18 July 2011

The Manager
Governance and Insolvency Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

Attention: Mr Timothy Beale
Telephone: 02 6263 2870.

**Via email: insolvency@treasury.gov.au**

Dear Sir,

**RE: "A MODERNISATION AND HARMONISATION OF THE REGULATORY FRAMEWORK APPLYING TO INSOLVENCY PRACTITIONERS IN AUSTRALIA"**

My submission to the Parliamentary Secretary to the Treasurer and Attorney-General in relation to the Options Paper detail above is contained herein.

**EXECUTIVE SUMMARY**

I am an Official Liquidator and Trustee in Bankruptcy with approximately 20 years' experience. I would like to offer my services to assist the Governance and Insolvency Unit make meaningful legislative reform.

The voluntary administration framework is a failure from the perspective of small business owners.

Last year there were about 9,300 corporate insolvency appointments[1] and only about 4.5% of all companies that entered into a formal appointment realised the objective of saving a business via the VA framework. I believe the vast majority of these success stories were large businesses that could afford the costs of the process.

Australia should adopt a hybrid of the UK's pre-pack legislation to supplement the existing VA framework. It is much cheaper and easier to save a small to medium sized business with this model.

Phoenix behaviour would be substantially eliminated if directors were automatically issued a director penalty notice and thereby be potentially personally liable for taxation obligations after say a 6 month moratorium to pay overdue taxation obligations or enter into an instalment plan. The ATO made a similar proposal in 2009[2] and I believe the recent budget has suggested similar changes may be adopted.

To substantially improve competition within the industry, the Corporations Act should adopt the Bankruptcy Act process of providing creditors with the ability to remove an incumbent insolvency practitioner at any time throughout the life of a job at a duly convened meeting of creditors.

When considering the removal of a insolvency practitioner, the practitioner should have the ability to reject the vote of a creditor who is biased (i.e. where a creditor is or may be subject to recovery proceedings from a liquidator) and such creditors should be permitted to apply to court for review of the liquidator's conduct (same as section 600A-D).

Furthermore, creditors should be encouraged to rotate and/or split up large jobs to permit several liquidators from various firms to complete the large jobs to ensure they are finalised in the most time and cost effective manner.

The statutory frameworks should encourage creditors to appoint multiple insolvency practitioners from different firms especially for the big jobs. Jobs tasks should be split between trade on, sale of assets, investigation, litigation and dividend process. Creditors should be able to select and replace the liquidator who they want to do each component of a liquidation. For small jobs it's likely to be cost effective for one liquidator to do all tasks, but for the large jobs, the jobs that go for 10 years, it's simply anti competitive and not cost effective to use one liquidator for the lot. Simply put, creditors know when the liquidator is doing a good job. They should determine if a liquidator continues with his job or it's given to somebody who is cheaper or maybe better.

If the Bankruptcy Act provisions that permit creditors to remove an incumbent trustee where adopted in the Corporations Act, the 664 liquidators would significantly increase competition within this market. Liquidators would fight to retain and complete their jobs to the satisfaction of creditors. If this proposal is adopted, it would encourage multiple liquidators from various firms undertaking distinct aspects of matters to varying charge out rates to ensure value for money, rather than current practise of one firm slowly doing all the work over years at the same charge out rate.

Insolvency administration is a difficult job. It takes many years of on the job training to become a good insolvency practitioner. A theoretical understanding, a law degree or a MBA provides very little benefit in the training of an insolvency practitioner. The Governance and Insolvency Unit should be wary of opening up the door to unqualified practitioners.

I believe the IPA has suggested and I endorse a $10 to $20 levy on the registration of new companies should be used to fund an enhanced assetless administration fund. ASIC's annual report indicates that it acted upon only 2% of reports of misconduct detailed by liquidator's in the 8000 statutory reports filed last year. Given the system is effectively relying upon private liquidator's to enforce the statutory framework pertaining to director's obligations and voidable transactions, the liquidator's should be funded appropriately by a levy on all new registrations.

