants focus and attention in Australia. An abstract consideration of how pre-packs (however defined) might be achieved through DOCAs is something of an arid exercise given that such pre-packs are not reflective of either the reality or the successes of the UK experience.

B. The roadblocks to pre-packing in Australia

Reports of genuine pre-packs in Australia are sparse. Lloyd, O’Brien and Robertson acknowledged that ‘[t]his procedure has not been used to date in Australia’ but also asserted that ‘the legal infrastructure exists to permit pre-packaging’. Australian literature and case law support the conclusion that ‘day 1’ pre-packaged sales by voluntary administrators (being the same insolvency practitioners who have advised the company prior to their appointment) are rare, if not non-existent. The primary reasons for this position are twofold. Firstly, Australia’s general law imposes strong independence standards upon insolvency practitioners. Secondly, the orthodoxy of Australian administrators is to effect ‘early sales’ only in exceptional circumstances—a custom based upon an entrenched culture and regard for creditor participation in the voluntary administration process, but which is also supported by a statutory construction of the legislative regime (discussed later).

In Australia, reference is often made to the country’s strict insolvent trading laws, which are said to discourage directors from continuing to trade while obtaining advice to implement ‘creative insolvency’ options (e.g. pre-packs), which would maximise business value. This point is well made. However, even if ‘softer’ insolvent trading laws were introduced, Australia’s independence standards and the aversion of administrators to early sales would still constitute two fundamental obstacles to the practice of a UK brand of pre-packing.

90. For some specific instances of pre-packs reported to have been implemented in Australia, see Black ‘A crystal clear result [bankruptcy reorganization of glass company Waterford Wedgwood]’ (2010) 88(1) 42 and Bryant ‘An Analysis of the Use of “Pre-Pack” Proceedings in an Insolvency Workout—Experiences from the UK and Australia’, March 2011, Insol International Electronic Newsletter. These pre-packs were not sales to connected parties, appear to have involved unique or exceptional examples of group or corporate distress and were not of the ‘garden-variety’ ilk of pre-pack commonly practised in the UK. Of course, even in the UK, pre-packs may present in any number of forms and circumstances.


92. Poulos and McCunn, footnote 85, 243-246; TMAA submission, footnote 87, 11–12.
C. Australian independence standards for insolvency practitioners—general law and professional codes of conduct

Australia’s general law imposes strong and exacting independence standards upon its insolvency practitioners. It is clear that the independence requirements of Australian administrators are no less than those of liquidators.93 Both are recognised as fiduciaries. Australian courts have also demonstrated a willingness to deploy a heightened sense of scrutiny in respect of voluntary or ‘privately ordered’ or nominee appointments.94 In very general terms, Australian voluntary administrators are not permitted under the general law to have ‘a substantial prior involvement’ with a company to which they are appointed. In Commonwealth v Irving,95 Australia’s Federal Court held that prior contact is not completely prohibited as this would constitute ‘commercial unreality’.96 The court considered that a company obtaining ‘professional advice respecting actual or apprehended insolvency’ would not disqualify that advising practitioner as a prospective appointee.97 However, the court also held that a ‘substantial involvement’ with a company prior to its administration would ‘be seen to detract from the ability of the person to act fairly and impartially during the course of an administration’.98

In Commonwealth v Irving, the court noted the earlier Federal Court decision in Re Stadbuck Pty Ltd99 where Sheppard J ‘spoke of an accountant, perhaps subconsciously, tending to favour those who had originally consulted him or her’.100 The court in Commonwealth v Irving understood Sheppard J to be applying those observations to ‘a consultation or consultations on matters of ongoing business relevance’.101 In another case, addressing the extent of permissible pre-appointment advice, the Queensland Supreme Court held that a line is crossed where a liquidator is involved in providing advice and consultations that go beyond basic financial advice (e.g. as to solvency) or general canvassing of options with a view to an appointment or initiation of some insolvency process.102

This strict requirement of Australian insolvency law and practice was again demonstrated by the Federal Court in the recent case of Pinklillies Pty Ltd (Trustee), in the matter of Northwest Motel Group Pty Ltd (in liq) v Huxtable (Pinklillies).103 In that case, a liquidator was removed by the court by reason of his prior association with a creditor. Although the liquidator had disclosed the existence of certain relationships prior to his appointment, further details came to light subsequent to the winding up order, which compromised the practitioner’s perceived independence. A services company that employed the impugned liquidator and the creditor that had successfully applied for the winding up were both ultimately controlled by the same

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95. (1996) 144 ALR 172.
96. (1996) 144 ALR 177.
97. (1996) 144 ALR 177.
98. (1996) 144 ALR 177.
100. Commonwealth v Irving (1996) 144 ALR 172, 177.
individual. The applicant creditor’s debt was subsequently found to be in dispute and in the court’s view this fatally compromised the perception of independence on the part of the practitioner. The Pinklillies decision is but another recent reinforcement of the long-standing principle in Australian general law that the appearance of independence of a liquidator (or administrator) is seen by the courts to be equally vital as actual independence. In Pinklillies, Logan J of the Federal Court referred to the long-standing line of authority in Australia that ‘[i]t is essential that the independence and impartiality of a liquidator should at all times exist in point of substance, and be manifestly seen to exist’. Logan J also stated the following:

The test, in relation to the removal of a liquidator, is whether, having regard to the liquidator’s conduct as a whole, it can be said to be such as to give rise in the mind of a fair minded observer to a perception of a lack of impartiality as between the various interests that he or she as liquidator must serve, and a lack of objectivity in serving those interests. Apple Computer Pty Ltd v Wiley (2003) 46 ACSR 729 at 738.

Logan J expressly noted that there was ‘no suggestion’ that the impugned liquidator had ‘acted in any improper way in the conduct, to date, of the liquidation’. His Honour held that ‘[i]f he order for his removal does not carry with it any condemnation on my part in respect of the actions which he has or has not undertaken as liquidator’. Furthermore, Logan J rejected the solution of appointing a special-purpose liquidator to determine the validity of the proof of debt of the ‘associated’ creditor. Logan J held that this would still leave the impugned liquidator having to assess all other proofs in the liquidation (or deciding whether to bring certain recovery proceedings), which would still affect the dividend that the ‘associated’ creditor stood to receive. Although the specific threat to independence in Pinklillies was not on all fours with that of a pre-pack administrator, the case does provide a timely restatement of the strict attitude Australian courts take to any adverse perceptions surrounding a practitioner’s appointment.

The Insolvency Practitioners Association of Australia (IPA) also promulgates a Code of Professional Practice (CoPP), which reflects (and in some respects extends) the Australian general law standards of independence to which its member practitioners are subject. Although not strictly legally binding, Australian courts have recognised the ‘utmost importance’ of the COPP in cases assessing the perceived independence of practitioner appointees and also (for example) the reasonableness of a practitioner’s remuneration. The provisions of the CoPP relating to independence are extensive. In Australia, the CoPP is a significant and established part of the insolvency practice landscape.

