

Institution: University of Wolverhampton		
Unit of Assessment: 18 Law		
Title of case study: Pre-packaged Administration – Informing Government and Judicial Policy		
Period when the underpinning research was undertaken: 2012-2014		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Professor Peter Walton	Professor of Insolvency Law	1988 - Present
Dr Chris Umfreville	Senior Lecturer	2012 - 2017
Dr Paul Wilson	Senior Lecturer in Statistics	2012 - Present
Period when the claimed impact occurred: 2014-2020		
Is this case study continued from a case study submitted in 2014? N		
1. Summary of the impact		
<p>Research by the Law Research Centre highlighted significant practical issues in relation to pre-packaged administration (pre-packs). Solutions to the problems associated with pre-packs were suggested by the Government-appointed independent Graham Review of pre-packs, which chose the Law Research Centre to conduct research to provide the necessary data regarding, and to highlight and advise on, specific issues relating to pre-packs. The research informed the recommendations made by the Graham Review in June 2014 and led to significant Government policy decisions and changes to professional practice. The research has been used to inform a similar debate in Australia, and been recognised judicially.</p>		
2. Underpinning research		
<p>The research was conducted by members of the Law Research Centre led by Professor Peter Walton. Professor Walton was the first person (in 2006) [R3] to identify a number of legal and practical problems with pre-packaged administration. It involves the immediate sale of a business on the appointment of an administrator without any recourse to the views of a company's creditors. Walton has written on legal, theoretical and comparative aspects of pre-packs. In addition, his comparative work [R2] considered how the Australian courts would view an attempt to introduce UK pre-packs to Australia. It led to the Finding [F] that:</p> <p><u>F1.</u> The stronger regulation of conflicts of interest would prevent pre-packs being permitted in Australia. This links closely with and underpins Impact I2.</p> <p>Following a competitive tender process, Professor Walton's reputation as the leading specialist in the area led to his appointment by the UK Government to conduct research for, and present interpretations of the resulting evidence to, the independent Graham Review [R1]. The research was carried out throughout late 2013 and early 2014 by Professor Walton and Chris Umfreville with the statistical assistance of mathematician Dr Paul Wilson. Walton designed the research project to include a large number of datapoints (over 30 per administration) collected in relation to a significant number of administrations (500 pre-packs commenced in a single year and a comparator group of 100 traditional administrations) which followed through the subsequent history of both the company entering administration and the purchasing company.</p>		

A regression analysis of pre-pack administrations assessed the procedure's ability to deliver viable purchasing companies. The study looked at the failure rates of purchasers from a pre-pack (and compared them with traditional administrations) and identified which determinants were the strongest predictors of subsequent failure.

The key Findings of the research showed that, although there were some benefits to the use of pre-packs, there were a number of problems with how pre-packs operated:

F2. The principal problems were identified as: inadequate marketing where marketing was conducted by the directors or internally within the administrators' own networks;

F3. Inadequate valuations of businesses where frequently a limited desktop valuation by the administrator was conducted;

F4. An absence of evidenced viability of the purchaser;

F5. The link between sales to connected parties and subsequent failures of the purchaser; and

F6. Statistically deferred consideration was not a factor in business survival.

Findings F2-F6 link to and underpin Impact I1.

Based upon the research the Graham Review recommended voluntary provisions, which were all adopted. The recommendations dealt with how to market and value businesses, how to conduct a viability review of the businesses and the introduction of the "Pre-Pack Pool" which brings some objective judgement to the decision whether the case for a pre-pack is proven in cases where the purchaser is a connected person. Consistent with the findings of the research, it did not suggest amendments to purchases using deferred consideration.

3. References to the research

The following research outputs which have been through a rigorous peer-review process. As shown below, they are points of reference for further research beyond the original institution. Evidence of peer-reviewed funding is also given below.

R1. *Pre-Pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration Final Report to the Graham Review* April 2014 prepared by Professor Peter Walton and Chris Umfreville with the assistance of Dr Paul Wilson. (REF 2 Output)

R2. M Wellard and P Walton, 'A Comparative Analysis of Anglo-Australian Pre-Packs: can the means be made to justify the ends?' (2012) 21(3) *International Insolvency Review* 143.

