

Review of the pre-pack industry measures:
Reconsidering the connected party sale before the sun sets
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1. Introduction

Since its emergence following the Enterprise Act 2002 reforms to the administration process, the pre-packaged administration sale has been a constant topic of debate, discussion and review. Following the publication of the 'Graham Review into Pre-pack Administration' ("Graham Review") in June 2014,¹ a number of industry-led reforms were introduced in 2015 to address the core issues identified therein. As recommended by the Graham Review, the Government reserved the power to introduce subsequent legislation should the proposed self-regulation not work.² It is in this context that the Insolvency Service announced in December 2017 that it would be contacting a variety of interested parties to assess the impact of the voluntary industry measures, and consider whether to impose conditions.³ This period has also seen developments in similar processes and attitudes towards them in other jurisdictions. It is pertinent, therefore, to reflect on the nature and impact of the voluntary industry measures, developments in the approach to pre-packs internationally, and to consider what further action may be taken.

2. The pre-pack administration

A pre-pack, or pre-packaged sale, is commonly understood as defined in paragraph 1 of Statement of Insolvency Practice 16 ("SIP 16"), being 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, appointment."⁴ A slightly more limited working definition was adopted by the Graham Review, focusing on "[a]rranging the sale of all or part of a company's undertaking before formal insolvency is entered, with the sale to be executed at or soon after the appointment of an administrator."⁵

Initially unregulated following acceptance of the process by the courts,⁶ pre-packs were subject to much early criticism and a number of issues were identified.⁷ As the process became regulated by

¹ T Graham, 'Graham Review into Pre-pack Administration: Report to the Rt Hon Vince Cable MP' (The Insolvency Service June 2014) available at <www.gov.uk/government/publications/graham-review-into-pre-pack-administration> accessed 14 January 2018

² Graham (n 1) para 9.38 and Insolvency Act 1986 (IA 1986) Schedule B1 para 60A as introduced by Small Business, Enterprise and Employment Act 2015 s 129

³ Insolvency Service, 'Review of the pre-pack industry measures' (*Gov.uk*, 12 December 2017) <www.gov.uk/government/news/review-of-the-pre-pack-industry-measures> accessed 14 January 2018

⁴ Statement of Insolvency Practice 16 version 3, available at <www.r3.org.uk/media/documents/technical_library/SIPS/SIP%2016%20Version%203%20Nov%202015.pdf> accessed 14 January 2018

⁵ Graham (n 1) para 5.15 With the vast majority of pre-packs involving business, as opposed to simple asset sales, this distinction is not significant, though it is interesting

⁶ *DKLL Solicitors v Revenue and Customs Commissioners* [2007] EWHC 2067 (Ch)

⁷ See for example Walton, P, 'Pre-packaged administrations - trick or treat?' *Insolv. Int.* 2006, 19(8), 113-122; Frisby, S 'A preliminary analysis of pre-packaged administrations: A summary' (R3, August 2007) available at <www.r3.org.uk/media/documents/publications/press/preliminary_analysis_of_pre-packed_administrations_-

the profession through the introduction of and revisions to SIP 16,⁸ it has become an integral part of the insolvency framework, especially in the context of going concern sales in administration.⁹

3. The sunset clause

Following the recommendations of the Graham Review, the Small Business, Enterprise and Employment Act 2015 introduced two small, but potentially significant changes to Schedule B1 of the Insolvency Act 1986. A new paragraph 60(2) created the potential to limit the broad powers afforded to administrators by Schedule 1 IA 1986, providing that "... the power to sell, hire out or otherwise dispose of property is subject to any regulations that may be made under paragraph 60A [of Schedule B1 IA 1986]"¹⁰ (hereafter referred to simply as disposals). Paragraph 60A introduced a sunset clause, allowing the Government to make provision in respect of a disposal by an administrator to a connected party. This power was time limited, expiring on the fifth anniversary of its coming into force.¹¹ With a hard deadline of 25 May 2020 to work to, and a tight parliamentary schedule over the remainder of the current Parliament for any change to be approved by both Houses,¹² the Government is reviewing the position now.