104. Ibid (Logan J).
105. In Re Monarch Gold Mining Co Ltd; ex parte Hughes [2008] WASC 201, [34]–[40] Master Sanderson of the Western Australian Supreme Court stated that the ‘the code is something more than a public relations exercise designed to assuage the concerns of those involved with insolvency practitioners’. Master Sanderson ordered a direction that administrators had tabbed a Declaration of Independence, Relevant Relationships and Indemnities (DIRRI) in accordance with the CoPP, stating that the order would ‘necessarily add to the status of the code and assure the public generally that the courts regard adherence to its terms as a matter of utmost importance’. In Golden Star Resources Ltd v Rosel [2010] QSC 26 the Queensland Supreme Court relied on the CoPP in determining whether the remuneration of receivers was reasonable.
The approach to insolvency practitioner independence in Australia might therefore be seen as ‘absolute’. There is very little room for negotiation or pragmatism. If there is a conflict identified, an insolvency practitioner will generally be removed. This contrasts with the approach of both the profession and the courts in the UK, where even if a conflict is identified, that conflict may be seen as being capable of being managed. The replacement of an office holder in the UK is seen as something of a last resort.

D. Perceived independence and pre-packs: mutually exclusive?

It is hard to see how a compliant, ‘independent’ Australian insolvency practitioner can ever be in a position to effect a ‘day 1’ pre-packaged sale in a voluntary administration. Indeed, regardless of the post-appointment timing of a pre-pack sale, it is hard to see how any Australian insolvency practitioner who has substantively advised or assisted on the detail of the pre-packaged transaction (i.e. advice going beyond the general availability of a pre-pack as an option) can subsequently take an appointment as voluntary administrator. Poulos and McCunn concede that the independence standards prescribed by the IPA CoPP ‘are likely to somewhat restrict the scope of an insolvency practitioner’s involvement in negotiations for progressing a pre-pack sale prior to their formal appointment’. However, Poulos and McCunn then contend:

In practical terms, an insolvency practitioner may still be involved in a pre-pack sale if the pre-appointment involvement is providing advice about the alternative courses of action that are open to the company, which could include consideration of a pre-pack sale. It may be that the sale is ultimately determined to be the best course, and the same practitioner is appointed as an administrator or receiver to complete the relevant transaction. The clear advantage of this approach is that the same practitioner that advised on the proposed pre-pack can complete the sale without the need to be brought up to speed with the details of the transaction. The practitioner would of course still need to declare his or her prior relationship under s 60 of the Act in completing their declaration of relevant relationships.106

With respect, this is a fine line to walk for an Australian insolvency practitioner. If the practitioner’s pre-appointment advice and assistance is of such substance and detail that he or she need not be ‘brought up to speed’ upon appointment—or there is nothing left to do upon appointment except immediately implement the pre-negotiated sale—then the pre-appointment advice and assistance might well have ‘crossed the line’ to constitute an impermissible ‘substantial prior involvement’ of which the court spoke in Commonwealth v Irving. When we reflect again on the perceptions of creditors (which count for everything in Australia’s general law test of independence), it is clear that an administrator implementing a ‘day 1’ pre-pack sale will be reasonably perceived by creditors to be endorsing a strategy ultimately controlled or inspired by a company’s directors and with which the administrator

106 Poulos and McCunn, footnote 85, 251–252.
has been substantively involved prior to appointment. It is contended that detailed involvement and assistance with a pre-pack proposal (particularly a proposed sale to a party connected with the directors of the subject company) would \textit{ipso facto} disqualify an Australian insolvency practitioner from taking an appointment as voluntary administrator. The aforementioned course contended by Poulos and McCunn is obviously expedient and cost-effective but, in many circumstances, could involve (rightly or wrongly) a failure to meet the standards of perceived and actual independence, which Australian courts plainly require.

It appears that very recently, a similar view was reached by an Australian insolvency practitioner who applied for his own replacement in the case of \textit{DCT v West Apartments Pty Ltd (in liq)}.\textsuperscript{107} The replacement application was brought about by the original liquidator’s resignation due to his firm’s prior role as investigating accountants for a secured creditor. The original liquidator had become aware of a contract of sale for one of the company’s properties during his initial investigations into the company’s affairs. The contract of sale pre-dated the appointment of the original liquidator but had not yet settled or completed, and as the court noted, it would ‘be necessary for that contract to be considered and evaluated prior to the proposed settlement date’.\textsuperscript{108} The original liquidator (who was not aware of the prior role of his firm at the time of his appointment) decided that his resignation was appropriate because ‘there could be an appearance of a lack of impartiality on his part in the execution of his duties as liquidator’.\textsuperscript{109} Although the reasons for judgment (in the application for the liquidator’s replacement) do not disclose more detail of the independence issues and concerns relating to the uncompleted contract, the parallels with a pre-pack sale are obvious.

The Australian parameters are thus far removed from the UK environment, which has accepted the ‘pre-pack’ practice of prospective administrators working side by side company directors to engineer pre-ordained outcomes of subsequent administrations. Such outcomes may well be judged by upstanding professionals to be in the best interests of creditors. However, the fact remains that a customary UK pre-pack involves a pre-appointment assessment by a practitioner following discussions with directors who have already expressed a firm intention to appoint the said practitioner by means of an out-of-court, voluntary appointment process. The issues and concerns surrounding ‘perceived independence’ in this scenario are obvious. In Australia, the general law’s requirements of actual and perceived independence do not and would not allow practitioners to be put in such a position in the first place.

\textbf{E. Early sales in administration: not ‘orthodox’ practice in Australia (yet)}

Australian voluntary administrators are often reluctant to countenance an early sale of a company’s business in the absence of court or creditor approval and only then where there is a compelling justification. Like the UK regime, Australian

administrators enjoy an express statutory power to sell a company’s business at any time following their appointment. However, Australian practitioners often have an innate aversion to exercising such broad powers in a manner that may disenfranchise creditors. Australian insolvency practitioners are sensitive to the fact that a significant, early exercise of a voluntary administrator’s powers will effectively make the creditors’ decision for them regarding the substantive outcome of the administration and the fate of the company. Notwithstanding the plain general nature of their statutory powers of sale, administrators seeking to invoke those powers prior to the second ‘substantial’ creditors’ meeting often seek court imprimatur for the contemplated ‘early sale’.

This practice is evident in two recent Australian decisions where voluntary administrators applied to court for directions that they would be ‘justified’ in effecting an early business sale (or that it would be ‘proper and reasonable’ to do so). The two cases, Re Advanced Medical Institute Pty Ltd (admin apptd) and AMI Australia Holdings Pty Ltd (admin apptd) and Re Killer; North Coast Wood Panels Pty Ltd (admin apptd), have been the subject of considered analysis and commentary by Schaffer and McCoy who concluded, It may be argued that, even if administrators do not need directions, they may still want their potential prophylactic benefits against as yet unforeseen complaints. The problem with that train of thought is that it ultimately negates both the clear conferral of power on administrators and another major policy underlying the enactment of Pt 5.3A—the creation of an insolvency regime that did not require court supervision as a matter of course.

These cases illustrate an emerging awareness in Australia of the value of early action by administrators but also that Australian administrators consider themselves exposed without a court order blessing an early and significant exercise of their powers. These two decisions evidence a real and entrenched resistance to the practice of disenfranchising creditors without both good cause and some protection from later criticism or challenge.