Evidence of the quality of the group's research is demonstrated by:

1. Its acceptance by the Graham Review and the subsequent acceptance by the UK government of the Graham Review's recommendations based upon the research report [R1]; and

2. Its citation and approval by the Australian Federal Court in *Re Ten Network Holdings Ltd* [2017] FCA 914, [2017] BPIR 1707 at paras [17-23] [C10].

R3. P Walton 'Pre-packaged administrations – trick or treat?' (2006) 19 *Insolvency Intelligence* 113 – 122.

This article was the first publication that shed light on the legal and practical difficulties of pre-packs. It was seen as so significant as to require an immediate response in the same law journal by senior insolvency practitioners - A Bloom and S Harris 'Pre-packaged administrations - what should be done given the current disquiet?' (2006) 19 *Insolvency Intelligence* 122 – 123.

Grant

Insolvency Service, GBP19,220, Pre-Pack Empirical Research. R1 refers.

4. Details of the impact

The research has had a direct impact on the law and practice in the UK. Parliament has recognised issues surrounding pre-packs as significant both in 2015 and in 2020. The scale of the impact is that it has affected thousands of businesses (and their employees) which have entered into a pre-pack since 2015. The research and its methodology have been relied upon by the Government and the insolvency profession as evidenced by significant practical and legislative changes in the UK. In addition, the research has been used to inform the debate on pre-packs, and judicial thinking, in Australia which has legislative and regulatory regimes comparable to those in the UK.

1.1. Impact in the UK

The research findings to the Graham Review [R1] were accepted and used as a basis for changes to Government policy on pre-packs. The results of the research led the Graham Review to make recommendations around how connected party pre-pack sales were conducted, including how the business should be valued and marketed [C1]. The recommendations were accepted by the Government and the profession and led to a new Statement of Insolvency Practice 16 and the creation of the Pre-Pack Pool [C2].

The main problems identified by the research surrounded the practice of selling a business to its management team in a pre-packaged administration whereby the process lacked transparency. Based upon the findings of the research, the Graham Review recommended a number of best practice actions, which would be available on a voluntary basis. In light of [F2], the revised Statement of Insolvency Practice 16 (SIP 16) now identifies the main principles of marketing which should be followed in a connected party pre-pack. On the basis of [F3], SIP 16 now requires an independent valuation of businesses in such circumstances. In order to address the concern highlighted in [F5] that many connected party pre-packs lead to an early failure by the purchaser Newco, the introduction of the Pre-Pack Pool was suggested and adopted. The Pre-Pack Pool is available for purchasers to approach on a voluntary basis for an opinion as to the reasonableness of the sale. It may also be asked to opine on the viability of Newco's business plan which addresses [F4]. Each of the principal findings of the research are addressed by the Graham recommendations. Graham explicitly favoured no action on purchases using deferred consideration as the research showed statistically that this was not significant in identifying business survival [F6].

The significance of the research is further evidenced by, for example, it being widely referred to in associated House of Commons Standard Notes and Research Briefing Papers [C3 and C4].

Section 129 Small Business, Enterprise and Employment Act 2015 was passed containing a reserve power to restrict administration sales to connected parties. The power lapsed at the end of May 2020 but was re-introduced by section 8 of the Corporate Insolvency and Governance Act 2020. The 2015 provision was stated in Parliament as being based upon the Graham recommendations which, in the same Parliamentary debate [C5], are specifically stated as being based upon the Wolverhampton research [R1].

The Government in its 2020 report *Pre-pack sales in administration report* [C6] has effectively decided to exercise its reserve power to make reference to the Pre-Pack Pool compulsory. The Government explicitly accepts that "the findings of the Graham Review remain valid". In deciding whether and, if so, how to exercise the reserve power, the Government carried out its own research whose "quantitative data is broadly comparable with that which was collated ... by the University of Wolverhampton, which accompanied the Graham Review." This is evidence both of the reliability of the research findings and impact but also confirmation of its sound methodology.

Success in the UK has been replicated in Australia.