There is considerable scope for reform within paragraph 60A, and it is not limited to pre-pack administrations. Reforms could be introduced in respect of any disposal by an administrator to a connected person, with no mention of timing of the sale.¹³ Outcomes of the current review could include a prohibition of connected party disposals by administrators,¹⁴ the imposition of requirements or conditions on future connected party sales,¹⁵ or conceivably no legislative action, instead continuing to rely on industry self-regulation (which itself could be subject to further reform). Should connected party sales be allowed to continue on a legislative footing, paragraph 60A makes wide provision for possible outcomes, as to the nature, application, and identity of the imposer of possible requirements or conditions.¹⁶

With the provisions of paragraph 60A seemingly a failsafe in the event that industry-led reforms suggested by the Graham Review do not address the issues identified therein, consideration of the Graham Review findings, recommendations and subsequent reforms is needed.

_summary.pdf> accessed 14 January 2018; Haywood, M, 'Pre-pack administrations' *Insol. Int.* 2010, 23(2), 17-22; and Walton, P, 'Pre-packin' in the UK' *I.I.R.* 2009, 18(2), 85-108

⁸ Statement of Insolvency Practice 16 versions 1 and 2, available at <www.r3.org.uk/media/documents/technical_library/SIPS/SIP%2016%20Version%203%20Nov%202015.pdf> accessed 14 January 2018

⁹ See for example Umfreville, C, Walton, P and Wilson, P, "Pre-Pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration" (2014) ("The Wolverhampton Report") p.85 available at: <www.gov.uk/government/publications/graham-review-into-pre-pack-administration> accessed 14 January 2018 The scarcity of going concern sales in administrations commencing in 2010 not involving a pre-packaged sale was noted in the Wolverhampton Report

¹⁰ IA 1986 Schedule B1 para 60(2)

¹¹ *Ibid* para 60A(10)

¹² *Ibid* para 60A(8)-(9)

¹³ *Ibid* paras 60A(3)-(6) Connected persons are defined quite broadly, in particular including companies in a manner which is wider than the definition of an associate company pursuant to s.435 IA 1986

¹⁴ *Ibid* para 60A(1)(a)

¹⁵ *Ibid* para 60A(1)(b)

¹⁶ *Ibid* para 60A(2) and (7)

4. The Graham Review

Teresa Graham CBE was commissioned by then Secretary of State for Business, Innovation and Skills Vince Cable to lead an independent review of the pre-pack process as part of the Coalition Government's 'Transparency and Trust' agenda.¹⁷ The terms of reference of the review were:

- "To assess the long term impact of pre-pack deals to form a view as to whether they encourage growth and employment; and whether they provide the best value for creditors as a whole;
- To assess the usefulness of the pre-pack procedure in the context of business rescue generally, using international comparisons as and when appropriate;
- To assess whether pre-packs cause detriment to any particular groups of creditors and specifically whether unsecured creditors are disadvantaged;
- To assess whether there are any practices associated with pre-packs which cause harm."¹⁸

The Graham Review was underpinned by both qualitative and quantitative data, with recommendations for reform made where perceptions and anecdotal evidence gleaned from speaking with those affected by pre-packs (including suppliers, landlords, insolvency practitioners and lawyers) coincided with the quantitative data presented in the 'Wolverhampton Report.'¹⁹ A number of positives, as well as areas requiring improvement, in the operation of pre-packs were identified and set out in the Graham Review.

4.1 Benefits of pre-packs

The preservation of employment secured by the continuation of business in a pre-pack was deemed a key benefit. In addition to the wider socio-economic advantage of continued employment, avoiding redundancy also benefits the insolvent company's creditors by reducing the possible preferential and unsecured claims. Furthermore, pre-packing offers significant cost advantages to alternative upstream procedures prior to formal insolvency, and the flexibility provides some wider benefit for the economy by attracting relocations from other jurisdictions. Finally, whilst deferred consideration was prevalent, and often represented a high proportion of the purchase price, it was fully paid in most cases and often backed by security, thereby not undermining unsecured creditors.²⁰

4.2 Areas for improvement

Aside from these positive aspects of the pre-pack, the Graham Review identified three key areas in need of improvement, all linked to the lack of transparency around the process. The first area suggested for improvement was the quality of marketing undertaken prior to a pre-pack sale. A potential dual benefit was identified: the receipt of a better sale price and improved creditor

¹⁷ Graham (n 1) p. 3 See 'Transparency & Trust: Enhancing The Transparency of UK Company Ownership and Increasing Trust In UK Business' (DBIS, July 2013) available at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/212079/bis-13-959-transparency-and-trust-enhancing-the-transparency-of-uk-company-ownership-and-increasing-trust-in-uk-business.pdf> accessed 14 January 2018