This resistance may not be purely attributable to culture or custom. As a matter of statutory construction, the voluntary administration regime can be said ordinarily to require creditor participation in the determination of the substantive fate of the company. Naturally, the statutory powers conferred upon administrators (and exercisable at any time upon appointment) sit in tension with the creditor participation also mandated by the regime. It stands to reason that such tension must be approached and resolved as a question of statutory construction. Rampant, customary early exercise of powers by administrators defeats the clear legislative intention that creditor participation be an ordinary feature of administrations and not a mere theoretical possibility. It could be argued that a line must be drawn according to a reasonable statutory construction of the legislation establishing

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110. Section 437A Corporations Act 2001 (Cth). See also Re eisa Ltd (admin apptd); Application of Love (2000) 35 ACSR 394; Brash Holdings Ltd v Shaffer (1994) 14 ACSR 192. The equivalent power of UK administrators is contained in Sch 1 of the Insolvency Act 1986 (UK).
111. [2011] NSWSC 574.
113. Schaffer and McCoy ‘Direct me if I am wrong...Early sales in voluntary administrations’ (2011) 12(1) Insolvency Law Bulletin 6, 8.
voluntary administration. In Australia, there is at least one example of a court having attempted to arrive at something resembling a ‘test’ to resolve this tension within the legislative regime.

*Carter v Global Food Equipment Pty Ltd* (Global Food)\(^{114}\) has been previously identified for its relevance to the possible advent of pre-packs in Australia.\(^{115}\) In *Global Food*, White J of the NSW Supreme Court was asked to extend the convening period for the substantial creditors meeting in circumstances where it was apparent that the extension sought would in fact provide the administrators a window within which they could complete a business sale and thereby render the substantial creditors meeting a non-event. White J attempted to resolve the tension in the regime as follows:

In principle, it seems to me that if the prospect of maximising returns to creditors was not jeopardised by the second meeting of creditors being held before any sales of businesses were effected, then it would be preferable for the second meeting of creditors to be held before the creditors were presented with what might be a fait accompli. Notwithstanding that it is the administrators’ right and their power to decide how the companies’ assets will be dealt with, the creditors have a legitimate expectation that the second meetings to decide the companies’ fate will be held swiftly and, hence, to consider the proposals in the deed of company arrangement which might be precluded by a sale.

However, whilst this is the theoretical position, the sting is in the rider. The order extending the period for convening the second meeting... is sought by the administrators because they consider that a swift completion of the sale process will maximise returns to creditors. They are experienced insolvency practitioners whose judgment should be respected. It may be that prospective purchasers will be discouraged if they believe that they will be unable to complete the purchase swiftly.\(^ {116}\)

The reasoning of White J could provide an answer to the anomalous reluctance of administrators to exercise their powers early without court protection (as questioned by Schaffer and McCoy). White J’s statement of principle offers something of a potential guide for administrators in resolving this very real tension within the Part 5.3A voluntary administration regime. The primary question for an administrator considering an early sale (such as a pre-pack) is whether creditor return is demonstrably jeopardised by creditor participation. If so, an administrator may exercise powers early to relieve creditors from this jeopardy. No directions should be necessary—indeed, unnecessary applications for directions also impair returns to creditors of companies in administration. As with any aspect of the conduct of an administration, administrators will need to justify their actions if subsequently queried or challenged. However, the essential reasoning of White J suggests that the early exercise of powers by an administrator in a manner inconsistent with creditor participation should generally be regarded as the exception to the rule.\(^{117}\)

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\(^{114}\) (2007) 25 ACLC 1173.

\(^{115}\) Brown, footnote 83, 166.

\(^{116}\) Ibid [18]-[20] (White J).

\(^{117}\) Brown (footnote 83, 166) appears to concur, contending that the judgment of White J does not endorse pre-pack sales as ‘the norm’.

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One revealing feature common to the early sales contemplated in *Re Killer* and *Global Food* was that the proposed early sale was ‘flagged’ at the first creditors’ meetings in the respective administrations. Australian voluntary administrations require a first meeting of creditors within eight business days of appointment, but the meeting has the very limited dual purpose of considering the following: (i) the possible replacement of the administrator and (ii) whether to establish a creditors’ committee. However, as these two cases show, first creditors’ meetings are often used by administrators for other informal purposes, including the provision of notice of the administrator’s intention to sell the company’s business prior to the substantial (second) creditors’ meeting. In both cases, it was clearly comforting to the court that the administrator had provided informal notice of the intended transaction to creditors at their first meeting and that no creditors had voiced any objection to that course. The role of first creditors’ meetings in Australia’s voluntary administration regime appears to discourage administrators taking significant action—such as a sale—before having at least gauged the attitudes of creditors in that forum.

The manner in which Australian courts have sought to resolve this tension in the voluntary administration regime appears more cautious and ‘creditor friendly’ when compared with the UK experience. Creditor participation is a concept that dies hard in Australian custom and culture, but the point should never be lost that such participation is contemplated and mandated in both the UK and Australian statutes establishing their respective administration regimes. The test for the legitimacy of a pre-pack in the UK should really be no different to that espoused in *Global Food*—that is, the practice must be justified in the interests of maximising business value (or preventing the destruction of it). In reality, however, the prevalence of pre-packs in the UK means that the onus is largely upon aggrieved parties to demonstrate that the risk of destruction of value was overstated or illusory. This is a difficult burden to discharge. When hearing a formal challenge to an administrator’s decision to pre-pack, UK courts are presented with an inexact, ‘crystal ball’ task of determining whether there was in fact a risk to business value that justified early action in the form of a pre-pack. It is not hard to see why the evidence of an insolvency practitioner’s judgment will be difficult to displace in circumstances where the alternative course of events will never be known. How can a professional’s judgment be proven wrong except in the most clear-cut of circumstances? (This issue is also relevant to the proposal discussed later, which suggests how pre-packs might be made to take account of the subsequent reality of the post-sale fate and fortunes of a sold business.)

The judgment in *Global Food* bears some similarity to the UK judgment in *T & D Industries*. Both cases support a statutory construction of the respective administration regimes whereby court directions should not ordinarily be required if the administrator is satisfied that an exercise of the power of sale is justified. Prior to

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118. Similarly, in *Re eisa* (footnote 110), the administrator consulted with a committee of creditors elected at the first creditors’ meeting.

T & D Industries, the UK courts were reluctant to permit early sales and thereby disenfranchise unsecured creditors. The point made by Schaffer and McCoy—that the propensity of Australian administrators to seek court approval of their conduct negates the out-of-court rationale for the voluntary administration regime—bears a striking resemblance to the reasoning of Neuberger J in T & D Industries:

It seems to me that there is a powerful argument for saying that the fewer applications which need to be made to the court by administrators the better. From the point of view of the court, it is obviously undesirable to have a potential plethora of applications by administrators, many of them urgent, many of them pretty trivial even if important to the administration in question. Administration is meant to be a more flexible, cheaper and comparatively informal alternative, with a potentially less destructive result, to liquidation.\(^{120}\)

It is also interesting that the Australian practice of informal consultation with creditors in the first creditors’ meeting appears to dovetail with another part of the reasoning of Neuberger J in T & D Industries, where His Lordship discussed the imbalance that might be said to exist in the conferral of a broad power upon an administrator to sell a company’s business prior to creditors’ consideration of proposals. Neuberger J stated that ‘one answer, albeit by no means a wholly satisfactory answer to this . . . is that, at least in an appropriate case, the administrator can informally discuss the proposal with at least some of the creditors’.\(^{121}\) Introducing a first creditors’ meeting (or some other early consultative mechanism) to the UK administration regime might be a proposal worthy of consideration.

