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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8A**

**AUSTRALIA**

This is the **summative (formal) assessment** for **Module 8A** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 8A**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

**INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question (where this must be done is indicated under each question).

2. All assessments must be **submitted electronically in MS Word format**, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – please do not change the document settings in any way. **DO NOT submit your assessment in PDF format** as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to each question. More often than not, one fact / statement will earn one mark, but it is also possible that half marks are awarded (this should be clear from the context of the question, or in the context of the answer).

4. You must save this document using the following format: **[studentID.assessment8A]**. An example would be as follows 202223-336.assessment8A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see paragraph 7 of the Course Handbook, specifically the information dealing with plagiarism and dishonesty in the submission of assessments. **Please note that plagiarism includes copying text from the guidance text and pasting it into your assessment as your answer**.

6.The final time and date for the submission of this assessment is **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **10 pages**.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

**Select the correct answer:**

Which of the following processes require the company to be solvent?

1. Members’ voluntary liquidation.
2. Creditors’ voluntary liquidation.
3. Court-ordered liquidation.
4. Simplified liquidation process.

**Question 1.2**

Which of the following **is not** a collective insolvency process?

1. Court-ordered liquidation.
2. Bankruptcy.
3. Private receivership.
4. Creditors’ voluntary liquidation.

**Question 1.3**

**Select the correct answer:**

Which of the following insolvency procedures **requires** court involvement?

1. Creditors’ scheme of arrangement.
2. Deed of company arrangement.
3. Creditors’ voluntary liquidation.
4. Voluntary administration.
5. Small company restructuring.

**Question 1.4**

**Select the correct answer:**

John Smith has an annual after-tax salary of AUD 120,000. He currently owes AUD 20,000 to Jack’s Tyres Pty Ltd and has an AUD 800,000 secured loan from his bank. Which of these restructuring processes is John **eligible** for?

1. A debt agreement under Part IX.
2. A voluntary administration.
3. A personal insolvency agreement under Part X.
4. A deed of company arrangement.

**Question 1.5**

**Select the correct answer:**

Stacey Lee runs a lawn-mowing business. Due to financial difficulties, she is unable to pay her trade creditors and has been declared bankrupt. Which of the following **is not** “divisible property” in her bankruptcy?

1. Wages earned by Stacey.
2. Stacey’s lawn mower (valued at AUD 2,000).
3. Choses in action relating to the Stacey’s assets.
4. Stacey’s family home.
5. Stacey’s collection of fine art (valued at AUD 50,000).

**Question 1.6**

Which of the following claims **are not provable** in a liquidation?

1. Future debts.
2. Contingent claims.
3. Penalties or fines imposed by a court in respect of an offence against a law.
4. Claims for damages for personal injury.

**Question 1.7**

**Select the correct answer:**

A deregistered company can be reinstated by ASIC where –

1. the directors unanimously vote in favour of reinstatement.
2. the liquidator becomes aware of assets in the company’s possession which were not distributed during the liquidation.
3. a court orders its reinstatement to enable legal proceedings to be pursued against it.
4. the Australian Taxation Office requests that it be reinstated due to outstanding tax liabilities.

**Question 1.8**

**Select the correct answer:**

A receiver –

1. is an agent of the secured creditors of the company.
2. owes a duty of care to unsecured creditors.
3. is an agent of the secured creditor, but prioritises the interests of the company.
4. is an agent of the company, until the appointment of a liquidator to the company.
5. is required to meet the priority claims of employees out of assets subject to a non-circulating security interest.

**Question 1.9**

**Select the correct answer:**

Australia has excluded from the definition of “laws relating to insolvency” for the purposes of Article 1 of the Model Law the following parts of the Corporations Act the part dealing with –

1. schemes of arrangement.
2. windings up of companies by the court on grounds of insolvency.
3. taxes and penalties payable to foreign revenue creditors.
4. the supervision of voluntary administrators.
5. receivers, and other controllers, of property of a corporation.

**Question 1.10**

**Select the correct answer:**

The small company restructuring process is available for companies which –

1. have total liabilities not exceeding AUD 500,000.
2. have undergone restructuring proceedings in the last seven years.
3. have fewer than five directors.
4. have total liabilities not exceeding AUD 1 million.
5. all of the above*.*

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 3 marks]**

Name the five types of voidable transactions that can be avoided by a liquidator on application to the court, and explain whether it is a complete defence to each of these types of voidable transactions if the defendant proves that they were not aware that the company was insolvent at the time they entered into the transactions.