¹⁸ Graham (n 1) para 5.3

¹⁹ Graham (n 1) paras 5.29-5.35

²⁰ Graham (n 1) paras 3.4-3.7 and 7.57-7.62

perception that they are getting the best deal, both of which should improve confidence in the process. Linked to this was the second area requiring improvement, the explanation of the valuation methodology adopted. Whilst the Wolverhampton Report recorded independent valuations in the overwhelming majority of cases, the Graham Review revealed concerns around the transparency of these valuations. Finally, it was identified that being able to demonstrate the future viability of the purchasing company could improve public perception and address supplier concerns. In addition to these three core areas for improvement, the Graham Review also identified the opportunity to improve the regulation and monitoring of pre-packs and guidance given to insolvency practitioners through SIP 16.²¹

4.3 Recommendations

With a self-confessed deregulator at heart leading the Graham Review²² at the time of the Coalition Government's 'Red Tape Challenge',²³ it is no surprise that legislative action was recommended as a last resort. The Graham Review instead put forward six recommendations for industry-led reform to put its house in order. These recommendations, the first two of which were labelled key, can be summarised as:

1. Connected parties voluntarily to approach a 'pre-pack pool' prior to the sale, disclosing details of the deal for the pool to opine on;
2. Connected parties voluntarily to complete a 'viability review' on the new company;
3. The Joint Insolvency Committee to consider a redrafted SIP 16 proposed by the Graham Review;
4. Marketing of businesses to be pre-packed to comply with the six principles of good marketing, with any deviation brought to the creditors' attention;
5. Valuations to be carried out by a valuer with professional indemnity insurance; and
6. Monitoring of SIP 16 statements be taken on by the Recognised Professional Bodies, rather than the Insolvency Service.

All of these recommendations were, to some extent, implemented towards the end of 2015. It is, therefore, important to consider how these recommendations were received and implemented by the insolvency industry, and in turn the impact of these reforms.

5. Voluntary Industry Measures

5.1 The Pre-Pack Pool

The first key recommendation of the Graham Review led to the launch of the Pre-Pack Pool ("the Pool") on 1st November 2015. A private limited company, independent of both government and the insolvency and restructuring profession, the Pool is comprised of experienced business people who offer an opinion on a proposed connected-party pre-packaged sale. Referral to the Pool is not compulsory, but at the discretion of the purchaser, who can also choose whether or not the opinion is shared with the proposed administrator. The insolvency practitioner is simply required to inform

²¹ Graham (n 1) paras 3.8 -3.13

²² Graham (n 1) p.5

²³ See <www.redtapechallenge.cabinetoffice.gov.uk/> accessed 14 January 2018

the purchaser of their ability to seek the Pool's opinion and to include any opinion it receives in its SIP 16 statement.

A purchaser who chooses to approach the Pool may submit whatever information it considers relevant. In the absence of specific requirements, suggested information includes details of company officers, their previous involvement in pre-packs, events leading to the proposed sale, why a pre-pack is necessary and what changes will be implemented in the new company.²⁴ The submission is then reviewed by one of the Pool members who will offer one of three opinions:

1. The case for the pre-pack is not unreasonable;
2. The case for a pre-pack is not unreasonable but there are minor limitations in the evidence provided; or
3. The case for a pre-pack is not made.

Although an opinion that 'the case for a pre-pack is not made' would suggest that the transaction is not viable, the Pool does not have any power to determine whether the proposed pre-pack can proceed. It is the responsibility of the administrator, who may not be provided with a copy of the opinion to reflect upon, ultimately to determine whether or not to proceed.

In its first fourteen months of operation, the Pool experienced rather low take up. According to SIP 16 records filed with the Recognised Professional Bodies, 192 of 405 pre-packs in this period (or 47.4%) involved connected party sales. Yet there were only 53 referrals to the Pool, representing 27.6% of eligible transactions.²⁵ Perhaps given both the novelty of the Pool and voluntary participation this low uptake is not surprising.

