PRE-PACKS

INTRODUCTION

THE LEGITIMATE PHOENIX OF AN INSOLVENT COMPANY

Pre-packs are arguably the cheapest way to re-structure or legitimately "phoenix" a small insolvent business in Australia. Although they can be contentious, pre-packs are a progressive and robust way to save a business with less than $150,000 in assets from an insolvency event.

The pre-pack concept has been widely promoted throughout the industry.

Since 2011 Bankruptcy Solutions has promoted and helped develop pre-packs in Australia. Our pre-pack model gives company directors a second chance to legitimately move an insolvent business into a new company shell and start again while simultaneously protecting the rights of creditors.

The 14 Government agencies that comprise the Inter-Agency Phoenix Forum and many creditors vigilantly review pre-pack sales to ensure they are not illegal phoenix sales.

The United Kingdom Government's enquiry into pre-packs reported 2 out of 3 pre-pack sales are to new shell companies set up by the existing company directors and about 60% defer consideration for the assets purchased.

It is imperative that any legitimate pre-pack sale is undertaken by an ethical and qualified professional who ensures market value is paid for company assets and directors do not breach their statutory and fiduciary duties.

THE OPTIONS FOR AN INSOLVENT COMPANY

There are generally four ways to restructure an insolvent company:

- Informal workouts
- Post liquidation sale of business
- Pre-liquidation **pre-pack** sale of business
- Voluntary administration

INDEX

1. Definition
2. Our pre-pack process
3. Pre-pack cost
4. Our Professional Fees
5. Post liquidation sale of assets
6. Voluntary administration or pre-pack?
7. Pre-pack history and statistics
8. Illegal phoenix sales
9. Unqualified and qualified assistance
10. Our contribution to pre-pack reform
11. Annexure A – Extract of relevant laws

1. DEFINITION

A pre-pack can be defined as a process of arranging the sale of a company's business before the formal appointment of a liquidator, who will finalise the sale as soon as possible after their appointment.

Pre-packs are used in the following countries to help small companies restructure: the UK, Germany, France, the Netherlands, Belgium, Italy and the Czech Republic.

A variation of the pre-pack model is also used in the US. The most famous example was the General Motors restructure. A company called New GM Inc paid $50 billion for the assets from the insolvent GM Inc. The deal took 30 days to put together and was funded by the US Government. It's a great example of a successful phoenix saving about 200,000 jobs.

In 2014, a British Government review into pre-packs drew the following conclusions:

- About 25 per cent of all companies that go into administration in the UK each year (about 750 companies) implement a pre-pack
- 96 per cent of pre-packs save jobs
- Pre-packs are at least 50 per cent cheaper than a traditional administration
- About 77 per cent of pre-pack sales in the UK are small companies (i.e. companies with fewer than 10 staff and a turnover of less than £1 million)
- The average purchase price of UK pre-pack sales in the UK is £54,000 (about $110,000)

For more details, see Graham Review into Pre-packs:

About 53 per cent of pre-pack sales in the UK use deferred consideration as a means to pay for assets subject to pre-packs. In two-thirds of these sales the new company will give security (a mortgage or security interest) to the insolvent old company to ensure the rights of its creditors are protected.

Here is an example of this type of pre-pack transaction:

A new company buys the assets from the insolvent old company. But the new company has no money to purchase the old company's assets, so it agrees to pay the market value of the assets in instalments over the next 12 months.

The new company then gives the old company a security interest (a mortgage or fixed floating charge) over its newly purchased assets, so they cannot be sold without the proceeds being paid to the old company. This protects the interests of the old company's creditors.

As the British Government report into pre-packs concluded:

> *Old company creditors are not unduly harmed by the presence of deferred consideration in a pre-pack deal.*

2. OUR PRE-PACK PROCESS

The key to a successful pre-pack is to ensure that the business or assets are sold for market value and that the creditors receive the benefit of that sale.

Our pre-packs are generally modelled on the UK practice, but tailored to our clients' needs.