The biggest loophole in the Bankruptcy Act should be closed, bankrupts should not be permitted to hide assets in discretionary trusts and these assets should be available to creditors.

The onus of proof for recovery actions from related parties should be reversed for related party transactions. For example instead of an insolvency practitioner being forced to prove insolvency as a pre requisite to enforce a recovery, the related party should be required to establish solvency as a defence to claims.

Finally the biggest obstacle to enforcing the public policy objectives of the Corporations and Bankruptcy Acts is the cost of litigation. Insolvency practitioners need access to a "Mini Court". A Mini Court would ensure the time available for written and oral submissions is capped at about 20% of the time available in the existing Courts. Similarly, the Judges written and oral decisions should also be capped by time and length. This would ensure judges with an insolvency background are not forced to spend months preparing a judgement. This would dramatically free up their time and cut the court delays.

The detailed submissions and judgements, currently common place, should be avoided and replaced with submissions and judgments capped at 10 pages of bullet points and references. A statement of agreed and disputed facts should be settled before the hearing. The costs of obtaining some judicial guidance would therefore be slashed. Appeals to the existing judicial framework should be allowed. A Mini Court would effectively be a forced mediation with judicial guidance. It may not be perfect justice but it would be a vast improvement on the current system as it would provide insolvency practitioners with access to the courts to enforce the obligations of the Acts in a cost effective manner.

Our statutory frameworks for recovery of assets and misconduct of directors are well drafted by a world standard, but it's almost impossible to enforce the frameworks due to the cost of litigation. For example during the past 10 years there has been on average 8,500 external appointments per annum. During the same period the number of insolvent trading claims that have been determined by the courts each year is just two. It's a ridiculous statistic that shows the access to justice is almost nonexistent for liquidators.

As indicated above, ASIC acknowledges it acts on just 2% of reports of misconduct by liquidators. 98% of the burden of enforcing the Corporations and Bankruptcy Act obligations for offences such as insolvent trading, uncommercial transactions and breach of director's duties therefore falls upon the insolvency practitioners who simply cannot afford to go to court as often as we would like.

The current legal system provides encouragement for the bad guys who have ripped the money out, or phoenixed a company for personal benefit to sit back, spend the money they have stolen and run up the costs of a liquidator and during a long period of litigation to force a settlement when the liquidator's money runs out. The costs of litigation are simply prohibitive in most liquidations and reform is essential to ensure the integrity of the public policy objectives of the Act.

**INTRODUCTION: PRE-PACKS**

The *Corporations Act 2001* ('the Act') is now seriously out of step with comparable countries' legislation due to its failure to encourage the sale of an insolvent company's business prior to its liquidation.

In the US and UK, a "pre-pack" refers to the process of selling an insolvent company's business or assets before the company goes into liquidation or administration.

The sale is coordinated by the insolvent company's existing management. Typically, the assets or business are sold for market value to a related company which I will call New Co. New Co re-employs the existing staff and produces the same goods and services from the same premises.

I know you're thinking "that's a phoenix. That's illegal." I'm here to challenge that view.

I will start in the USA. General Motors, the largest US auto manufacturer was sold as a pre-pack for $50 billion in late 2009. The sale was finalised only 40 days after initiating the protection of Chapter 11 of the US Bankruptcy Code. 225,000 staff were re-employed by New GM Inc after it purchased the $85 billion of assets from old GM. The purchase was funded and approved by the US Government. GM was the 4th largest corporate failure in history and is the biggest pre-pack to date.[3]
The largest corporate failure to date is Lehman Brothers. The day after Lehman Brothers entered Chapter 11 protection, Barclays Bank announced its agreement to purchase its investment-banking assets. A week later that agreement was approved by the Courts. This sale wasn't a pre-pack but it was a sale of $600 billion in assets made within 24 hours with the regulator's rubber stamp.[4] It demonstrates a quick sale can be a good sale.

The United States has used the pre-pack model of selling assets since 1978. Last year about 12,000 companies used the framework in an attempt to restructure and save their business.