It should be noted that 47 of the 53 referrals (88.7%) received a positive, though sometimes qualified, opinion, with only 6 negative opinions, four of which related to a group transaction.²⁶ Furthermore, the incidence of connected party pre-packs appears to be lower during this period, representing around half of all pre-packs, than compared with data from 2010 and 2011 which estimates over 70% of pre-packs were to connected parties.²⁷ This data represents conflicting possibilities for the efficacy of the Pool. On the one hand, perhaps purchasers are not making submissions to avoid a possible negative response, with only those confident of a positive outcome utilising the Pool. Or on the other hand, as the Pre-Pack Pool Annual Review suggests, perhaps the "reforms have deterred some connected party pre-packs being proposed in the first place."²⁸ Or then again, perhaps purchasers acting in a time and cost sensitive environment are eschewing the delay and £800 plus VAT fee which are not obligatory in order to focus on the proposed transaction. With uptake apparently increasing towards the end of 2016, it is too early to form a conclusion as to the operation of the Pool at this stage.²⁹

²⁴ See <www.prepackpool.co.uk/guidance-documents> accessed 14 January 2018

²⁵ Insolvency Service, '2016 Annual Review of Insolvency Practitioner Regulation' (The Insolvency Service March 2017) pp.7-8 available at <www.gov.uk/government/publications/insolvency-practitioner-regulation-process-review-2016> accessed 14 January 2018

²⁶ Pre-Pack Pool 'Annual Review 2016' (Pre-Pack Pool Ltd March 2017) p. 5 available at: <www.prepackpool.co.uk/uploads/files/documents/Pre-pack%20Pool%20Annual%20Review%202016-17.pdf> accessed 14 January 2018

²⁷ Ibid p.7

²⁸ Ibid p.3

²⁹ Ibid p.2

5.2 The Viability Review

The second key recommendation of the Graham Review was the introduction of a viability review where the purchaser is a connected party. Intended to address the higher prevalence of subsequent failure amongst connected party purchasers, the viability review is to be completed by the purchaser stating how the company would survive for at least twelve months. This includes a narrative detail of how the business would differ from that of the old company, to prevent subsequent failure. The SIP 16 statement circulated to creditors would either attach the viability statement received or report that it has been requested but not received.

Although it is listed as a suggested item of supporting evidence for submission to the Pool, completion of the viability review and sharing it with the Pool and administrator is purely voluntary.³⁰ As with the referral rate to the Pool, the submission of viability reviews is disappointingly low. Only 37 viability reviews were submitted between 1 November 2015 and 31 December 2016, representing 69.8% of referrals to the pre-pack pool and just 19.3% of all connected sales.³¹

This low incidence is not really surprising, as directors are likely wary of the risk of subsequent action that a viability statement could expose them to. The Graham Review suggested that should the purchaser subsequently fail, the viability statement would be available for consideration by the insolvency office holder to assist assessment of the conduct of the purchaser's management, and ascertaining whether any action should be taken against them (though how it would be available is not clear).³² In light of this risk, directors would be wise to take professional advice on any viability statement proffered. At a time and cost sensitive juncture, that such a voluntary measure is regularly ignored is understandable.

5.3 SIP 16 Reforms

The remaining recommendations all led to changes to the contents and use of the SIP 16 statement by insolvency practitioners. The revisions to SIP 16 recommended by the Graham Review have in essence been adopted in full. In addition to reporting on the use of the Pool and provision of a viability statement, the revised SIP 16 requires details of the marketing activities undertaken and valuations obtained by the insolvency practitioner prior to the pre-packaged sale.

The research underpinning the Graham Review revealed that cases with no marketing returned less money for creditors. The latest reforms to SIP 16 aimed to improve the quality of marketing undertaken, and in turn improve confidence in pre-packs. Underpinning this strategy is the "comply or explain" principle, requiring insolvency practitioners to explain any deviation from requirements for broadcast marketing, strategy explanation, independence, publicising rather than simply publication and online communications.³³ Little can be said of the impact of these changes without significant further study. The Insolvency Service's 2016 Annual Review of Insolvency Practitioner Regulation reports marketing activity being recorded in 290 of the 405 SIP 16 statements submitted to the Recognised Professional Bodies.³⁴ This shows that marketing activities were carried out in 7 out of every 10 pre-packs. It is not clear, however, what this marketing involved, whether it relates to connected party sales or whether the principles identified by the Graham Review are being

³⁰ See <www.prepackpool.co.uk/guidance-documents> accessed 14 January 2018

³¹ Insolvency Service (n 25) p.8

³² Graham (n 1) para 9.18

³³ Graham (n 1) paras 9.23-9.26

³⁴ Insolvency Service (n 25) p.8

adhered to. Given the high rate of non-compliance of SIP 16s since the reforms were introduced (38% were deemed non-compliant), it is possible that some may relate to a deficiency in the reporting of marketing activities.³⁵