The first thing a client must do if they want us to facilitate a sale is to decide which of two roles they want us to perform

in delivering our services. We can act as the client's adviser and organise a pre-pack sale of the business before liquidation, or we can act as the liquidator of the insolvent company and sell the business after liquidation.
To avoid the perception of a conflict of interest, we cannot perform both roles.

If we act as the pre-pack adviser we can:

- Act solely for the client
- Undertake an informal workout
- Implement a moratorium on creditor payments
- Re-structure a company
- Sell the business into a new shell
- Act as consultant while another liquidator winds up the old company

Pre-pack sales offer directors the certainty of ensuring their business is sold into a new company they own. But the sale will be subject to the scrutiny of an independent liquidator who has statutory obligations to investigate the sale and set aside any sale that is deemed to be undervalued or that breaches a director's statutory or fiduciary duties.

Our pre-pack approach ensures that the business will continue to trade up until it is sold.

A quick sale of an insolvent company offers the following benefits:

- It preserves the goodwill of customers
- It retains staff
- It avoids the personal exposure of voluntary administrators, particularly the WH&S obligations that can terrify liquidators
- It avoids funding a trade on administration, which is always difficult, thereby avoiding significant liquidator/voluntary administrator fees

We make sure every sale we undertake is conducted in a manner that protects the rights of creditors and maximises the value of the available assets for the creditors' benefit.

3. PRE-PACK COST

The cost of a pre-pack varies depending on the value of the assets being sold. The directors will need to pay the market value of the assets they purchase.

Market value will vary on the circumstances. For a small insolvent loss making company it will usually be the auction value of the assets. For a larger more saleable businesses the auction value plus an appropriate premium will need to be paid to ensure the purchase reflects market value.

Where there is appropriate security provided, purchasers may pay for the assets over a 6 to 12 month period.
Directors should expect to pay about $5000 for the cost of a Workplace Health and Safety review, an asset valuation, insurance, advertising and sale agreements as part of any pre pack purchase.

4. OUR PROFESSIONAL FEES

The Federal Government's Senate Inquiry into insolvency found that our average hourly charge-out rates were about 33 per cent lower than those of large insolvency firms.

5. POST LIQUIDATION SALE OF ASSETS

Instead of doing a pre-pack, directors may invite us to act as the liquidator of the insolvent company so that we can sell the business for them.

If we are appointed as the liquidator, we will act in the best interests of all creditors and not solely for the benefit of directors.

As liquidator we can, if it is commercially viable, invite the director to enter into a licence agreement to continue to trade the business for a few weeks (i.e. the director's new company can trade the business).

The director's new company can also execute a conditional sale agreement to buy the insolvent company's assets.

The sale price is usually estimated at somewhere between the "auction" and "going concern" value of the company, but will not be finalised until the assets are valued by a registered valuer and a public sale process completed by us as liquidator.

As liquidator we will advertise the business as "for sale" and invite tenders from the public to purchase the business as a going concern.

If we receive an offer to buy the business from a member of the public, the director (via their new company) will be given the chance to outbid it, just like a normal auction process. If the director or related party cannot outbid the offer, the business will be sold to the public purchaser.

A post liquidation sale of a business by a liquidator does not offer certainty that a related party will purchase the business.

Sales via a pre-pack or voluntary administration, on the other hand, will offer this certainty, but the UK research suggest that 64 per cent of pre-pack sales are to related parties. The average sale price in the UK is $110,000. It follows that in Australia the most likely purchaser of a small business worth about $100,000 will be a related party, if that party is a motivated purchaser.

This process ensures the business is sold for market value. There can be no argument if the director was involved in an illegal phoenix sale.

Trading during this sale process must be on a cash-on-delivery basis or creditors must be paid from new company resources to ensure the company does not trade while insolvent.

6. VOLUNTARY ADMINISTRATION OR PRE-PACK?

The voluntary administration (VA) framework is a world-class statutory framework, but the administrator's fees and trade-on costs are prohibitive for most small businessespto successfully use it to guide them out of financial distress. In Australia only about 5 per cent of the 10,000 companies that enter into a formal insolvency administration each year will use this framework to successfully restructure.