The underlying reasoning of the decisions in Re AMI, Re Killer and Global Food—insofar as the Australian courts have demonstrated a willingness to endorse the decisions of administrators to effect justifiable early sales—might now encourage practitioners to ‘back themselves’ more often and use their powers without the expense and delay of court involvement (particularly where informal consultations have yielded no objections). It is arguable that in the UK the decisions in T & D Industries and Re Transbus International laid the platform for the prevalence of early pre-pack sales. It is therefore conceivable that in Australia, Re AMI, Re Killer and Global Food may be looked back on as a collective milestone in the journey towards permitting pre-packs (or at least more early sales). Although the voluntary administration procedure differs from UK administration in requiring an early initial creditors’ meeting, it may not be long before the Australian courts bless an ‘urgent’ early sale prior to such a meeting. Australia may well be heading in the same direction as the UK (albeit slowly and cautiously).

The faith in the judgment of insolvency practitioners (as professed by White J in Global Food) is not unreasonable and parallel observations have been made by UK judges when assessing the justification for pre-packs. The difference in Australia of course, is that the ‘professional’ judgment as to an early sale is made by a practitioner who has had no substantial pre-appointment involvement with the

\(^{120}\) Re T & D Industries Limited [2000] BCC 956, 961 [Neuberger J].

\(^{121}\) Re T & D Industries Limited [2000] BCC 962 [Neuberger J].
company. Australian general law, settings and practice are a timely (and possibly uncomfortable) reminder of how the UK has clearly compromised the perceived independence of its practitioners in the interests of early action to preserve business value. Whether the outcomes and successes of pre-packs have justified the consequential loss of confidence by stakeholders in the administration regime is a matter for debate.

IV. Possible Ways Forward in Australia (and Possible Ways Back for the UK)

The ‘early sale’ cases earlier demonstrate that there is presently a limit as to how far Australia is prepared to come in the way of countenancing early action (sales) at the expense of creditor participation. Despite a general awareness of the obstacles to pre-packing in Australia, there has been little appetite evident on the part of either government or commentators to formulate the sort of reforms that would be necessary to open the way for an increased and legitimate use of the practice in Australia. The gulf between the realities of professional practice in the UK and Australia remain unbridged. Talk of pre-packs in Australia largely remains just that.

‘Softer’ insolvent trading laws may incentivise pre-packs on one level, but in the absence of other compendious changes to the law, the only pre-packs that would be permissible in Australia would be those that entail the use of two practitioners—one pre-appointment adviser and one post-appointment, ‘independent’ practitioner acting as administrator. The notion of two practitioners acting on a pre-pack transaction has been canvassed in both Australia and the UK.122 In the UK, this idea has (unsurprisingly) met with objections to the attendant costs and delay involved with a second practitioner’s review of a pre-packaged transaction.123 Possible legislative reforms facilitating pre-packs that have been floated in the course of the debate in Australia include the following: (i) a ‘pre-pack panel’, which would comprise some sort of review of the proposed pre-pack by a second, independent practitioner;124 (ii) some degree of legislative abrogation of general

122. Wellard ‘UK pre-pack reforms: pause for thought in Australia?’ (2011) 23(2) Australian Insolvency Journal 12, 18; UK Insolvency Service’s March 2010 Consultation/Call for Evidence ‘Improving the transparency of, and confidence in, pre-packaged sales in administrations’ (Option 4).
123. UK Insolvency Service’s March 2011 Summary of consultation responses ‘Improving the transparency of, and confidence in, pre-packaged sales in administrations’ 33, [7.1]–[7.6].
124. Wellard (footnote 122, 19) suggested that an independent practitioner could be appointed from such a panel to act as administrator and review a pre-pack proposal, which had been negotiated or designed before his/her appointment. Building on this idea, Paul Billingham of Grant Thornton (Sydney) and Leonard McCarthy of Henry Davis York (Brisbane)—in a presentation at the IPA’s National Conference on 1–3 June 2011—agreed that a ‘pre-pack panel’ might work to provide for a review and approval of the proposed transaction but suggested that the pre-pack should still be implemented by the same practitioner who had advised the company pre-appointment. As a matter of commercial reality, it is accepted that bona fide directors of companies would baulk at a process whereby their ‘pre-pack adviser’ ultimately delivers them into the hands of a different practitioner to take the appointment as administrator and implement the transaction. From a professional standpoint, it seems that practitioners would also feel uncomfortable not maintaining ‘ownership’ and carriage of the insolvency solution they have helped procure for the company and its creditors. Therefore, the notion of an independent review (i.e. undertaken by a practitioner from a panel that is entirely independent of the directors and their IP adviser)—but with the retention of the same pre-appointment practitioner as subsequent administrator—would appear to have merit. Indeed, the notion of a review by a practitioner who does not stand to earn fees from any subsequent assignment (implementing the transaction) also has appeal.
law independence requirements; and/or (iii) abridgement of administration timeframes for creditor participation (already discussed earlier).

All these suggestions would appear to attract criticism on account of costs and delay or a risk of diminished professional standards, which may erode overall confidence on involuntary administrations and the insolvency regime generally (as might be said has occurred in the UK). If the bitter pill of further costs can be accepted—and it must be acknowledged that there are costs associated with all sorts of transactions—the notion of a ‘pre-pack panel’ delivering a genuinely independent, pre-appointment review of a proposed sale could have merit. Some legislative abrogation of independence standards could be introduced whereby an insolvency practitioner may act and advise upon a pre-pack, on the condition that the transaction be reviewed and approved by an independent practitioner prior to appointment and implementation. The value of the panel process would be that the ‘reviewing’ practitioner, unlike the pre-appointment adviser and prospective administrator, could not be ‘privately ordered’ by the company or its directors.

A pre-appointment review process could be embraced in the UK with the requisite professional and political will. Such a process would not pose undue risk to business value or compromise the speed of pre-packs—there would be no post-appointment delay. The only real quibble one could mount would be with the costs of the review. In this regard, one might ask: what price confidence in an insolvency regime? An independent review is no perfect substitute for creditor participation, but it would address the independence issues, which have created negative perceptions of pre-pack sales, especially those in favour of connected party purchasers.

Be that as it may, further regulation of pre-packs is plainly not the flavour of the month, as demonstrated by the recent about-turn by the UK government in respect of its 2011 proposals for a mandatory notice (to creditors) of connected-party pre-pack sales. Any regulation that impinges on the current ability and discretion of UK practitioners to pre-pack will clearly face an uphill battle for acceptance and support. However, another proposal may lend itself to addressing the confidence-sapping practice of ‘connected-party pre-packs’: a proposal that has the advantages of leaving unfettered the speed and expediency of a pre-pack but that might deliver to creditors a ‘royalty’ or return for their disenfranchisement and exclusion from the voluntary administration process (including the very decision to pre-pack). Indeed, a working model for such a proposal already exists in the personal bankruptcy regimes of both the UK and Australia.

V. What Price a Second Chance? A Post-sale Income Contribution Obligation for Connected Party Pre-packs

It is well known that pre-pack sales to connected-party purchasers attract the severest criticism and disapproval of the practice.125 Far from decrying connected-party

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125. See UK Insolvency Service’s March 2011 Summary of consultation responses, footnote 123, 6 [2.3].
pre-pack sales as something that should be an exception to the rule, UK proponents openly laud pre-packs as an appropriate ‘tool’ for insolvency practitioners to ensure that a business is able to be saved by its transfer to a new entity managed by the same, key personnel. This ‘second chance’ rationale for connected-party pre-packs has been laid bare by Frisby\textsuperscript{126} and a recent UK House of Commons Select Committee inquiry.