The entire structure of Chapter 11 is designed to provide existing management with time to sell an insolvent business into a new entity. The US system is cumbersome and expensive because it is Court-sanctioned.

I will now jump to the United Kingdom.

The UK Insolvency Act 1986 was revamped by the Enterprise Act 2002 which permitted a company to appoint an administrator without judicial scrutiny. The UK Act was modelled on Australia's VA Law. But it has some twists.[5]

The most significant difference between the Australian voluntary administration procedure and the UK version is the UK administrator gets in early and assists management to undertake the pre-pack sale of assets prior to their formal appointment. After the terms of the sale have been agreed, the UK administrator is formally appointed. The administrator will then immediately sign the contract for sale.[6]

This point must be emphasised: the UK administrator will typically sign off on the pre-pack sale on the day of their appointment.

In the UK there are around a 100 pre-pack sales a month.[7]

Some examples of recent pre-pack sales include:

- *Officers Club*, the men's retail clothing chain sold to the existing management by PWC immediately after their appointment as administrator. This business had 120 retail stores and more than 1,000 staff.
- *Whittard of Chelsea* (the tea and coffee retailer) sold to private equity by Ernst & Young immediately after their appointment as administrator. This business had 130 retail stores and more than 1,000 staff.

The Insolvency Service (the UK's equivalent of ITSA) has stated:

> *'a pre-pack may offer the best chance for a business to be rescued, preserve goodwill and employment, maximise realisations and generally speed up the insolvency process.'* [8]

The UK's insolvency regulatory bodies have in fact sanctioned pre-pack sales and issued a guidance note to accountants and lawyers to assist them to undertake pre-packs. The 'Statement of Insolvency Practice 16' (SIP 16) sets out the basic principles and essential procedures that are to be followed.

It has been adopted by each of the United Kingdom's regulatory bodies, including:

- The Association of Chartered Certified Accountants;
- The Insolvency Practitioners Association;
- The Institute of Chartered Accountants in England and Wales;
- The Institute of Chartered Accountants in Ireland;
- The Institute of Chartered Accountants of Scotland;
- The Law Society;
- The Law Society of Scotland.[9]

The SIP16 is not a definitive statement of law, but insolvency practitioners are liable for disciplinary action by their respective regulatory trade body if they fail to comply with its guidelines.

The website of the UK Attorney General states:

> *"It is perfectly legal to form a new company from the remains of a failed company. Any director of a failed company can become a director of a new company."* [10]

During the eight years pre-packs have been used in the UK, some research into the process has been undertaken which is summarised below.[11]

| **Particulars** | **Pre-pack sale** | **Insolvency sale** |
|---|---|---|
| All employees transferred to new company. | 92% | 65% |
| Secured creditor return. | 42% | 28% |
| Average return (unsecured creditors) | 1% | 3% |
| Sale of assets to related party. | 59% | 52% |

The key statistic from this table is 52% of all insolvency sales by a liquidator in the UK involve a sale of some assets to a related party.

It is my view that the UK model for pre-packs is a commendable first attempt to get the process right, however, it could be refined and improved if the following modifications were adopted.

Firstly, in the UK, the business is not openly advertised for sale. Instead, it is commonplace for the business to be sold in secret. This approach is a mistake. A justification for this approach is that almost all companies have exhausted their lines of credit and cash reserves before they approach a liquidator seeking advice. An administrator will only trade an insolvent company if the cash flow during the trade on period is positive, there is certainty as to the value of the assets which are to be sold, or there is an indemnity for trading losses.

Any Australian liquidator will tell you that, when a VA commences:

1. Customers stop paying their debts, withdraw credit and supply.
2. Employees flee. This is a particularly bad scenario when a company has a high dependency upon a small group of skilled employees.