Building on the reforms to SIP 16 introduced in 2013, which required details of the identity and independence of valuers, the valuation methodology and rationale, together with the valuation and reason for any variance in the sale price, the revised SIP 16 requires a statement that the valuer has professional indemnity insurance or an explanation why it does not. This is intended to improve confidence in the valuation through the indirect regulation by insurance providers. No information on compliance with this reform has been published, so it is not possible to reflect on its efficacy, though R3 has suggested it has gone down well in practice.³⁶

Finally, SIP 16 statements are now being monitored by the Recognised Professional Bodies. Whilst the high incidence of non-compliant statements is of concern, the differences reported by each regulator suggests that this may be down to different approaches being adopted: for example, the Institute of Chartered Accountants of England and Wales reported a compliance rate of 39% compared with 91% for the Insolvency Practitioners' Association. It should also be noted that the vast majority of compliance issues were deemed not serious. As insolvency practitioners become more accustomed to the revised forms and regulators become more proficient in their monitoring, it would be expected that rates of non-compliance will decrease. The very small number of sanctions imposed by the regulators on insolvency practitioners for non-compliance with SIP 16 would appear to support this view.³⁷

5.4 Review of the reforms

These reforms were introduced to improve transparency of connected party pre-pack sales and, in turn, to improve confidence in the process. To date, the published data on use of the Pool and submission of viability statements suggest that these are being under-utilised. The publication of the Pool's second annual report later this year will far more revealing of the uptake, and in turn effectiveness, of these reforms as they bed in.

The Pool in particular, and by extension the use of the viability statement as a recommended document for submission, have been welcomed by industry. Oliver Parry of the Institute of Directors views the Pool as "an important step in de-stigmatising the pre-pack administration regime, which in many cases represents by far the best outcome for creditors of distressed businesses."³⁸ However, it is acknowledged that the Pool needs to be used more. Philip Ling of the Chartered Institute of Credit Management believes that "... the laudable aims of The Pool will only be realised if The Pool is more widely promoted."³⁹ According to the Pool, it is the responsibility of the insolvency profession and

³⁵ Insolvency Service (n 25) p.7 The vast majority of non-compliant statements are reported to be of a technical, non-serious nature

³⁶ R3, 'Government pre-pack review opportunity for improvement – R3' (R3, 13 December 2017) <www.r3.org.uk/index.cfm?page=1114&element=31163&refpage=1008> accessed 14 January 2018

³⁷ Insolvency Service (n 25) pp.13-16 Just two sanctions were imposed in relation to SIP 16 in 2016 relating to members regulated by ICAEW. IPA has imposed one Disciplinary Consent Order to date in respect of failure to comply with the revised SIP 16 guidelines, see <www.insolvency-practitioners.org.uk/regulatory-notice/regulatory-notice> accessed 14 January 2018

³⁸ Pre-pack Pool (n 26) p.8

³⁹ Ibid p.6

creditors to make connected party purchasers aware of its availability, and to put pressure on them to use it.⁴⁰

The pre-packaged sale in administration has become a core fixture in the restructuring and insolvency industry, with connected party transactions representing around half of recent transactions and far more historically. The importance is underlined by Duncan Swift, deputy vice president of R3, who states that “[w]ithout pre-packs, it would be harder to rescue businesses and more jobs would be put at risk ... [and] creditors would lose money.”⁴¹ Whilst the Government could decide to ban connected party pre-packs (or, indeed more widely, connected party sales) through exercise of its power under paragraph 60A, this would seem unwise, both in the context of the importance of the pre-pack in the UK, but also the approach being taken in other jurisdictions.