Typically the lucky 5 per cent are large companies with enough money to pay the administrator's fees and trade-on costs. In our experience, it is impossible for the majority of insolvent small companies to use the VA framework to restructure. The following background information supports this view.

ARITA figures from 2013 report:

- The average cost of a VA was $54,670
- The average cost of a deed of company arrangement $28,772
- Total professional fees came to $83,442
- The average dividend paid to creditors was 5.5 cents

More from the ASIC Report 412 Insolvency Statistics to June 2014, Table 30:

- 80 per cent of all corporate failures have fewer than 25 creditors
- 75 per cent of all corporate failures owe less than $500,000 to creditors.
- Various ASIC annual reports show 93 per cent of liquidations do not pay any dividend.

In short, in 75 per cent of the 10,000 companies that go broke each year, there is simply no money left. The mums and dads who own these 7500 SMEs don't even have the money to keep trading, let alone a spare $83,000 to pay an administrator.

Without at least $83,000 in cash or liquid assets, an insolvent business will usually be shut down and will not survive the voluntary administration process.

Voluntary administration remains a wonderful framework to restructure companies that have the resources to pay for administration costs. Everybody else should be restructured via a pre-pack or post liquidation sale of assets.

7. PRE-PACK HISTORY

Since the introduction of the concept of trading via a company in the 1800s people have purchased the assets from the wreckage of failed companies and used those assets to trade in new company shells. The voluntary administration framework is merely a variation of this practice of recycling or "phoenixing" assets into a new cleanskin company. Pre-packs are the latest variation of this process.

Pre-packs were developed in the UK about 13 years ago and do not rely upon a statutory framework. They were developed from common practice, judicial support and a statement of best practice (SIP 16) issued by the professional bodies that practice insolvency.

THE UK'S PRE-PACK EXPERIENCE

" ut 50 to 100 pre-packs or legitimate phoenix sales are undertaken in the UK each month. The UK's Government vency Service (the counterpart to our AFSA) 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.*

The insolvency regulatory bodies in the UK have issued a guidance note that sets out the basic principles and essential procedures insolvency practitioners must comply with when they undertake a pre-pack. (That's right, the UK government has sanctioned pre-pack sales or legal phoenix sales and issued a guidance note to accountants and lawyers to assist them in undertaking pre-packs.)

Statement of Insolvency Practice 16 has been adopted by each of the UK's professional 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

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.*

PRE-PACK STATISTICS

Summary of research into the pre-pack process in the UK		
Particulars	**Pre-pack sale**	**Insolvency sale**
All employees transferred to new company	96%	65%
Secured creditor return	42%	28%
Average return (unsecured creditors)	1%	3%
Sale of assets to related party	64%	52%

Source: Frisby SA "Preliminary analysis of pre-packed administrations" 2007
https://www.r3.org.uk
Amended for the Graham Review findings

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

PRE-PACKS SAVE JOBS

Statistics we obtained from ASIC on behalf of Senator Williams in 2010 showed that only 4 per cent of the 10,000 companies that go broke each year in Australia will complete their obligations under a deed of company arrangement (VA). That is, only 4 per cent of all insolvent companies will successfully restructure using the VA framework.

In the UK, by contrast, pre-packs have a 96 per cent success rate of preserving existing employee jobs, according to the UK Government's Graham Review. (See page 25 of the report note only 20 of the 499 pre-packs in the sample failed to retain staff and most of these were cases where the business was shut down before a liquidator was engaged.)

If saving jobs is the yardstick for determining if insolvency laws help a business, that's a 4 per cent success rate for the Australian voluntary administration framework and a 4 per cent failure rate in the UK's pre-packs.

ONLY SMALL BUSINESSES USE PRE-PACKS

Page 26 of the UK Government's review into pre-packs indicates that the vast majority of pre-packs are used by companies that have less than $110,000 in assets.

RELATED PARTY PURCHASES

In the UK, about 64 per cent of all assets and businesses sold via a pre-pack are sales to related parties.

In Australia, there is no statutory prohibition on a director or a related party purchasing the business or assets of an insolvent company. In addition, there is a common misconception that any sale of a business to an existing director or

related party is always an illegal "phoenix".