Unfair preference

Uncommercial transactions

Unreasonable director-related transactions

Unfair loans

Circulating security interests (in limited circumstances)

**Question 2.2 [maximum 3 marks]**

How does a court determine the scope of the stay in relation to a corporate debtor under Australia’s implementation of Article 20 of the Model Law?

The Court will consider what the “the case requires”, i.e. whether the case requires the broader voluntary administration stay which affects secured creditors, or the standard liquidation stay that affects only unsecured creditors. It is not a question of discretion but rather which stay should apply according to the nature of the proceeding. Where the foreign proceeding is clearly a business rescue procedure, the former will be more appropriate. Where it is a case of foreign proceedings that are more analogous to liquidations, the latter will be more appropriate.

**Question 2.3 [maximum 4 marks]**

What are the differences between a voluntary administration followed by a Deed of Company Arrangement and a small company restructuring?

These are 2 different mechanisms aimed at providing distressed companies with options for restricting and resolving their financial difficulties.

The first difference is the eligibility criteria which applies only to small company restructuring. Small company restructuring is specifically designed for eligible small businesses. To qualify, the company must have:

* total liabilities not exceeding AUD 1 million
* no current director or a former director in the past 1 year which has been director of another company that has been under restructuring or the subject of a simplified liquidation process
* and, not itself been under restricting or the subject of a simplified liquidation process within 7 years

Another difference is that under the DOCA regime, an independent voluntary administrator is appointed to take control of the company’s affairs. Under small company restructuring, it is a restructuring practitioner who is appointed instead.

Another difference is the involvement of creditors. Under the DOCA, there is a need for meetings of creditors, and at the 2nd meeting, the creditors have to vote on a resolution whether to execute and implement the DOCA set out in the voluntary administrator’s statement to them, that the administration should end, or that the company should be wound up. This will be passed if the majority of creditors agree. Under small company restructuring, while the restructuring practitioner will give creditors a copy of the restructuring plan and a creditor may dispute its admissible debts or claims, they do not get to vote on the restructuring plan.

Another difference is the effect of the DOCA/restructuring plan (as is the case in each). A DOCA is binding in all creditors to the extent their claims arose on or before the time nominated in the DOCA, but for secured creditors, binding only to the extent that they either voted in favour of the DOCA or the court so offers. Under small company restructuring, the restructuring plan is binding on creditors to the extent of having an admissible debt or claim and secured creditors to the extent that the value of their security interest is less than their admissible debts or claims.

**QUESTION 3 (essay-type questions) [15 marks in total]**

“Australia’s insolvency and restructuring options have in the past been very creditor-friendly. However, recent reforms have turned Australia into a debtor-friendly jurisdiction.”

Critically discuss this statement and indicate whether you agree or disagree with it, providing reasons for your answer.

The statement suggests a shift in Australia's insolvency and restructuring landscape from being primarily creditor-friendly to becoming more debtor-friendly due to recent reforms. I agree with the statement to the extent that significant recent reforms appear to encourage a stronger corporate and business rescue culture and promote a move away from the existing dominance of creditors’ rights.

First, it would be fair to say that Australia’s insolvency regime for both individual and corporate debtors has historically been creditor-friendly, to the extent that its primary focus has been the protection of creditors’ rights to the exclusion of management and shareholders. For example:

* Secured creditors are entitled to enforce their rights during the bankruptcy process for an insolvent individual and the liquidation process for an insolvent company (as the case may be).
* Major creditors with security over the whole or substantially the whole of a company’s property remain entitled to appoint a receiver over the top of a voluntary administrator, subject only to certain time restrictions.
* Australia’s relatively broad insolvent trading and voidable transaction regimes allow liquidators to either recover certain sums from directors (usually via a director or officer insurance policy) or to clawback transactions, both for the benefit of creditors. In particular on the latter, there is no a need to prove improper conduct such as an intention to defeat creditors.