Frisby’s 2009 analysis of the UK pre-pack’s ‘contribution to the “second-chance culture” for both businesses and owner/managers of companies’\textsuperscript{127} contended that

[T]here is nothing intrinsically objectionable, and certainly nothing unlawful, in “phoenixing”: indeed, there may be very good reasons for offering the existing owner/managers a second chance along with their businesses. In many reports and statements of proposals to creditors, practitioners justify the phoenix by reference to a variety of factors, including that the connected party offer was the best available, or sometimes the only offer. Where pre-pack sales are concerned, this may appear less than convincing given that, at best, only limited and discrete solicitation of offers for the business will have taken place, but where the purchaser is both integral and critical to the business in question, it may have some credence.\textsuperscript{128}

Frisby’s analysis demonstrated that ‘connected party pre-packs appear to survive on average longer than their unconnected party counterparts’, which ‘may provide some support for facilitating that second chance’.\textsuperscript{129} Frisby concluded that ‘there is room to suggest that the tendency towards “phoenixing” is not to be roundly condemned, as in many cases the phoenix will survive, and even where it does not, it will trade for a relatively sustained period during which it may make some positive contribution to the economy’.\textsuperscript{130}

These observations were reinforced in the course of the UK House of Commons Select Committee inquiry into The Insolvency Service,\textsuperscript{131} which convened meetings in early 2012 to hear contributions from representatives of insolvency professional associations and regulatory bodies on a variety of matters, including pre-packs. The committee meeting of 24 January 2012 heard a contribution from Ms Frances Coulson, R3 President,\textsuperscript{132} to the effect that connected-party pre-packs are a reflection of the reality that

[I]n a large number of cases nobody else would give the [insolvent company’s] business a go, if you like, so I think it’s fair to say that it [pre-packing] is a valuable tool particularly in the SME sector and if you want people to try and then try again then ... you

\textsuperscript{129} Frisby’s ‘The second-chance culture and beyond: some observations on the pre-pack contribution’ (2009) \textit{Law and Financial Markets Review} 242, 244.
\textsuperscript{130} Frisby’s ‘The second-chance culture and beyond: some observations on the pre-pack contribution’ (2009) \textit{Law and Financial Markets Review} 242, 246.
\textsuperscript{131} House of Commons Business, Innovation and Skills Committee inquiry into the Insolvency Service, announced 30 November 2011.
\textsuperscript{132} R3 is the UK insolvency trade body, the professional association for insolvency practitioners, representing some 97% of UK insolvency practitioners.
have to have some sort of mechanism whereby they can do that. Again, that’s not a policy decision for us to make but I think it would have an effect if that tool were taken away, particularly in the SME sector.133

Pre-packing therefore appears to be very much driven by a desire to enable or provide small business proprietors (and their employees) a ‘second chance’ in circumstances where the only beholder of business value might be the existing board or management. This objective, in and of itself, is patently reasonable. Naturally, creditors will also stand to benefit to some extent from any insolvency procedures that preserve business value. But the reality and pervasive nature of the ‘second-chance’ rationale for pre-packing warrants deeper reflection as to whether there might be room for improvements to the legislative framework—i.e., whether the law should ask those who receive the benefit of a ‘second chance’ to make a further contribution in light of it, particularly in circumstances where that second chance has enabled or facilitated a profitable, rehabilitated business. Is it unreasonable to consider whether those enjoying the privilege of a ‘second chance’ delivered by a corporate insolvency procedure should be compelled to make a contribution—from the income or fruit of the ‘second life’ of their business—back in favour of the remaining creditors of the insolvent company they have left behind? As will be seen, the insolvency regimes in Australia and UK reflect community expectations that this is a reasonable thing to ask of insolvent (bankrupt) individuals. Is there any reason not to ask the same of directors of ‘pre-packed’ insolvent companies who are, in reality, enjoying a ‘second chance’ in much the same manner as a bankrupt individual?

The idea of a future income contribution would appear to be consistent with various UK government policy statements leading up to the Enterprise Act 2002. The Executive Summary of the White Paper,134 which led to the Enterprise Act 2002, refers to the purpose of the reforms as being ‘designed to create a fairer system in which there is a duty of care to all creditors and all creditors are able to participate. It should also help to maximise economic value by aligning incentives properly...’.

Under the White Paper’s Corporate Insolvency Proposals heading at para 2.2, the purpose of the Enterprise Act 2002 was stated as providing ‘adequate incentives to maximise economic value’ and equally to provide ‘an acceptable level of transparency and accountability to the range of stakeholders with an interest in a company’s affairs, particularly creditors’. At para 2.4, ‘on the grounds of both equity and efficiency, the time has come to make changes that will tip the balance firmly in favour of collective insolvency proceedings in which all creditors participate’. Similar sentiments could be put forward to support the suggested contribution solution.

133. Ibid, House of Commons Business, Innovation and Skills Committee meeting regarding its inquiry into The Insolvency Service held on Tuesday, 24 January, from 10.28AM to 12.28PM. The quoted contribution from Ms Coulson, R3 President (including the question to which she was responding) is at 53 min 2 s of the total 1 h 59 min recording. A recording of the hearing is available on the UK Parliament website: http://www.parliamentlive.tv/Main/Player.aspx?meetingId=9951.
A connected-party pre-pack (post-sale) contribution obligation could be advocated and justified on two grounds. Firstly, as already mentioned, those UK and Australian insolvency regimes that promote a ‘second chance’ for individual debtors have already enshrined income contribution obligations as a just corollary of the debtor’s ‘clean slate’. Secondly, in a (voluntary) administration context, a contribution mechanism could be seen as an acknowledgement or ‘compensation’ for the creditors’ loss of participation and voting rights in the administration through which a pre-pack sale is implemented. Such a mechanism could be viewed as an ‘income contribution’ or a ‘royalty’, depending on which justification holds greater appeal.

A. UK/Australian bankruptcy antecedents of income contribution mechanisms

Income contribution mechanisms exist in both Australian and UK bankruptcy legislation—regimes that provide a ‘second chance’ for insolvent debtors similar to that which pre-packs deliver for the directors of insolvent companies and their businesses.

The Australian bankruptcy regime (for individuals) provides for an ‘automatic’ or compulsory obligation upon bankrupts to make income contributions according to their level of earnings. This component of the regime (Division 4B of the Bankruptcy Act) was introduced in 1991, prior to which income contributions could only be ordered by a court upon application by the trustee in bankruptcy. The 1991 regime was introduced to provide a more effective mechanism ‘for obtaining income contributions from bankrupts who are able to make some contribution’. The Explanatory Memorandum for the enabling legislation stated the rationale for mandating such a contribution:

Many bankrupts earn quite large incomes after bankruptcy and for all practical purposes are not required to make any repayment to creditors from that income. In a case where the bankrupt has few if any divisible assets, the creditors will get nothing out of the process at all, notwithstanding that the bankrupt may have considerable capacity to pay. Further, some bankrupts manage to put their assets out of the reach of creditors and to channel income away from themselves through the use of associated individuals, companies, partnerships, or trusts which are referred to in the Act as “associated entities” of the bankrupt. These associated entities may, and usually do then provide the bankrupt with substantial non-cash benefits, such as free or low cost housing, motor vehicles, boats and payment of expenses. Very often the entity employs the bankrupt, and by virtue of that employment, the entity is able to generate substantial income. If the bankrupt ceased to be in the employment of the entity, its capacity to derive income would be lost.