In fact, related party sales are common in Australia, but directors should seek professional advice to be sure they discharge their statutory and fiduciary obligations when they purchase an asset or business from their company.
In our experience, the most important asset of any small business is its staff, the "key people" and existing management who know how to run the business. For this reason, most small companies' insolvent businesses are purchased by staff and related parties. The existing directors, shareholders and staff know the value of the insolvent business, the good and bad suppliers and the potential value of the location, goods and services sold.

OUR SUBMISSIONS TO FEDERAL GOVERNMENT INSOLVENCY INQUIRIES

In 2010, Bankruptcy Solutions launched their turnaround advisory services. We initiated this service because, of the 273 insolvency firms around the country, our firm was one of a few that made a submission to the Federal Government's Senate Economics Committee into Insolvency and the Federal Government's own inquiry and options paper into insolvency.

Our firm was the only small firm in the country willing to devote its own resources to promote change to the insolvency frameworks. We wanted Australia to have the best insolvency turnaround laws in the world, and we particularly wanted to see the mums and dads who own small businesses to be able to benefit from these laws.

We were not happy with the existing frameworks because they did not offer a cost-effective framework for saving insolvent small businesses.

Our pre-pack process is relatively new in Australia and is entirely legal and legitimate. As official liquidators we are officers of the Court who must satisfy and discharge our fiduciary and statutory obligations to avoid any illegal phoenix sale.

Bankruptcy Solutions shared its research and new pre-pack process with the Federal Government's Senate Economics Committee Inquiry into insolvency which on the 14th September 2010 was released in a report entitled:

In mid 2011 and again in early 2012 after the Senate committee finalised its report, we met the chairman of the senate inquiry, Senator John Williams, in Sydney and Canberra to discuss our pre-pack concept and other legislative reforms.

The Australian Restructuring Insolvency and Turnaround Association (ARITA, formerly the Insolvency Practitioners Association, also known as the liquidators' professional association) published our concepts and research in its national journal (volume 23, number 1, 2011 edition) to help companies, directors and the industry as a whole.

In the UK, the Association of Business Recovery Professionals, also known as R3, is the professional body for liquidators. Its journal, called Recovery, published an extract from our Senate Inquiry submission called, "Pre-pack: a legitimate means to phoenix an insolvent company" in its 2011 summer edition.

In June 2011 we submitted details of our pre-pack model to the Federal Government's Attorney-General and the Parliamentary Secretary to the Treasurer in response to their Options Paper, A modernisation and harmonisation of the

regulatory framework applying to insolvency practitioners in Australia.

We were again invited to Parliament House in Canberra to discuss our submission with the Parliamentary Secretary to the Treasurer, the Honourable David Bradbury MP. We met with the Honourable Member and various treasury officials again in February 2012 to discuss pre-packs and other legislative reforms.
In September 2011, more than 150 lawyers, liquidators, bankers, and ASIC and AFSA staff attended the insolvency practitioners' (NSW) annual conference which concluded with a two-hour panel discussion that included our pre-pack concept.

In 2014, Nicholas Crouch assisted Senator Williams' pursuit of statutory reform, which included direct communications with ASIC chairman Greg Medcraft and Minister for Finance Mathias Cormann.

In early 2015, Senator Williams invited Nicholas Crouch to meet with ASIC commissioner Mr John Price and his staff to discuss pre-packs.

In July 2015, Nicholas Crouch made a detailed submission to the Australian Government's Productivity Commission inquiry, called "Business set-up, transfer and closure".

In August 2015, the Productivity Commission invited us to provide further and better particulars regarding our submission.

In November 2015, Nicholas Crouch meet with Senator Williams and the Minister for Revenue and Financial Services, Hon Kelly O'Dwyer MP to discuss the implantation of a prepack framework.

8. ILLEGAL PHOENIX SALES

In ASIC's 2010 Annual Report, phoenix trading was defined as the process:

> *Where directors evade creditors by moving assets from an indebted company to another entity and then put the business into administration.*

This process must be distinguished from the legally sound method of a liquidator selling the company's assets to a new company or directors and their related parties.

