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PRE-PACKS IN AUSTRALIA AND SAFE HARBOUR

As observers of Australian corporate insolvency will be aware, Pre-Packs are controversial topics. In the U.K., despite Pre-Packs having a form of legislative support since 2002 and being a recognised solution to corporate restructuring, it nonetheless remains controversial. A review of recent business articles in the Financial Times and letters to the Editors of that newspapers in April and May of 2017 are testament to this.

We make the following observations:

1. ***UK vs Australian "pre-packs": independence and creditor participation***

   There is a difference in understanding and practice between Australian and UK pre-packs. The reason for this is "two-fold." In particular, Australian law and culture differs in its:

   - Focus on **creditor participation**.
   - Stricter interpretation of the insolvency practitioner's (IP) **duty of independence** (both perceived and actual).

   The UK pre-pack is '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 IP and the IP effects the sale immediately on, or shortly after, his appointment.

   In Australia, the argument runs that this process may run into regulatory difficulties unless two practitioners: 'one pre-appointment adviser and one post-appointment, 'independent' practitioner acting as administrator. In the UK, these two functions can be completed by the same person.

In the Australian context the argument for the need for two separate practitioners stems from an IP's strict duty of independence and impartiality (*Bovis Lend Lease Pty Ltd v Wily* (2003) 45 ACSR 612 at [123]-[141]). Perceived independence is just as important as actual independence (*Pinklillies Pty Ltd (Trustee) v Huxtable (Pinklillies)* [2011] FCA 1543). IPs should not therefore have 'prior substantial involvement' with a company they have been appointed to.

This duty has not, evidently, been strictly applied in the UK context.

UK case law indicates that in situations where creditors challenge an administrator's decision, a court will only interfere in exceptional circumstances. The 'financial bottom line' is the most important factor to consider. In *Re Hellas Telecommunications (Luxembourg) II SCA* [2009] EHWC 3199, the court asserted that exceptional cases included those where '[i]t may on the evidence be obvious that a pre-pack sale is an abuse of the administrator's powers'. Hence, in the U.K. at least a conflict does not in and of itself amount to an abuse of power.

This sentiment was echoed in *Kayley Vending Ltd, Re Insolvency Act 1986* [2009] EWHC 904, whereby it was recognised that if a pre-pack is being 'obviously abused to the disadvantage of creditors' then 'the court *may* conclude that it is inappropriate to give the pre-pack the apparent blessing'. In ascertaining this, a court is to examine the transaction, its background and may also refer to relevant accounting standards. But *DKLL Solicitors v HMRC* [2008] 1 BCLC 112 shows that even in situations where a majority of unsecured creditors oppose the plan, this does not necessarily amount to 'obviously abused.' All in all in the U.K. it seems very difficult to challenge an administrator's decisions.

2. Safe Harbour

There is presently before the Senate the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2)* Bill 2017. The Bill introduces safe harbour provisions for directors and a moratorium on *ipso facto* clauses. The Bill introduces two safe harbour models.

Model A is based on directors appointing a restructuring adviser (and providing them with company books and all relevant information).

Model B is premised on an assessment of whether directors took "reasonable steps" (i.e. did they appoint a restructuring adviser and/or consult creditors and other key stakeholders?).

Model B appears to be a more flexible approach -- it doesn't mandate any particular course of action but imports a sense of reasonableness.

It remains to be seen whether the Australian commercial market is ready for a more entrepreneurial approach to corporate insolvency.