At the same time, there have been relatively recent reforms to the insolvency and bankruptcy regime which are designed to encourage the abovementioned stronger corporate and business rescue culture:

* For one, under the voluntary administration and DOCA regime, the primary goal is the maximisation of the chance of an insolvent company or as much as possible of its business to continue in existence under the terms of the DOCA.
* Second, as of 1 July 2018, creditors can be prevented from enforcing ipso factor contractual rights contingent only on a company’s insolvency or entry into external administration. The approach in personal insolvency is even stricter, with the Bankruptcy Act rendering ipso factor clauses void outright when a person becomes bankrupt.
* Third, as of 2017, there is now a ‘safe harbour’ in the abovementioned broad insolvent trading laws so that directors can continue to allow a company to incur debts with a view to implementing an informal restructuring attempt under the supervision of an appointed restructuring expert. This amendment provided directors with protection from personal liability for insolvent trading if they took steps to develop a restructuring plan that could lead to a better outcome for the company and its creditors. This change was aimed at encouraging directors to pursue restructuring options without the fear of personal liability.
* Fourth and in relation to bankruptcy, 2019 reforms doubled the divisible property limit and limited the period of debt agreements to 3 years (or 5 if the debtor owns their own home), and introduced further requirements that the total proposed payments under the debt agreement cannot exceed the debtor’s annual after-tax income by a prescribed percentage. These reforms would appear to provide greater protection for debtors by preventing them from too readily entering into a debt agreement which they cannot afford and increase their financial stress.

At the same time, it is not the case that *all* recent reforms are debtor-friendly to the exclusion of creditor rights. Below are some examples of recent creditor-friendly reforms:

* One example is the ‘simplified liquidation process’ introduced for small companies. The adaptations to the existing liquidation regime to make the process less complex for eligible companies, less costly and swifter, would tend to ensure greater returns for creditors (and also employees). On the other hand, it is not to say that such reforms are not *debtor­*-friendly as well insofar as they provided smaller companies with streamlined and cost-effective options for restructuring or winding up. These mechanisms aim to provide more accessible avenues for financially distressed companies to restructure and continue trading where possible.
* Another creditor-friendly example is the 2019-20 reforms to reduce the impact and incident of ‘phoenix company activity’ in Australia, which refers to the anti-avoidance practice involving asset-stripping, i.e. directors removing assets from a company and allowing debts to accumulate in the name of the company before placing it in liquidation and then recommencing the company’s business under a new name. To this end, amendments were introduced in 2019 to deter directors from attempting to avoid paying employees (creditors), by expanding the civil and criminal liability for such directors in relation to transactions with the subjective intention of avoiding payment of outstanding employee entitlements and also to capture transactions entered into which are reasonably likely to prevent or significantly reduce the recovery of employee entitlements, and also by giving the court a power to make an ‘employee entitlement contribution order’ against a parent company or another entity which has benefitted from the services of the employees of a company which is being liquidated where it is just and equitable to do so. Further amendments were introduced in 2020 to impose direct liability on directors who ‘phoenix’ companies.
* A further creditor-friendly example is the new voidable transactions provision which has been introduced into the Corporations Act to enable liquidators to recover a ‘creditor defeating disposition’, defined as a disposition of company property which has the effect of preventing, hindering or significantly delaying the property becoming available for creditors in the event of a winding up, irrespective of intention and subject only to the transaction occurring during the period of the company’s insolvency or causing it, or occurring during the 12-months before the commencement of external administration (provided such administration was a direct or indirect result of the disposition). Directors will also face personal liability if they fail to prevent the company from entering into such a disposition and the director knows, ought to have known or was reckless as to the result of the disposition. Other persons such as pre-insolvency advisors and related entitles may also be liable for procuring, inciting, inducing or encouraging a company to make a creditor-defeating transfer of company assets.

Hence in my view, it would be overly simplistic to characterise Australia's insolvency and restructuring environment as purely either creditor- or debtor-friendly. The reforms aim to strike a balance between the interests of debtors and creditors, recognising the importance of preserving viable businesses while also ensuring fair treatment for creditors. To characterise them as either one or the other overlooks the nuanced nature of the reforms and the ongoing importance of creditor rights and protections within the framework.

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

**Question 4.1 [maximum 8 marks]**

OzBling Pty Ltd (OzBling), a company incorporated in the fictional country of Florin, sells jewellery containing Australian native gems and crystals. The jewellery is manufactured in Australia by NewGems Pty Ltd (NewGems), an Australian-incorporated wholly-owned subsidiary of OzBling.