In Australia it's not unusual for the business of an insolvent company to be sold before liquidation. Unfortunately such sales are often conducted by shonky operators who intentionally seek to pay less than the market value for the business via illegal phoenix behaviour. It is generally understood that when a business is sold for less than market value before a lator is appointed, it is an illegal phoenix sale.

12 report by the Fair Work Ombudsman into phoenix activity in Australia estimated the annual cost of phoenixing at een $1.78 billion and $3.19 billion. The report defines phoenix activity as:

> *The deliberate and systematic liquidation of a corporate trading entity which occurs with the fraudulent or illegal intention to avoid tax and other liabilities, such as employee entitlements and continue the operation and profit taking of the business through another trading entity.*

It estimated that the annual cost of illegal phoenix restructures in Australia is:

- Up to $655 million for employees
- Up to $1.93 billion for businesses, as a result of phoenix companies not paying for goods and services and
- Around $600 million in unpaid tax

ASIC, the ATO and 11 other government agencies now have task forces that seek to identify and prosecute parties for illegal phoenix sales.

DIRECTORS BANNED FOR PHOENIX BEHAVIOUR

In 2010, ASIC banned 70 company directors from managing companies for insolvency and phoenix-related offences, according to its annual report.

It's important to note that all 70 directors banned by ASIC chose to sell their company's assets before a liquidator was appointed. By undertaking a sale of the company's assets on their own, even with the assistance of a turnaround specialist, accountant or solicitor, the directors exposed themselves to prosecution by ASIC for illegal phoenix-related activity.

Most critically, this risk could have been eliminated if the directors had chosen to engage a liquidator to facilitate the sale of their assets to a new company. When a liquidator is engaged to undertake the sale of a company's assets, the risk of the sale being below market value and therefore an illegal phoenix sale passes from the director to the liquidator. The liquidator has a fiduciary and statutory obligation to avoid an illegal phoenix sale.

ASIC's 2010 annual report also made clear that ASIC will continue to prosecute directors who fail to sell assets at market value, and their legal and accounting advisers.

In 2010 the Supreme Court of NSW found that eight directors of unrelated companies acted in breach of the Corporations Act and engaged in illegal phoenix activity. All the directors had independently sought advice from a lawyer who specialises in insolvency and were banned from managing corporations for a total of 22 years. This is the first time ASIC has successfully taken action against a solicitor for involvement in facilitating illegal phoenix behaviour.

Our submission to the Government's options paper and the Senate's Inquiry also highlighted the clear distinction between the illegal phoenix sale of assets to related parties for less than market value and the legally sound sale of an insolvent company's assets to a director or related party at market value.

In Australia a director or shareholder of a failed company is not prohibited from buying the assets of the insolvent company and starting again. But the director or shareholder must be careful how this sale is undertaken. Get the sale wrong and the director will be party to an illegal phoenix sale. Get it right and the director can start again and not be responsible for the insolvent company's debts, including any tax debt. But creditors' interests must be protected and directors must ensure creditors receive the best possible return.

The critical question here is: what is the market value of the business? ASIC and creditors will typically argue that market value is the "going concern value" of a business which includes a premium calculated by an open and free market assessment of its intangible value. This can only be objectively calculated after a comprehensive public sales campaign.

Some turnaround "experts" argue that market value is merely the auction value, or auction value less auction costs, or even auction value less employee entitlements. Some of these valuation techniques are more valid than others, but the bottom line is that there is no hard and fast rule to determine market value - it changes based on the facts and each

company's circumstances. Remember, however, that if you want to avoid a clash with ASIC, creditors or a liquidator, the best way to determine market value is to put the business on the market via a liquidator who has a statutory obl igation to sell at market value.

9. UNQUALIFIED AND QUALIFIED ASSISTANCE

In the past few years, the pre-insolvency expert has become an influential new player at the smaller end of the insolvency market.

There are exceptions, but pre-insolvency advisors are generally experts at marketing, not insolvency. Almost none have any insolvency qualifications.

It takes about seven to 10 years to become qualified as a liquidator. The partners at Crouch Amirbeaggi have almost 25 years of insolvency experience.