12. Impact in Australia

The Graham Review and its underpinning research have been cited by the Australian insolvency practitioner professional body (ARITA) [C7] as well as Australian law reform bodies [C8], including the Productivity Commission's Inquiry Report no.75 from September 2015 [C9], to argue in favour of or against the introduction of pre-packs in Australia. There is no empirical evidence of such practices anywhere else except in our research and so, in a jurisdiction with much in common with the UK, Australia has adopted the research as evidence for its ongoing policy debate.

The comparative work co-authored by Walton [R2] and [F1] received support for its analysis and conclusion by the Federal Court of Australia [C10].

5. Sources to corroborate the impact

C1. April 2014 Pre-pack research commissioned by the Government which was relied upon by Graham Review of pre-packs – research report [R1] published alongside the Graham Report.

<https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration>

C2. 16 June 2014 - Measures to improve confidence in the insolvency regime – Graham recommendations based upon findings in [R1] all accepted by the Government (Ministerial Written Statement by Jenny Willott MP, Parliamentary Under-Secretary of State for BIS 16 June 2014 HC Vol 582 col 69WS).

<https://hansard.parliament.uk/Commons/2014-06-16/debates/140616900007/InsolvencyRegime?highlight=graham%20review#contribution-1406169000013>

C3. 04 September 2014 research [R1] referred to by House of Commons Standard Note on Administration Procedure (now see House of Commons Briefing paper: 4915 on Company Administration 2019).

<http://researchbriefings.files.parliament.uk/documents/SN04915/SN04915.pdf>

C4. 04 September 2014 research [R1] referred to by House of Commons Standard Note on Pre-Pack Administration (now see House of Commons Briefing Paper: 5035 on Pre-Pack Administration 2019).

<http://researchbriefings.files.parliament.uk/documents/SN05035/SN05035.pdf>

C5. Section 129 Small Business, Enterprise and Employment Act 2015 was passed by Parliament on 26 March 2015. It was based upon Graham recommendations, which were stated by the Under Secretary for BIS, Jo Swinson MP as drawing upon the research [R1] in the Parliamentary Debate on 04 November 2014 at column 468.

<https://publications.parliament.uk/pa/cm201415/cmpublic/smallbusiness/141104/am/141104s01.htm>

C6. *Pre-pack sales in administration report* (08 October 2020) (section 2 and section 4.2). The Government's Corporate report makes specific mention of the research [R1] underpinning the Graham Review and that the Government has effectively replicated the research methodology to understand the current position.

<https://www.gov.uk/government/publications/pre-pack-sales-in-administration/pre-pack-sales-in-administration-report>

C7. October 2014 Pre-pack research [R1] referred to by the Australian Restructuring Insolvency and Turnaround Association in its discussion paper on distressed companies A Platform for Recovery 2014 Dealing with Corporate Financial Distress in Australia: A Discussion Paper.

<https://www.arita.com.au/documents/Technical/Public-policy/a-platform-for-recovery-2014.pdf>

C8. Response by Richard Fisher (a former member of the Harmer Law Reform Committee in Australia in 1988) referred extensively to the Graham Review and the research supporting it [R1] in his response to the Australian Government's Consultation on Reforms to Address Corporate Misuse of the FEG Scheme that ran from 17 May 2017 to 16 June 2017.

<https://treasury.gov.au/consultation/reforms-to-address-corporate-misuse-of-the-feg-scheme/>

C9. Australian Government Productivity Commission Report 75 "Business Set-Up, Transfer and Closure" (2015) pages 387 et seq text to recommendations 14.3 and 14.4 – citing the research underpinning the Graham review [R1] for evidence to support its own recommendations.

<https://www.pc.gov.au/inquiries/completed/business/report/business.pdf>

C10. *Re Ten Network Holdings Ltd* [2017] FCA 914, [2017] BPIR 1707 Australian Federal Court, O'Callagan J at paras [17-23]. Numerous references to Wellard and Walton article [R2], which is cited as assessing accurately how an Australian court would deal with an attempt to engage in a UK-style pre-pack.

<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2017/914.html>