OzBling has offices in both Sydney and in Florin. Its factories are only in Sydney. OzBling regularly sells its jewellery all over the world, with orders received in Florin and shipped from the Sydney factories. OzBling and NewGems share a board of directors, made up of five Australians and one Florinean. OzBling employs 50 staff: 25 in Sydney and 25 in Florin. OzBling’s CEO is an Australian, but she is resident in Florin. OzBling’s CFO is an Australian, resident in Australia.

OzBling is insolvent. NewGems, however, remains solvent.

A liquidator has been appointed to OzBling in Florin. He applies to the Federal Court of Australia for recognition of the Florinean liquidation as a foreign main proceeding under the Cross-Border Insolvency Act 2008, and for orders entrusting OzBling’s assets (including OzBling’s shares in NewGem which are worth AUD 20 million) to him, so that he can realise them for the benefit of creditors in the Florinean liquidation.

OzBling owes AUD 12 million in taxes in Australia, payable to the Australian Taxation Office (ATO). Assume that revenue creditors such as the ATO are not entitled to prove in the Florinean liquidation.

You are advising the ATO. What should the ATO do to protect or improve its position?

First, I would advise the ATO to object to the recognition of the Florinean liquidation as the main foreign proceeding under the Cross-Border Insolvency Act 2008 (CBIA). I would base the objection on the assertion that, notwithstanding OzBling is a Florinean-incorporated company, its COMI is in Australia given the significant assets, operations and management presence therein. Per *Ackers v Saad Investments*, the COMI is to be determined having regard to the objectively ascertainable factors of the debtor which are noted above.

Second, even if the Florin proceedings were recognised as the foreign main proceedings, I would advise the ATO to restrain the intended entrustment of AUD 20 million to the Florinean liquidator. In so doing, I would rely on the decision in *Ackers v Deputy Commissioner of Taxation*, which similarly concerned an intended remittance of AUD 7 million from Australia to Cayman. The Cayman proceedings had been recognised as the foreign main proceedings in Australia. Having said that, the court modified the recognition orders to give leave to the Deputy Commissioner to enforce its claim in Australia, expressly for the purpose of recovering an amount up to the *pari passu* amount that the ATO would have received if they were entitled to prove for the tax debts as an unsecured creditor in the foreign main proceeding. This decision was upheld on appeal before the Full Court, which found that the modification of the recognition order was an appropriate way to ensure that the interest of the ATO as a creditor was adequately protected. This is in line with the principle that tax debts are given precedence over claims by unsecured creditors in insolvency proceedings, and also the principle under Article 22 of the Model law that the court must be satisfied that the interests of creditors are adequately protected when granting relief under Article 19.

Third, I would also advise the ATO to seek security from the foreign representative, recoverable only on an application under Article 18, or to request the court to only make a stay order for a certain fixed period and to require the foreign representative at regular intervals to report to the court to justify each extension, failing which the stay would be vacated automatically. This will protect ATO’s position in the chance that the foreign proceedings in Florin come to an end and the foreign representative no longer has control of or represents the company, and is no longer obliged to perform its obligations to inform the Australian court of the end of the foreign proceedings.

**Question 4.2 [maximum 7 marks]**

CopperTech Australia Pty Ltd (CT) is a company incorporated in Australia. It is in the business of recycling copper waste in Australia and selling the recycled copper. All of the shares in CT are owned by its parent company, CopperTech Group Ltd (CTG), also incorporated in Australia. The same board of directors controls both CT and CTG.

CT operated a copper recycling plant near Sydney, Australia as a joint venture with Aussie Metals Refinery Pty Ltd (AMR). The joint venture proved to be unprofitable, and the plant ceased operations in mid-2022.

CT’s major remaining asset is a second recycling plant that it operates near Perth, Western Australia. This plant has only been in operation for one year. The funding for the Perth plant has been provided by a major shareholder of CTG as an unsecured loan for AUD 50 million. The loan agreement provides that the loan is repayable by monthly instalments over a term of 10 years with the first payment due at the end of 2023. The loan agreement also provides that the loan becomes automatically due and payable in full if CT enters into any formal insolvency or restructuring process in Australia.

CT also owns three large trucks that transport waste copper to the Perth recycling plant and transport recycled copper to CT’s customers. Those trucks were purchased using a AUD 5 million loan from the Commonwealth Bank of Australia (CBA). That loan is secured by mortgages over the three trucks. The mortgages are not registered on the Personal Property Securities Register.