Pre-insolvency advisers often know enough to give the appearance of being an expert, but their experience and insolvency skill will be grossly inadequate compared to those of a qualified and experienced liquidator.

We have worked with some excellent, albeit unqualified, pre-insolvency advisers. But we have also seen unqualified pre-insolvency advisers act with great incompetence and charge large sums of money for their services.

We strongly recommend that all directors take control of the rescue process and do the research to ensure they understand the solutions offered and the background of their advisers. Make sure you know where your money is being spent and how much each adviser will be paid. It's not uncommon for a pre-insolvency adviser to charge up to $30,000 for liquidation advice then pay $10,000 to the liquidator who actually performs the task of winding up a company.

We urge all directors to be sceptical of any turnaround expert who requests a large introduction or consulting fee up front. The recent Federal Government Senate Report into Insolvency clearly states most professionals in the insolvency industry work on a scale of fees based on an hourly rate.

There are no shortcuts or magic solutions. If directors have breached their obligations, there's nothing a pre-insolvency adviser can do to save them from prosecution by ASIC, creditors, the Courts or a liquidator for misconduct, if it is viable and in the interests of creditors.

We cannot rectify a director's mistakes, but we can facilitate the formal or informal restructure of an insolvent business, including the sale of an insolvent business back to the director – which can give the director a second chance to run their business again so that they can afford to pay for any past breaches, if they are prosecuted.

OUR CONTRIBUTION TO PRE PACK REFORMS

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ril 2016, the Chairman of the Federal Government's Senate Inquiry into Insolvency, Senator John Williams provided ollowing endorsement of Crouch Amirbeaggi:

> *There is no doubt that liquidators Nicholas Crouch and Shabnam Amirbeaggi have made a valuable contribution to improving Australian insolvency practice for the benefit of the Australian community and empowering the regulator*

For over 6 years we served as an informal adviser to Senator Williams. Throughout this time we constantly lobbied for the Senator to ensure his law reforms will include an amendment to the Corporations Act that empowers creditors to replace a liquidator via a meeting of creditors instead of the very expensive and rarely used Court process.
This power ensures liquidators are accountable to creditors and offers a high degree of self-regulation that assists ASIC in its compliance work.

The Insolvency Law Reform Bill 2015, introduced this reform. The Government's Hansard reflects the Bill was heavily based upon Senator Williams Senate Enquiry Report.

Rightly or wrongly we claim a lot of credit for the implementation of this amendment (Around the office we call it "the Crouch Amirbeaggi Amendment").

In 2015, the Federal Government's Productivity Commission undertook the most comprehensive review of insolvency industry in the past 20 years. The Productivity Commission stated:

Crouch Amirbeaggi suggested an Australian hybrid model [for restructuring insolvent companies] that could avoids costs, assuage creditors' concerns and presents small to medium enterprises with a genuine option for restructure.
The Commission made 13 recommendations to reform corporate insolvency law and practice in Australia. 3 of the 13 recommendations were directly adopted from the Crouch Amirbeaggi submissions.

Recommendation 15.7 invites ASIC to do what Crouch Amirbeaggi had solely lobbied for during the previous 5 years, that ASIC should introduce a Regulatory Guide on prepacks to assist small business owners who cannot afford to use a VA to save their insolvent small business.

Crouch Amirbeaggi are disappointed that we were the lone voice on this idea but we are proud that our practice and reforms were acknowledged as some of the best in Australia. For a small firm, our contribution to insolvency reform and best practice is truly exceptional.

We think this verifies our claim that we are the best and most innovative small insolvency firm in Australia that is focused on saving small businesses from insolvency events.

We have invested an enormous amount of time into pursuing statutory reform. We hope improved industry practices and a cost effective framework that facilitates the restructure of a small insolvent company is our legacy.

Crouch Amirbeaggi was the first insolvency firm in the country to release ASIC statistics that show only 4 per cent of companies under a formal insolvency administration will successfully restructure by using the Voluntary Administration ('VA') framework. It's an awful fact that only 4% of the 10,000 companies that get into trouble each year will be saved using a VA.