I suspect it is for these reasons that the UK approach has sought to avoid the sale of assets by a publicly advertised process. The UK approach ensures that the business will continue to trade up until the date of its sale. It is clear that a sale, by way of limited marketing exposure, offers the following benefits, in that it:

1. Preserves the goodwill of customers and suppliers;
2. Retains staff;
3. Avoids the personal exposure of a voluntary administrator, including Occupational Health and Safety obligations, which can cause liquidators significant concern;
4. Avoids funding a trade-on administration, which is always difficult and therefore avoids significant liquidator/voluntary administrator fees; and
5. Eliminates the costs of an auction/formal liquidation sale, which are significant.

The UK legislation has considered these pros and cons and formed the view that a secret sale is better than no sale.

Creditors have criticised this aspect of the process, suggesting that the realisation may be improved through wider marketing.

I contend the second material defect of the UK pre-pack system is that the administrator works with management to organise the sale. Thereby, the administrator in waiting will help management with:

1. Valuations of the business;
2. Discussions with prospective buyers;
3. Obtaining the support of secure creditors and suppliers;
4. Setting the sale price and terms of the contract for sale.

When all the details are agreed and a formal agreement is ready to be executed, the formal appointment of the administrator is then attended to.

The problem here is that the administrator who put together the deal also has the responsibility for checking to see if the sale realised market value on behalf of creditors. There is an inherent conflict of interest in the two roles. There can be no doubt that management will enjoy the expertise of an administrator or pre-pack expert. Selling an insolvent company is a specialist role and only a few have knowledge and experience to do the job well. However, fundamentally, a liquidator should only sit on one side of the fence, and ideally, the administrator should be appointed by creditors to preserve and protect the creditors' position and specifically prosecute the directors and advisors who fail to realise market value from a sale.

In Australia, the IPA's Code of Professional Practice (Code) and the law impose independence requirements preventing practitioners from taking an appointment if they have had certain prior professional relationships with the company or its directors. The Act also says that the liquidator is disqualified from acting if he/she is a creditor of the company. Finally, section 420A of the Act contains the 'duty of care' provision that controllers must exercise when utilising a power of sale. One other restriction in the Code, and the law, is that the administrator can only charge for pre-appointment work if court approval is obtained and the work is necessary for the administration. It is therefore clear that in Australia, two different parties will attend to the role of helping management and the role of scrutinising a sale.

Moving to the Spanish jurisdiction, their Insolvency Act was amended by Royal Decree 3/2009, which created a pre-insolvency negotiation period to enable a pre-pack plan to be developed.[12]

In New Zealand, which has largely adopted Australia's voluntary administration regime, the Companies Act 1993 was recently amended to accommodate phoenix arrangements. The explanatory material suggests that many phoenix situations are legitimate and operate to promote the interests of creditors of the insolvent entity through lower transactions costs and higher sale price as the business is sold as a going concern.[13]

So let's recap. Our major trading partners use pre-packs but in Australia we pretend they don't happen.

The first pre-pack in Australia?

What is said to be Australia's first pre-pack is the sale of the 250 year-old Royal Doulton fine china manufacturer, Waterford Wedgewood Group.

Accounting firm Deloitte sold the Australian operations of this company on the first day of their appointment in January 2009. Some 450 staff were moved sideways as part of a $1 billion worldwide restructure.

The lawyers acting for them were Blake Dawson, who have stated that, "What we did was examine relevant law, worked out what would comply with the law before obtaining senior legal advice that would, if need be, satisfy a court".[14]

Deloitte and Blake Dawson ran the pre-pack from beginning to end. They commented that, "Australia has a much tighter and more stringent legal framework [than the UK and the US] but in the right circumstances and with absolute transparency for all stakeholders, pre-packs can make commercial and compelling sense."

This view was supported by lawyers Baker & McKenzie and liquidators KordaMentha in March 2009 when they stated, "the legal infrastructure exists to permit pre-packaging and the market environment might now be right for pre-packaged transactions to become more prevalent".[15]

While Waterford Wedgewood might be "the first Australian pre-pack", the reality is that pre-packs are common in Australia.