In the UK, under s310 of the Insolvency Act 1986, a trustee in bankruptcy may apply to the court for an income payments order. The effect of such an order

135. Murray and Harris, Key’s Insolvency: Personal and Corporate Law and Practice (Thomson Reuters, Australia 2011), [6.263].
137. Ibid [8].
138. A similar provision was previously contained in s51 Bankruptcy Act 1914 but appears not to have been utilised effectively (see the Cork Committee’s discussion and recommendations at paras 591–598 and 1158–1163, which led to the introduction of s310).
is that a part of the bankrupt’s income, while the bankrupt remains undischarged, must be paid over to the trustee. The court will not order an amount to be paid over which reduces the bankrupt’s income to below the level that the court believes is necessary for meeting the reasonable domestic needs of the bankrupt and his or her family. The income payments order will specify how long it is to continue. It may end when the bankrupt is discharged (which, in the ordinary case, will happen within 12 months) or last for up to 3 years from the date of the bankruptcy order. If the amount to be paid over to the trustee in bankruptcy can be agreed between the parties, there is no need to obtain a court order. Instead, an income payments agreement can be entered into under s310A. This legally binding agreement is enforceable as if it were an income payments order.

B. The connected-party pre-pack ‘royalty’—putting a price on disenfranchising creditors from the (voluntary) administration process

From a *quid pro quo* perspective, it is just and reasonable that unsecured creditors receive something for their exclusion from the (voluntary) administration process in circumstances where the business of their corporate debtor has been transferred to a company directed by the same individuals. As outlined earlier, bearing in mind that it is the exclusion of creditors from any approval process (e.g. creditors’ meeting) that enables a pre-pack sale to be successfully and speedily implemented, the *quid pro quo* for the lack of a collective decision-making process could be that creditors stand to receive a modest benefit (e.g. percentage) of any ‘upside’ in the way of income earned by the successor entity that trades the business into the future, free of the old company’s debts. Put simply, it is the creditors’ non-participation that provides and enables the business rescue—thus, those creditors should stand to receive a modest contribution from the monetary rewards of that second chance.

It should be stressed that the aforementioned proposal (and the justifications for it) would only apply to connected-party pre-pack sales. Only where the successor entity is directed, managed or owned by the same individuals could it be legitimately contended that the pre-pack has delivered a ‘second chance’, justifying some sort of contribution obligation.

C. Possible objections

There is an obvious objection to translating this type of provision into the corporate world of the pre-pack. In bankruptcy law, it is the same debtor who has failed to pay his or her debts who is being ordered to pay a proportion of future income towards the payment of those debts. In the context of a pre-pack (to connected persons), it would seem contrary to the principle of separate corporate legal personality to make income from ‘Newco’ be used to pay off (to some extent) the debts of ‘Oldco’. There is though the corporate precedent of making successor companies liable for certain

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140. This provision was introduced by s260 Enterprise Act 2002 and came into force in April 2004.
rights of employees that have been breached by the predecessor company where the breach occurred because of the transfer of the business. Such rights against ‘Oldco’ are transferred to ‘Newco’.\footnote{See the Transfer of Undertakings (Protection of Employment) Regulations 2006 (2006/246) and the courts’ recent interpretations of the insolvency provisions of those regulations in Key2Law (Surrey) LLP v DeAntiquis [2011] EWCA Civ 1367 and Spaceight Europe Ltd v Baillavoine [2011] EWCA Civ 1565.}

It is also arguably ‘fair’ that ‘Newco’ (in a connected-party pre-pack) should be asked to contribute. In the context of the payment of pre-appointment fees, the UK High Court has been asked to consider ‘whether the advantage to the purchasing directors in retaining a business shorn of debt is clearly outweighed by the advantage derived by creditors from the pre-pack’. The answer was ‘Where the directors . . . are the purchasers, it is rarely possible to establish clearly that the balance of advantage is in the creditors’ favour’.\footnote{Re Johnson Machine and Tool Co Ltd [2010] BCC 382 per HHJ Purle at para 5. See also Re Kayley Vending Ltd [2009] BCC 578.} From this, it would appear that where a pre-pack is in favour of connected persons, it will be rare for the pre-pack to be seen as to the advantage of the creditors. If the pre-pack is to the advantage of the connected persons, it would seem fair and reasonable that if the business is successful, then it should be asked to contribute to the satisfaction of the debts owed by the predecessor company.

D. Valuations, ‘crystal ball’ projections and ‘strike oil’ scenarios

It might also be contended that a pre-pack administrator who obtains proper value for a business sale will ensure that creditors receive all they could (or should) ever justifiably ask for. With an arms-length investor or purchaser, this argument would carry considerable weight—and it could not be said that the new directors of the successor entity were enjoying a ‘second chance’ in the commonly understood meaning of the term. Even for a connected-party sale, it might still be argued that a contribution mechanism is unjustified if the administrator (as agent of the insolvent corporate vendor) has obtained proper value for the sale that comprises or represents future cash flow earnings of the rescued business, discounted for present value and the risk assumed by the purchaser.

However, the inadequacies of valuations in the context of business rescue and creditor participation have been demonstrated by decisions such as \textit{Re Bluebrook Ltd (IMO Carwash)}\footnote{[2009] EWHC 2114 (Ch); [2010] B.C.C. 209.} where the court observed that although a ‘going concern’ valuation may clearly be appropriate, there are various, alternative valuation methodologies that present themselves. The \textit{IMO Carwash} decision also demonstrates the potential unfairness that can arise from ‘valuing out’ junior or unsecured creditors from an insolvency process.

\textit{IMO Carwash} dealt with a challenge to a scheme of arrangement which—in very general terms—effected a pre-pack transfer of an insolvent company’s business and senior secured debt to a new company (‘Newco’), leaving behind junior debt in the insolvent company (‘Oldco’). Oldco, by virtue of the business transfer, was to become

\textit{Re Bluebrook Ltd (IMO Carwash)}
a mere, asset-less, shell. Junior secured creditors were denied any vote on the scheme because the accepted range of enterprise value of the business was assessed to be less than even the quantum of the senior lenders’ debt, rendering the subordinated creditors unable to point to an ‘economic interest’ in the outcome of the scheme. Mann J assessed a range of differing valuation approaches to determine the competing valuations proffered by the proponents of the scheme and the objecting creditors. One of the possible going-concern methodologies for valuing a business (and which was considered by Mann J among a range of alternative methodologies)144 is an income or Discounted Cash Flow (DCF) approach, which ‘indicates business realisation proceeds based on the cash flow that the business can be expected to generate in the future’.145

In the final analysis, Mann J identified significant failings in the competing valuation evidence submitted by the objectors to the scheme (e.g. an absence of detailed underlying assumptions). Mann J found an enterprise value in a range that was (at its highest) much less than the senior debt. Mann J found that he could not conclude that the junior lenders were ‘getting a raw deal because there is a good or even reasonable case for saying that they are being deprived of value’.146 Although the decision appears eminently justified on the evidence put before the court, the reasons of Mann J beg the question as to what the court would have made of the scheme if the competing valuations were closer. Seah, in analysing the effect of the IMO Carwash decision, contended that ‘the pendulum has on many occasions swung too far in favour of safeguarding the senior claimants’ interests’.147 Seah persuasively made the case for creditors who are understandably aggrieved at being ‘valued out’ of participation in an insolvency procedure:148

The Senior Creditors and the scheme companies were unanimous in wishing to keep the businesses of the companies as going concerns so as to actualize any benefits which may accrue following a successful rehabilitation of the companies, thereby increasing the prospects of ... repayment of the Senior Debt in due course. To achieve such rehabilitation, the scheme terms contemplated the transfer of the assets of the scheme companies to the Newcos. The balance sheets of the reconstituted companies were thereby significantly improved... The improved balance sheets of the Newcos with the resultant reduced gearing ratios would significantly improve the prospects of the Newcos obtaining new credit lines or other financial accommodation for their operations, thereby increasing chances of a successful rehabilitation. Any upsides of a successful rehabilitation (assuming they materialize) would however accrue to the Senior Creditors exclusively as the Junior Creditors had been cut-off from the new structure and left with claims against shell companies.