6. The Pre-Packaged Sale: An International Perspective

6.1 Europe

Pre-packing is not unique to the UK. The Graham Review highlighted that equivalent processes were available in a number of other EU Member States, including France, Germany, Italy and the Netherlands.⁴² What distinguishes these regimes from that in the UK is the involvement of either the court or the creditors in the approval of the proposed transaction. This is also an area of development at present. For example, in the Netherlands steps have been taken to put pre-packs on a legislative footing, with the Dutch Government proposing the draft Continuity of Enterprises Act I (Wet Continuïteit Ondernemingen I, or WCO I) in June 2014. The passage of the Act has been delayed by opposition questions, then elections and efforts to form a new coalition, and more recently in anticipation of and then the aftermath of the European Court of Justice decision in *Federatie Nederlandse Vakvereniging and Others v Smallsteps BV* (known as the Smallsteps case).⁴³

The Dutch pre-pack currently operates without legislative footing and is permitted in eight of the eleven district courts. The proposed Continuity of Enterprises Act I seeks to put this process on a statutory basis to be adopted by all courts, offering a framework to ensure supervision by the courts, protection of employees and safeguards against abuse. There are not, however, express provisions relating to connected party sales. The draft legislation currently lies before the Senate following adoption by the House of Representatives in June 2016 and is subject to further consultation.⁴⁴

6.2 Australia

Further afield, pre-packs are also being pushed on to the political agenda in Australia. The pre-pack has traditionally been rejected in Australia, with issues such as the independence of insolvency practitioners advising pre-appointment and the importance assigned to creditor input operating as a

⁴⁰ Ibid p.3

⁴¹ R3 (n 36)

⁴² Graham (n 1) p.28

⁴³ Case C-126/16 *Federatie Nederlandse Vakvereniging and Others v Smallsteps BV* [2017] ECR I-489 The decision of the ECJ in Smallsteps echoed that of the Court of Appeal in *Key2Law Surrey LLP v De’Antiquis* [2011] EWCA Civ 1567

⁴⁴ For an overview of the proposals and the legislative history see

<www.eerstekamer.nl/wetsvoorstel/34218_wet_continuïteit> accessed 14 January 2018

bar to its emergence.⁴⁵ In some spheres this stance does not appear to be changing. In the recent Federal Court of Australia case *In the Matter of Ten Network Holdings Ltd (In Administration)*, O’Callaghan J reflecting on the possibility of an insolvency practitioner being appointed as voluntary administrator having substantively advised or assisted on a pre-pack, opined that “it is difficult to imagine a situation in which the taking of such an appointment ... would ever be countenanced.”⁴⁶ However, there are calls for the introduction of a pre-pack regime.

In response to increasing costs to the Fair Entitlements Guarantee Scheme (similar to the National Insurance Fund in the UK), in part attributable to the use of insolvency mechanisms by employers to shift costs on to the scheme, the Australian Government launched a consultation on reform proposals in May 2017.⁴⁷ This has been seen as an opportunity to introduce the pre-pack in Australia. Richard Fisher AM, Adjunct Professor of Law at the University of Sydney and contributor as a Commissioner to the Australian Law Reform Commission 1988 General Insolvency Inquiry (known as the Harmer Report), set out in his response to the consultation how the introduction of pre-packs could mitigate the effect of corporate failures on the Fair Entitlements Guarantee Scheme.⁴⁸ Echoing the recommendation of the 2015 Productivity Commission Report on Business Set-up, Transfer and Closure and reflecting on the findings of the Graham Review, Fisher calls for the creation of “a legislative environment which facilitates the preservation of either companies or their businesses and secures the ongoing engagement of the company’s employees.”⁴⁹ This suggestion recognises both the effectiveness of the pre-pack in preserving employment and the lack of suitable mechanisms for smaller companies in Australia. The risk of a pre-pack facilitating fraudulent phoenix activity is acknowledged. As such, rather than restricting connected party transactions *per se*, Fisher recommends a clear legislative framework combined with insolvency practitioner regulation and standards on top of the initiatives proposed in the consultation itself. Fisher’s suggestions include limiting supervision to a panel of insolvency practitioners, limiting access to smaller companies, and ensuring creditor communication and transparency similar to that provided by SIP 16.⁵⁰

The Australian Government’s response to the consultation is yet to be published. In light of Fisher’s suggestions, and the earlier proposals made by the Productivity Commission in 2015,⁵¹ this could prove a very interesting period in the development of Australian insolvency law, and worth taking note of in the UK.