Throughout the twenty years that I have practised insolvency I have known many "reconstruction specialists", lawyers who "re-engineer", "rebirth" and "phoenix" companies. If you want to know who these parties are, I invite you to let a creditor initiate a winding up application against you. The resulting requisite advertisement will see at least half a dozen specialists call you and offer a "rescue plan" at a price you can afford.

I suspect pre-packs and specialists who trade in them in one form or another have been around for as long as the concept of limited liability, which goes back to 1855.

Definition of Phoenix

You recall that the traditional definition of a phoenix relates to the mythological bird, which at the end of its life, burns and then rises from the ashes.

Defining precisely what constitutes fraudulent phoenix activity is inherently difficult. This was noted by the Parliamentary Join Committee on Corporations and Financial Services in its report on corporate insolvency laws in 2004.[16]

The pursuit by ASIC's media department for a headline has resulted in ASIC repeatedly using the phrase "phoenix activity" as shorthand for director misconduct and breach of statutory and fiduciary duties. It fits into a by-line better. It's a catchy phrase. Its good media spin. But the result of ASIC's media activity is a blurring of the distinction between the legitimate process of selling a business and the illegitimate conduct of directors who breach their various obligations.[17]

The ATO's media releases are more confined and accurate:

> *"Fraudulent phoenix activity involves the evasion of tax and other liabilities such as employee entitlements through the deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities."* [18]

Cost of illegal Phoenix behaviour in Australia

In 1996, the then Australian Securities Commission (now ASIC) published its investigation into the problem of fraudulent phoenix activity in Australia. The report estimated annual losses to the Australian economy due to phoenix activities to be between $670 million to $1.3 billion.[19]

In 2010, the ATO estimated that the current stock of suspected phoenix cases it is monitoring poses a risk to the revenue of around $600 million.[20] The ATO, and therefore taxpayers in general, are clearly the biggest losers from phoenix activity.

There can be no doubt that fraudulent phoenix behaviour as defined above must be eliminated by the legislators and the professionals who work in the area.

Current Legal Framework

So let's review the law that relates to pre-packs.

Despite what might be seen as ASIC's simplistic media releases, there is in fact no prohibition of phoenix sales in the Corporations Act or in any other legislation. If there were such a prohibition on the sale of assets from an insolvent company to existing management, assets would be abandoned and the loss to creditors exacerbated in a significant number of liquidations.[21]

The law

The law sets out a number of duties of directors. The common law requires directors to act in good faith, honestly and exercise their discretion in the interests of the company.[22] A director must exercise the powers conferred on them for the purpose for which they were conferred. The Corporations Act codifies the common law obligations in s 181 (by requiring a director to exercise their powers and discharge their duties in good faith in the best interests of the company and for a proper purpose) and following sections codify other general law obligations.[23]

There are specific remedies available against directors who engage in fraudulent phoenix activity, including civil and criminal penalties under the Act. A number of general law remedies are available for breach of fiduciary duty by directors. They include injunctions and declarations, damages and compensation, accounts of profits, rescission, tracing and constructive trusts. Such remedies reflect the fiduciary relationship between a director and a company. There are also civil penalty provisions that may be used, and criminal offences.

In particular, accountants and solicitors should be aware that pursuant to section 79 of the Act, professional advisers may be liable for breaches of the Act if they have aided, abetted or counselled the contravention by their client. In 2009, solicitor Tim Somerville was held liable in the Supreme Court of NSW for the conduct of his directors when six unrelated clients attempted to fraudulently phoenix various companies in a process that ensured market value for assets was not paid.[24] Mr Somerville had recommended a transaction and prepared or obtained documents necessary to carry out an improper transaction.

Our insolvent trading and other laws provide an incentive to directors to appoint an administrator and it discourages directors from pursuing restructures and taking reasonable and calculated risks to trade a company out of financial difficulty, but there certainly is no outright prohibition on pre-packs.