145. Ibid (Mann J).

146. Ibid (Mann J).


148. Ibid (Mann J).
The IMO Carwash decision highlights the potential problems and unfairness when valuations are used to determine the extent of creditors’ ability to participate and/or share in the benefits of a successful business rescue or rehabilitation. Valuations are invariably an inexact science. An Irish judge recently observed (in the context of another valuation exercise relating to a scheme) that ‘[t]he business of economic forecasting is notoriously difficult; its sole function according to J.K. Galbraith being to make astrology look respectable’. Upon initiation of an administration procedure, it is the interests of creditors that are paramount vis a vis the company’s assets. Should it not be the creditors’ decision to ‘sell’ (i.e. accept the valuation on offer from a connected party) or to ‘hold’ (i.e. hold out for a better offer or even propose a CVA/DOCA or longer work-out)?

Proponents of pre-packs laud the procedure as a ‘business rescue tool’. However, an upfront, ‘enterprise value’ or pre-packaged approach to business rescue, which denies creditor participation, presses further the awkward question referred to earlier—for whose benefit is the business being rescued? In any event, rather than proposing that pre-pack sales without collective approval be prohibited, a workable ‘compromise position’ might be to introduce an income contribution mechanism for connected-party pre-packs. This mechanism would preserve the efficacy of pre-packs (and the business rescue outcomes they deliver) while recognising that in a connected-party/phoenix scenario, pre-packs constitute a dramatic abrogation of creditors’ rights of participation. The loss of participation rights in a connected-party pre-pack business rescue merits a modest stake for creditors in the ultimate success of the attempt at business rehabilitation.

In circumstances where the connected-party purchaser is the only party interested in the business (Frisby and Coulson suggest this is not uncommon), it would be interesting to know if it is customary for administrators to insist upon a sale consideration calculated according to a DCF formula. As mentioned, a purchase price that incorporates future projected (discounted) cash flow could possibly counter any suggestion that creditors should receive a subsequent ‘premium’ on the initial, agreed sale consideration. Some pre-pack commentary has referred to the fact that many pre-pack sales incorporate deferred consideration terms, but again it is unclear if such terms customarily endeavour to ensure that ‘dumped’ creditors retain a direct stake in the potential upside (i.e. profits) of a subsequently successful business rescue. There might be scope for insolvency practitioners to negotiate a pre-pack sale, which incorporates something similar to an income contribution mechanism. However, this would be very much a matter for the commercial will of the parties involved. If an administrator is provided with a ‘take-it-or-leave-it’ offer by a connected party, which cannot be matched—or indeed where there is no competing bidder to be found at all, as Frisby observed—then there is a

151. See footnote 128.
reasonable argument that the administrator has little room to do anything but accept the best (or only) offer on the table. That scenario is where a mandated contribution mechanism for connected-party pre-packs would instil some confidence in the process—particularly from the perspective of creditors whose debts are seen as significant enough to ‘dump’, but not deserving enough to participate in the decision to pre-pack.

### E. Design and implementation of a contribution mechanism for connected-party pre-packs

The existing bankruptcy regime contribution mechanisms that exist in the UK and Australia already provide a template model for a similar contribution obligation for connected-party pre-packs. Appropriate income thresholds and earning periods\(^{152}\) for a contribution mechanism could be debated, as could the appropriate definition of ‘connected party’. It should be stressed that the contribution mechanism proposed herein is one that would be contingent upon income being earned incidental to a successful business rescue. In their analysis of outcomes in CVAs in the UK, Frisby and Walters noted that ‘one might suggest that the “ethos” of the CVA procedure requires this sacrifice from owners and managers’ and that some CVA proposals ‘envisage that contributions to the CVA may rise according to the profits of the company, which . . . appears to be a reasonable term’.\(^{153}\) If a connected-party pre-pack resulted in a second business failure or poor earnings, then no contribution obligation would arise.\(^ {154}\) Liquidations would need to be ‘held open’ for the period in which the assessment periods and contribution obligations would operate, but this would not appear to provide any significant difficulties in terms of time and cost.

It is acknowledged that a contribution mechanism is less attractive (and may even be self-defeating) in circumstances where a genuine ‘white knight’ investor is looking to step up to the business rescue plate. There will always be varying degrees of ‘connected-party’ status of a pre-pack purchaser. The contribution mechanism would need to be designed so that third-party, arms-length investors are not discouraged from pre-pack sales merely because (for example) one key director of the old company is maintaining a presence with the new entity taking over the business. As always, an appropriate balance would need to be struck.

Consideration would also need to be given as to whether the contribution obligation should work as an ‘adjustment’ mechanism (providing retrospective integrity to upfront valuations) or alternatively operate as a premium, ‘royalty’ obligation regardless of whether the valuation (purchase price) is proven to be accurate by the

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152. In Australia, the trustee-in-bankruptcy assesses a bankrupt’s income for each ‘contribution assessment period’, which is every 12-month period from the commencement of the bankruptcy (or less than 12 months if the bankrupt is discharged or the bankruptcy annulled); ss139K and 139W Bankruptcy Act 1966 (Cth). In Australia, a bankrupt is automatically discharged after 3 years in the absence of any objections: s149 Bankruptcy Act 1966 (Cth). In the UK, an income payments order or agreement may last up to 3 years even though the bankrupt will be discharged within 12 months.


154. It should be mentioned that the prevalence of second-chance business failures (or ‘serial’ pre-packing of the same business) raises its own separate ground for a policy debate of the merits of pre-packing.
subsequent performance of the business. There may lie a risk of ‘robbing Peter to pay Paul’ if connected-party purchasers were simply able to discount the purchase price paid for a pre-pack sale to offset any apprehended income contribution. This outcome could be avoided by the administrator’s insistence upon a sale consideration calculated by reference to a customary valuation that excludes from the mix any future (contingent) contribution obligation imposed by statute. It would only be a connected-party purchaser who could argue that the ‘present value’ of the business would be reduced by a future contribution obligation. To the rest of the marketplace (i.e. potential arms-length purchasers), the value of a business would be unaffected by any contingent contribution obligation, and this is the value that an administrator must obtain for a pre-packed business if an income contribution mechanism were to work effectively. The relevant legislation could expressly mandate that an administrator effecting a connected-party pre-pack sale must obtain proper value without any reduction or deduction on account of the compulsory income contribution.