⁴⁵ See e.g. Wellard, M and Walton, P ‘A Comparative Analysis of Anglo-Australian Pre-packs: Can the Means Be Made to Justify the Ends?’ (2012) 21 Int Insol Rev 143

⁴⁶ *In the Matter of Ten Network Holdings Ltd (In Administration)* [2017] BPIR 1707 at 1719

⁴⁷ Australian Government, ‘Reforms to address corporate misuse of the FEG scheme’ (The Treasury, 2017) <<https://treasury.gov.au/consultation/reforms-to-address-corporate-misuse-of-the-feg-scheme/>> accessed 14 January 2018

⁴⁸ Fisher, R, ‘Reforms to Address Corporate Misuse of the Fair Entitlements Guarantee Scheme’ Submission to the Consultation on Reforms to address corporate misuse of the Fair Entitlements Guarantee scheme (The Treasury, May 2017) available at <<https://treasury.gov.au/consultation/reforms-to-address-corporate-misuse-of-the-feg-scheme/>> accessed 14 January 2018

⁴⁹ *Ibid* para 2.2

⁵⁰ *Ibid* para 5

⁵¹ Australian Government Productivity Commission, ‘Inquiry Report No.75 Business Set-up, Transfer and Closure’ (Productivity Commission, September 2015) available at <www.pc.gov.au/inquiries/completed/business/report/business.pdf> accessed 14 January 2018 See in particular Recommendation 14.3

7. Possible Reforms in the UK

With the pre-packaged sale in insolvency seemingly becoming more acceptable elsewhere (certainly to the extent of being legislated for), it would seem counterintuitive to take steps to prohibit a significant proportion of the pre-pack market in the UK. The first Pre-Pack Pool Annual Review notes that it “would be a shame to lose [pre-packs]: fewer business rescues, more job losses, and lower returns to creditors are possible outcomes in such a scenario.”⁵² The latter two of these outcomes will be of particular political concern. Employment and job preservation are always a priority of government. With the current desire to promote the UK in the World Bank’s Doing Business rankings,⁵³ any action that could result in lower returns to creditors could negatively impact the UK’s ranking for insolvency outcomes, and in turn the overall rankings, so would most likely want to be avoided. The UK has fallen from sixth for insolvency outcomes in 2012 to fourteenth in 2018. Whilst there are some questions about the methodology adopted by the World Bank,⁵⁴ the Government will want to avoid taking action that could cause further decline to the UK’s standing, especially given the importance of attracting investment post-Brexit.

As considered above, paragraph 60A allows considerable scope for potential reform. So what reforms should the Government consider?

A common feature of pre-pack regimes in other jurisdictions is the involvement of the court or creditors in approving the process. Could a similar approach be adopted in the UK? Involving the court in the approval of commercial matters would be contrary to tradition. As Neuberger J set out in *Re T&D Industries plc*, “[c]ommercial and administrative decisions are for [the administrator], and the court is not here to act as a sort of bomb shelter for him.”⁵⁵ With a pre-pack in essence an extension of the principle of the early sale permitted by Neuberger J, a requirement for court approval would not be a logical progression. Whilst the Chancery Division is blessed with a fine bench, it is not a specialist insolvency court akin to the Bankruptcy Courts in the United States. Similarly, the involvement of creditors does not seem likely. Both court and creditor involvement in the pre-pack process were suggested by the 2010 ‘Consultation / Call for Evidence: Improving the transparency of, and confidence in, pre-packaged sales in administrations.’ Neither was implemented though, in part due to perceived increased costs and delays which could impact viability.⁵⁶ Furthermore, neither court nor creditor approval featured in the Graham Review in 2014.

The regulation of insolvency practitioners and their conduct of pre-packs, primarily through the SIP 16 regime does appear to have improved matters. As Teresa Graham reflected, the second version of SIP 16 introduced in November 2013 “was a big step in the right direction,” which her proposed reforms intended to further progress.⁵⁷ The information required to be disclosed by insolvency practitioners through SIP 16 statements, since the first version was introduced in October 2009, has

⁵² Pre-pack Pool (n 26) p.3

⁵³ ‘The Conservative Party Manifesto 2015’ (The Conservative Party, 2015) available at <www.conservatives.com/manifesto2015> accessed 14 January 2018

⁵⁴ See G McCormack ‘World Bank “Doing Business” project: should insolvency lawyers take it seriously?’ *Insolv. Int.* 2015, 28(8), 119-123

⁵⁵ *Re T&D Industries plc (in administration); Re T&D Automotive Ltd (in administration)* [2000] 1 BCLC 471 at 483