In the US there is no equivalent insolvent trading provision[25] that deters directors from pursuing a pre-pack. In the UK, the insolvent trading equivalent is much more lenient than the provisions in Australia. The directors will not be liable if they took every step to minimise loss to the creditors. Directors will, therefore, be able to pursue a pre-pack if they can satisfy themselves that a pre-pack will maximise the value of the company and therefore increase the benefit available to creditors.[26] This defence is known as the "business betterment rule".

It is commonly stated that pre-packs occur minimally in Australia because directors are concerned about their exposure to insolvent trading and fiduciary duties. There is however a real question whether these laws are in fact effective. Recent studies have shown that there are in fact very few cases pursued to judgment.

On average, over the past ten years there were approximately 8,500 insolvency appointments per annum but of these, usually only two insolvent trading claims were determined by the courts and the average compensation order was less than $200,000. These statistics indicate that the insolvent trading regime is not an effective deterrent to

insolvent trading. In my view, the insolvent trading provisions provide a very limited barrier to a director undertaking a pre-pack.

Most directors exhaust a company's resources before approaching a liquidator for help. Accordingly, the marginal value of the "extra" insolvent trading claim, compared to the existing insolvent trading claim, does not provide a deterrent for a director to keep trading an insolvent company for a short period while they undertake a pre-pack.

Directors must be discouraged from incurring further credit during a pre-pack sale process and be able to stand in front of creditors and say, "I formed the view that the company was insolvent on this date and incurred no further credit." Affording priority to select creditors may resolve this issue, if legislative reform is made. Directors should be punished if they deliberately avoid their taxation and obligations under the Corporations Act.

Proposed legislative reform

In my submission to the 2010 Senate Inquiry into insolvency, I offered the following advice:

- That pre-packs should be embraced where the voluntary administrator holds the purchase price in trust for 14 days and reviews the sale by management to determine if the market value for a related party sale was realised. If the sale was at less than market value, the voluntary administrator should be able to set aside the sale and refund the sale proceeds. The voluntary administrator would then act with a view to trade on and sell the business in the normal manner.

- Directors should be automatically issued a director penalty notice and thereby be potentially personally liable for taxation obligations after, say, a six month moratorium to pay overdue taxation obligations. The ATO made a similar proposal in 2009.[27] The onus of proof for insolvent trading should also be reversed if an ATO debt is outstanding for a similar six month period.

- I also suggested insolvency appointments should be, at the creditors' discretion at annual meetings, rotated and/or split up permitting several liquidators to complete large jobs to ensure they are completed in the most timely and cost effective manner (but that is a discussion for another day).

In fact I contend the three most important issues in any pre-pack that the law should support, for the benefit of creditors where possible, are:

1. That market value is realised for the assets. Where there are no other buyers, that is generally an auction value for a small business. Management should be encouraged to pay the going concern value.

2. Management must deal with the insolvent company's assets as if they belong to the creditors. Any pre-pack must be made for the benefit of creditors.

3. Insolvent trading should not be prosecuted during a pre-pack sale process.

Actual legislative reform

The recent legislative reform of tightening the director penalty provisions and the introduction of taxation bonds is interesting but, I contend, ineffective. What is in fact a 1930s process of lodging a bond to pay tax will not slow down fraudulent phoenix behaviour. Australia has a self-assessment system of taxation. The fraudulent conduct of dishonest directors will occur long before the ATO has an opportunity to ask for a bond.

**Some Statistics**

ASIC's insolvency statistics for the period 1999 to 2010 show the following annual averages:

| | |
|---|---|
| Insolvency Appointments | 8,761 |
| VA Appointments | 2,724 |
| Deeds Entered | 629 |
| Deeds Completed | 403 |

It follows that about a quarter of companies that enter a VA will offer a deed. Directors will satisfy the deed obligations in two thirds of those matters.

It also follows that only five percent of all companies that enter into a formal insolvency appointment will complete a deed of company arrangement. While there are no statistics to support it, in my experience this successful five percent would be almost entirely confined to the large scale insolvent companies that suffer financial difficulties. One conclusion that is arguable from this data is that only one in 20 companies has the money to pay for a successful VA. The framework of restructuring insolvent companies is too expensive to be widely used by small business.