In July 2021, AMR commenced proceedings against CT in the Supreme Court of New South Wales for damages in respect of the failed joint venture. On 1 October 2021, the Supreme Court found in favour of AMR, ordering that CT pay AUD 4.1 million in damages to AMR.

Between October 2021 and October 2022, CT continued to trade, incurring debts to trade creditors as well as borrowing AUD 6 million from its parent company CTG. It made only a small profit from its Perth recycling plant.

A competitor has recently approached CT with an attractive offer to purchase the Perth recycling plant.

In October 2023, you are called in to advise the board of directors of CTG and CT about the financial predicament of CT. The board tells you that CT has never earned enough from its second recycling plant to meet the judgment debt and to start repaying CBA at the end of 2023. The board also tells you that there is no more funding available for CT’s operations, and that they have exhausted all possibilities for refinancing CT’s debts.

What do you advise the board to do about CT? What are the main issues that the board of CTG and CT should be aware of in light of the facts set out above?

First, I would advise the board to conduct a thorough assessment of CT's financial position, including its liabilities, assets, cash flow, and ability to meet its obligations. This assessment should consider the outstanding judgment debt owed to AMR, the repayment obligations to the CBA, and the inability to generate sufficient profits from the Perth recycling plant. Given that CT continues to trade and incur debts to trade creditors, I would highlight to the board that Australia has a broad insolvent trading liability regime, which allows a liquidator to recover substantial sums from directors where the directors have allowed a company to incur debts whilst insolvent. Based on the facts instructed, the directors may be exposed to risk under this regime as there are no reasonable grounds to expect solvency (bearing in mind that the Perth plant generates only modest profits).

Should directors wish to continue to allow CT to trade and in the course thereof incur additional debt, I would advise them to consider the safe harbour regime which allows directors to incur debts with a view to implementing an informal restructuring attempt. I would seek further instructions on whether the directors have developed or can develop courses of action which are reasonably likely to lead to a better outcome for the company, i.e. than the immediate appointment of an administrator or liquidator. In particular, there will be a need to ensure that the directors are properly informed of the company’s financial position, have taken steps to prevent misconduct by CT’s officers/employees and to ensure CT is keeping appropriate financial records, have obtained advice from a qualified expert that a restructuring plan should be adopted and is likely to lead to a better outcome, and have proceeded to develop and implement the restricting plan in consultation with such expert. In the meantime, I would advise the board that CT needs to continue to pay all employee entitlements as and when they fall due and to comply with all tax reporting obligations. I would note that the safe harbour exception only applies to debts incurred in connection with the above proposed course of action.

Second, given CT's financial predicament and inability to repay debts or operational expenses, the board should also explore restructuring options to address the company's financial distress. This may include negotiating with creditors, seeking a moratorium on debt payments, or proposing a voluntary administration followed by a DOCA with creditors.

Third, since a competitor has approached CT with an attractive offer to purchase the Perth recycling plant, the board should seriously consider selling this asset to generate funds to repay creditors, including AMR and CBA. However, they must carefully evaluate the offer to ensure it maximises value for CT's stakeholders. Otherwise, the transaction may subsequently be voidable as an undervalued transaction in the event that CT subsequently enters liquidation.

Fourth, the board should address the outstanding legal judgment debt owed to AMR. Should CT enter voluntary liquidation as discussed above, this would have the advantage of triggering a moratorium over enforcement action against CT’s assets (s. 471B, Corporations Act (“CA”)) as the judgment debtor is an unsecured one. By contrast, the moratorium will have no effect on the security interest over the trucks in favour of the CBA. Under s. 471C of the CA, secured creditors such as CBA are permitted to enforce any rights they have under any valid security interest. The caveat to this is the fact that the mortgages over the trucks have not been registered with the PPSR, which means that other security interests will take priority over the unregistered interest and this may result in a loss of the security interest on commencement external administration.

Finally, as regards the loan agreement with the major shareholder, I would note that since 1 July 2018, creditors are prevented from relying on ipso factor contractual clauses to terminate a contract with a company solely because it has entered voluntary administration (Corporations Act, s. 451E). However, the shareholder is still able to obtain a court order permitting enforcement should it be in the interests of justice (Corporations Act, s. 451F).

**\* End of Assessment \***