⁵⁶ See Insolvency Service, ‘Consultation/Call for Evidence: Improving the transparency of, and confidence in, pre-packaged sales in administrations’ (The Insolvency Service, 2010) together with responses, available at <<http://webarchive.nationalarchives.gov.uk/20140109104654/http://www.bis.gov.uk/insolvency/Consultation/PrePack?cat=closedwithresponse>> accessed 14 January 2018

⁵⁷ Graham (n 1) para 9.22

progressively addressed the lack of information provided to creditors in early pre-packs identified by Sandra Frisby in 2007.⁵⁸ There is potentially still room for improvement here, however. Following the Graham Review reforms, the onus is on the insolvency practitioner to make the purchaser aware of the availability and role of the Pool and viability review, with a requirement to report on the same in the SIP 16 statement. Perhaps the onus could be shifted from the insolvency practitioner.

A guiding principle of the Graham Review was that the state should legislate as a last resort, with market participants addressing matters they can remedy or mitigate.⁵⁹ Although referral to the Pool and undertaking a viability review for consideration are subject to the discretion of the purchaser, arguably behaviour could be influenced by the market. For example, if credit managers were to deny credit to a connected party purchaser unless it had obtained a positive opinion from the Pool, directors would be encouraged to engage with the process.⁶⁰ This requires a joined up approach from a wide variety of sectors, and may be too much to hope for. The low take up of the Pool to date does not inspire confidence here.

Ultimately, the Pool needs “to be used for it to be useful.”⁶¹ Perhaps the most logical reform is to take the positive offering of the Pool and make its use mandatory for all connected party pre-packs. In doing so, a list of prescribed documents for submission could be drawn up, rather than the existing suggestive list. This could include the provision of a viability statement following a viability review. In turn, the opinion of the Pool could be provided directly to both the purchaser and insolvency practitioner, rather than relying on the purchaser for onward transmission. This would ensure that the insolvency practitioner is fully informed when entering into any transaction. Additionally, should the Pool return a negative opinion and the connected party withdraws, the insolvency practitioner could refer to this when reporting to creditors in a subsequent insolvency, if a rescue is not possible or a lower realisation achieved. Additionally it would be valuable, as R3 has suggested, that the insolvency practitioner also be able to provide information to the Pool to ensure it is fully informed.⁶²

There would no doubt be some opposition to mandating referral to the Pool. Not least, there would be additional costs incurred in producing the documentation, including the viability review, as well as the referral fee. However, these appear to be barriers to the use of the Pool at present, together with the possible adverse consequences of providing a viability statement considered above. The most effective manner to overcome these, and further improve both creditor and market confidence in the pre-pack process, would be to impose the requirement under the retained powers in Paragraph 60A. By doing so, the issues with the pre-pack regime identified by the Graham Review could be addressed universally, rather than on a selective basis.

8. Conclusion

Underlying the reforms introduced by the Graham Review was the concept of comply or explain. Combined, all of the reforms have the potential to address the issues of transparency of and confidence in the pre-pack process identified by the Graham Review. However, as currently adopted,

⁵⁸ Frisby (n 7) p.6

⁵⁹ Graham (n 1) para 5.6

⁶⁰ Hopewell, S and Kerr, D, ‘Unpacking the Pre Pack’ (Credit Management Magazine, CICM, November 2016) p.13 available at <www.insolvency-practitioners.org.uk/download/documents/1467> accessed 14 January 2018

⁶¹ R3 (n 36)

⁶² Ibid

the two key recommendations require the connected party purchaser to comply, and the insolvency practitioner to explain. With the variety of factors identified to dissuade a purchaser from both interacting with the Pool and providing relevant information to the proposed administrator, and the difficulty of achieving market regulation, the powers in paragraph 60A Schedule B1 of the Insolvency Act 1986 could be used to mandate both key recommendations. With the ongoing impact in Parliament of preparations for Brexit and beyond, this could offer further opportunity for the implementation of the essence of the Graham Review reforms, whilst placing minimal demands on Parliamentary time. In the face of developments in the insolvency frameworks in other jurisdictions, the recent trend of the UK falling down the World Bank rankings for insolvency outcomes, and the uncertainty of Brexit on the horizon, this is not a time for inaction. Rather, the Government needs to ensure that the UK regime is as competitive and reliable as it possibly can be. As Teresa Graham concluded: "The benefits that pre-packing brings to the UK's insolvency framework mean that reform of the process is worthwhile."⁶³ It would just seem that the reform is not quite complete.

⁶³ Graham (n 1) p.5