Conclusion

In Australia, we need to re-think the idea that a sale of an insolvent company's assets to existing management and stakeholders is always unconscionable. We should invite legislative reform to embrace Pre-Packs.

Last year there were about 9,500 corporate insolvency appointments.[28] Approximately 23 percent of the insolvent companies entered into a deed of company arrangement.[29] It follows only about five percent of all companies that enter into a formal appointment under the current legislative framework realise the objective of saving a business via the VA framework. The statistics show the current framework is not effective.

Pre-packs offer a means to increase the survival rate of insolvent companies.

For small business, pre-packs offer by far the best chance for existing management to save their business. Pre-packs are a common, everyday occurrence for our trading partners but in Australia they remain a developing process that should only be attempted by a professional to ensure creditors' interests are preserved.

**Nicholas Crouch**
**12 July 2011**

## REFERENCES


[1] See ASIC website. *http://www.asic.gov.au/asic/asic.nsf/byheadline/Insolvency+statistics+-+Series+1+Companies+entering+external+administration?openDocument* (Note: ASIC's old statistics double-counted appointments (i.e. a VA that goes into a deed of company arrangement then fails and goes into liquidation was counted as 3 appointments by ASIC.)) Form 5056 and Form 5047A statistics sourced from Information Services Registry Services & Licensing ASIC on 21 January 2011 (big thanks to you Kim).

[2] Part 4.2 of the Federal Governments Proposal Paper by the Australian Government, "Action against fraudulent phoenix activity November 2009"

[3] Australian Journal of Corporate Law, "The Phoenix Re-examined" by Niall F Coburn, Page No 321-331 (1998)

[4] Accountancy Age, London, "So what is a pre-pack, Pat", by Tim Carter, David Kendall, 11 June 2009 page 19.

[5] Already cited at note 6 above.

[6] Already cited at note 6 above.

[7] In the Black, "A crystal clear result", by Anthony Black February 2010, pages 42-45.

[8] Already cited at note 6 above.

[9] Statement of Insolvency Practice 16 (E&W), "Pre-Packaged sales in administrations", Effective Date 1 January 2009, Published by Solicitors Regulation Authority.

[10] *http://www.attorneygeneral.gov.uk/nfa/actionfraud/FAB /Pages/PhoenixCompanies.aspx*

[11] Frisby SA "Preliminary analysis of pre-packed administrations" 2007 *https://www.r3.org.uk* (follow the Publications link).

[12] InsolWorld, first quarter 2010, "The pre-packaged plan and its legal uncertainties (Spain)".

[13] National Accountant, 'The flight of the Phoenix' by Geoffrey McDonald, February 2008, pp 73-74.

[14] Already cited at note 9 above.

[15] Lloyd, O'Brien and Robertson, 'Pre-packaged transactions in administration, strategy and application' (2009) 9(7) INSLB 110.

[16] "Action against fraudulent phoenix activity" Proposals Paper by the Australian Government, November 2009, page 1.

[17] *http://www.asic.gov.au/asic/asic.nsf/byheadline/06-125+ASIC+takes+action+against+%27phoenix%27+director?openDocument*

[18] Already cited at note 18 above.

[19] Already cited at 18, page 3.

[20] Already cited at 18, page 5.

[21] Already cited at note 14 above.

[22] 'Directors' Duties and Phoenix Companies', Angela Martin, Allens Arthur Robinson, 2007, pp 1-12.

[23] Already cited at note 24 above.

[24] ASIC v Somerville [2009] NSWSC 934.

[25] Already cited at note 17 above.

[26] Mark Hyde and Iain White, "Pre-pack Administrations: Unwrapped" (2009) 3(2) Law and Financial Markets Review 134.

[27] Already cited at note 18 above.

[28] Already cited at note 1 above.

[29] ASIC Report 129: Review of s439A reports for voluntary administrations of June 2008 shows 1 in 5 companies that enter VA enter into a deed of company arrangement.