Even if such a discount was proscribed, it would still need to be determined whether the contribution will merely ensure the return to creditors, which should have been reflected in the purchase price but was not (because the DCF assessment at the time of sale has later been shown to be inadequate), or alternatively if the contribution should charge a ‘royalty’ even where the DCF underlying the purchase price has proven to be an accurate forecast of the earnings of the rehabilitated business. As discussed earlier, it may be that a connected-party bid for a business is the ‘only offer on the table’. In this scenario, there may not be much of a going concern or DCF valuation methodology to speak of (over and above basic asset values). In such a scenario, an income contribution regime would go at least some way towards a ‘corrective’ adjustment mechanism (if not a royalty) when a modest purchase price does not reflect the reality of the fortunes of a successfully rehabilitated business. (In this scenario, if the contribution was merely to operate as a subsequent ‘adjustment’ to the initial DCF valuation, the administrator would presumably have to attribute (or compel the purchaser to attribute) part of the purchase price to DCF or ‘future earnings’ so that a comparison to actual earnings could later be made and the necessary adjustment effected by means of the income contribution.)

F. Expediency with fairness

The contribution mechanism would be entirely consistent with the ‘rescue culture’ and the idea of the ‘second chance’. It would go some way to counter the complaint from some that pre-packs give a business an unfair advantage over its competitors, have a significant, negative knock-on effect on its own suppliers and are bad for the economy as a whole. The pre-packaged business, if successful the second time around, would share its success with its former creditors and would

155. Frisy, footnote 128.
156. See for example the letter from the Association of British Insurers to the Insolvency Service found at http://www.abi.org.uk/...
encourage those former creditors to continue to trade with it, as they would have a clear stake in its success. It would encourage the survival of the pre-packaged business and its suppliers. The concept of a ‘second chance’ might be taken literally so that the contribution mechanism could be combined with a prohibition of a further connected-party pre-pack of the business within a certain period. There would be no third or fourth chance.

In the context of the straightforward, ‘second-chance’ connected-party pre-pack, it is difficult to contest that a contribution mechanism would introduce to many garden-variety UK pre-packs added fairness and creditor confidence. From the perspective of an unsecured creditor, it is contended that the SIP16 information disclosures (important though they are) pale in comparison with a contribution mechanism that would deliver a self-executing, monetary stake in a business rescue that the creditor may be powerless to prevent or even influence.157

VI. Conclusion

Australia’s resistance to the UK brand of pre-packing may be an uncomfortable but instructive point of reference for UK policymakers and practitioners. It is something of an oddity that independence standards in the mother country have so profoundly diverged from the Australian general law (or perhaps it is the other way round). That said, it is an open question as to whether the clear loss of perceived independence of UK insolvency practitioners is offset by the successes delivered by pre-packs in the way of business rescues and jobs retention. The earlier analysis has endeavoured to acknowledge the successes of pre-packs and also highlight the underlying reasons for the success of the practice. The controversial facets of pre-packs (i.e. creditor disenfranchisement, pre-appointment practitioner involvement and the early exercise of administrator power) are the very things that enable pre-packs successfully to rescue businesses.

In both jurisdictions, policymakers and practitioners should not lose sight of the original ideals that promoted the introduction of voluntary administrations in the first place: that is, the notion of rescuing a distressed company (or its business) for the benefit of creditors (secured and unsecured). Voluntary administration was not introduced primarily to deliver directors or management of small businesses a ‘second chance’. Practitioners and policymakers might reflect a little more on whether the profitable businesses of some distressed companies could be made to work just a little harder for ‘Oldco’ (the existing corporate owner and its creditors) instead of taking the expedient route of a second-chance ‘dump and transfer’ pre-pack sale to ‘Newco’. This is a question that any prospective administrator should be critically considering before deciding whether to engineer a pre-pack in the first place.

157. Some creditors may be able to hold and exercise some commercial leverage in a pre-pack sale (e.g. by being a key supplier).
It is debatable whether the ability of prospective UK administrators to undertake significant pre-appointment transactional work means that threshold decisions to pre-pack may not always undergo the same rigour of ‘critical’ analysis, which might be applied by practitioners who are not privately consulted or ‘privately ordered’ by a director. Debates as to professional standards, independence and ethics often focus on extreme examples of conduct, misconduct or conflicts. However, the reality of professional insolvency practice is that honest, reputable professionals are consulted by a ‘client’ and asked to proffer ‘solutions’ for a corporate distress scenario. As with all reputable professionals doing their level best in a competitive, consumer-driven marketplace, the competing interests of the ‘client’, the company and creditors can present judgment calls that are often more grey than black or white. Few would disagree that thoroughly unscrupulous professionals are a rarity in both jurisdictions. However, putting to one side the clear cases of abuse which will arise in any system, it is not unreasonable to ask further whether the prevalence and popularity of UK pre-packs reflect the fact that for some companies the practice is being used as a tool of convenience for directors rather than being one option in a considered assessment of all possible alternatives—including, say, a workout with collective creditor support where a profitable business could ‘stay where it is’ and be put to work for the benefit of the insolvent company and its creditors (e.g. through a DOCA or CVA).

In their analysis of CVA outcomes, Frisby and Walters identified the ambivalence of directors or equity holders towards trading on for creditors rather than themselves:

One important aspect of the possible move towards longer CVAs is that it effectively locks out equity holders from at least a proportion of their possible dividend for a considerable period. Where the company in question does not distribute dividends, and instead its owners are also managers/directors who receive a . . . salary calculated with reference to profits [available for the purpose of distribution] the same applies: such owners/managers are subjecting themselves to an ‘austerity’ schedule of quite some length. There is, of course, absolutely nothing objectionable in this, but . . . to put it simply, owner/managers may find that the effort of continuing to trade, when little or no return is generated to them personally, ultimately hollow. . . . Again, this is speculative, and the matter could usefully be investigated further, but well-advised directors may find themselves with alternative strategies from which to choose, the obvious one being a pre-pack administration under which they themselves acquire the business and assets of the company free of its debts.\footnote{Walters and Frisby, footnote 155, 16–17.}

The ability to pre-pack arguably disincentivises the CVA as a genuine alternative to address a company’s insolvency.

In any event, it appears that pre-packs will very much remain in the UK administrator’s ‘toolkit’ and that there is little appetite to impair their expediency in terms of regulating implementation process (e.g. by mandating creditor/court
participation). That being the case, an income contribution mechanism is one proposal that could restore some balance to the ‘outcome–process pendulum’, which in the UK has arguably swung a little too far towards expediency at the expense of process and creditor confidence. Creditor participation has been a long-accepted hallmark of insolvency systems said to be worthy of stakeholder confidence.\(^{159}\) It is clear that this aspect of the Australian insolvency landscape will die hard. The UK and Australia may both serve as examples of jurisdictions where the ‘outcome–process pendulum’ has swung too far, but in opposite directions. It may be that neither jurisdiction has yet found the right balance. Perhaps lessons can be learned both ways.

The attraction of a connected-party pre-pack contribution mechanism is that it delivers a *quid pro quo* or ‘royalty’ to creditors for their disenfranchisement, while still allowing such pre-packs to deliver expediently ‘second chances’ in the SME sector. An income contribution proposal warrants consideration and reflection, not just in the UK (to correct a perceived imbalance) but also in Australia as that jurisdiction continues to broach questions of if, and how, creditor participation should be compromised in the interests of achieving better business rescue outcomes.

\(^{159}\) Harmer Report (ALRC 45, General Insolvency Inquiry, 1988), Part I, Aims of insolvency law—principles, para 33; Cork Committee at for example, paras 232, 914, 917 and 919.