Crouch Amirbeaggi were also the first firm in the country to highlight this failure rate and compare it to the UK pre-packs process which have a 96% success rate of preserving existing employee jobs.

11. ANNEXURE A

PRE-PACK LAW RELEVANT LEGISLATION

Some of the legislation that should be considered prior to implementing a pre-pack.

CORPORATIONS ACT

Voidable transactions (s 588FE) [uncommercial transactions (s 588FB) insolvent transactions (s 588FC) unreasonable director-related transactions (s 588FDA)]

Director's duty to prevent insolvent trading by company (s 588G) via an uncommercial transaction (s 588FB or s 588G1A)

Offences by officers of certain companies (s 590): failing to disclose property of the company, improper disposition or fraudulent concealment of property, or the concealment of debts (s 590)

Incurring of certain debts fraudulent conduct (s 592)

Frauds by officers (s 596).

Entering into agreements or transactions to avoid employee entitlements (s 596AB) [person who contravenes s 596AB liable to compensate for loss (s 596AC)]

Order against person concerned with corporation (s 598)

Court power of disqualification – insolvency and non-payment of debts (s 206D)

Directors' and officers' duties: duty of care and diligence (s 180)

Duty to exercise powers and discharge duties in good faith in the best interests of the corporation and for a proper purpose (s 181)

Duty to not use position improperly to gain an advantage for oneself or someone else, or to cause detriment to the company (s 182)

Duty to not use information improperly to gain an advantage for oneself or someone else, or to cause detriment to the company (s 183).

Court power of disqualification contravention of civil penalty provision (s 206C)

Court power of disqualification insolvency and non-payment of debts (s 206D)

Compensation orders: a Court may order a person to compensate a corporation or registered scheme for damage suffered by the corporation or scheme if that person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme and damage resulted from the contravention (s 1317H)

Court ordered pecuniary penalties where a contravention materially prejudices the interests of the corporation or scheme, or its members or materially prejudices the corporation's ability to pay its creditors or is serious (s 1317G)

ASIC may apply for a declaration of contravention, a pecuniary penalty order or a compensation order (s 1317J)

Criminal breach of directors' duties (s 184)

Liability of the adviser as an accessory to directors' duty breaches (s 79)

Breaches of the company's obligation to correctly record and explain transactions and the financial position and performance of the company (s 286)

Falsification of books (s 1307)

A court may set aside a resolution where the outcome of voting at a creditors' meeting was determined by a related entity (s 600A).

TAX ADMINISTRATION ACT

Failure to comply with requirements under taxation law (s 8C)

Failure to answer questions when attending before the Commissioner or another person pursuant to a taxation law (s 8D)

Making false or misleading statements to a taxation officer (s 8K) or recklessly making false or misleading statements (s 8N)

Incorrectly keeping records (s 8L) or recklessly incorrectly keeping records (s8Q)

Incorrectly keeping records with intention of deceiving or misleading (s 8T)

Falsifying or concealing identity with intention of deceiving or misleading (s 8U)

Directors and officers are liable for taxation offences committed by the company (s 8Y). Note that from 29th June 2012, amendments to s 8Y extended the director penalty notice regime (DPN) to make directors personally liable for their company's unpaid superannuation guarantee charge (SGC) and pay as you go (PAYG) withholding amounts. They also limit the circumstances in which directors can discharge a director penalty by placing their company into VA or liquidation. The measures were contained in the Tax Laws Amendment (2012 Measures No.2) Act 2012 (Cth).

CRIMINAL CODE ACT 1995 (CTH)

Dishonestly obtaining Commonwealth property (s 134.1(1))

Obtaining financial advantage by deception (s 134.2(1))

Dishonestly causing a loss to the Commonwealth (s 135.4(3))

CONCLUSION

Our pre-pack model was developed in 2011. It is Australia's cheapest, most progressive method of saving a small business from insolvency.

We encourage you to use it to save your business, and are happy to answer any questions you might have about pre-packs.

DO YOU NEED HELP?

We invite you to give us a call, all initial discussions are free of cost or obligation. Talk to our in-house liquidators, bankruptcy trustees, lawyers or accountants about your circumstances and options.