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.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 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 the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentnumber.assessment8A]**. An example would be something along the following lines: 202021IFU-314.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 "studentnumber" 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 the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. 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 **7 pages**.

ANSWER ALL THE QUESTIONS

Commented [DB1]: 36 out of 50 = 72% Well done!

QUESTION 1 (multiple-choice questions) [10 marks in total] 9/10

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:

If a creditor is dissatisfied with the bankruptcy trustee or liquidator's decision in respect of its proof of debt, the creditor may:

(a) apply to AFSA or ASIC for the decision to be reversed or varied.

(b) apply to the bankruptcy trustee or liquidator for the decision to be reversed or varied.

(c) bring court proceedings for a money judgment in respect of the debt.

(d) apply to the court for the decision to be reversed or varied.

Question 1.2

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

(a) Receivership.

(b) Liquidation.

(c) Deed of company arrangement.

(d) Voluntary administration.

Question 1.3

Select the correct answer:

The purpose of the Assetless Administration Fund is to:

(a) finance preliminary investigations and reports by AFSA to trustees into the bankruptcies of individuals with few or no assets, to assist trustees in deciding whether to commence enforcement action.

(b) finance preliminary investigations and reports by ASIC to liquidators into the failure of companies with few or no assets, to assist liquidators in deciding whether to commence enforcement action.

(c) finance preliminary investigations and reports to AFSA by trustees into the bankruptcies of individuals with few or no assets, to assist AFSA in deciding whether to commence enforcement action.

(d) finance preliminary investigations and reports to ASIC by liquidators into the failure of companies with few or no assets, to assist ASIC in deciding whether to commence enforcement action.

Question 1.4

Select the correct answer:

Newco Pty Ltd has 3 employees and an annual turnover of AUD 950,000. It currently owes AUD 300,000 to its trade creditors, and it has a AUD 800,000 secured loan from its bank. Which of these restructuring processes is Newco **ineligible** for?

(a) A voluntary administration followed by a deed of company arrangement.

(b) An informal restructuring with the agreement of creditors.

(c) A small business restructuring plan.

(d) A deed of company arrangement.

Question 1.5

Select the correct answer:

Which of the following is **not** "divisible property" in a bankruptcy?

(a) Wages earned by the bankrupt.

(b) Fine art.

(c) Choses in action relating to the debtors' assets.

(d) The bankrupt's family home.

(e) Superannuation funds.

Question 1.6

Which of the following **is not** a relevant period for the entry into a transaction which constitutes an unfair preference in a liquidation?

(a) The six-month period ending on the "relation back day".

(b) The one-year period ending on the relation back day where the creditor had reasonable grounds for suspecting that the company was insolvent.

(c) The four-year period ending on the relation back day where the creditor is a related entity of the company.

(d) The 10-year period ending on the relation back day where the transaction was entered into for a purpose that included defeating, delaying or interfering with the rights of creditors in the event of insolvency.

(e) After the relation back day but on or before the liquidator was appointed.

Question 1.7

Select the correct answer:

A receiver:

(a) is an agent of the secured creditor that appointed the receiver.

(b) owes a duty of care to unsecured creditors.

(c) is an agent of the company and not of the secured creditor that appointed the receiver.

(d) is an agent of the company until the appointment of a liquidator to the company.

(e) is required to meet the priority claims of employees out of assets subject to a non-circulating security interest.

Question 1.8

Select the correct answer:

A voluntary administrator must convene and hold a first meeting of creditors within how many business days of his appointment?

(a) 3 business days.

(b) 8 business days.

(c) 12 business days.

(d) 24 business days.

(e) 45 business days.

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:

(a) The part dealing with schemes of arrangement.

(b) The part dealing with windings up of companies by the court on grounds of insolvency.

(c) The part dealing with taxes and penalties payable to foreign revenue creditors.

(d) The part dealing with the supervision of voluntary administrators.

(e) The part dealing with receivers, and other controllers, of property of the corporation.

Question 1.10

Select the correct answer:

Laws regarding the following came into effect on 1 January 2021:

(a) an *ipso facto* moratorium in voluntary administrations and liquidations.

(b) simplified restructuring and liquidation regimes for small companies.

(c) reducing the default bankruptcy period from three years to one year.

(d) a safe harbour from insolvent trading liability.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks] 3/3

Name the three types of voidable transactions that can be reversed by a bankruptcy trustee and describe the circumstances in which such a transaction will not be reversible.

[There are three types of voidable transaction provisions also known as clawback or anti-avoidance provisions in the Bankruptcy Act which allow the bankruptcy trustee to bring court proceedings to reverse the effect of:

a) undervalued transactions;

b) transfers to defeat creditors; or

c) preferential payments to creditors.

However in certain circumstances, such transactions will not be reversible such as
i) transactions which occurred during the relative back period but were transacted in good faith, in the ordinary course of business and in the absence of notice of a creditor's petition or debtor's petition, (s 123).
ii) Instances where the original transferee has since transferred the property to a third party and the third party received the property in good faith and for market value] (s 120(1)).

Excellent answer!

Question 2.2 [maximum 3 marks] 2.5/3

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?

[As per its Bankruptcy Legislation, Australia has specified the scope of the stay under Article 20 of the Model Law as being the same that would apply if the stay or suspension arose under:
a) the Bankruptcy Act; or

b) Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act,
as the case requires. Good.
Accordingly, in the scenario of an Australian court considering a recognition application in relation to a corporate debtor, it needs to consider what "the case requires", that is, whether the case requires the broader voluntary administration stay which affects secured creditors or the standard liquidation stay that affects only unsecured creditors. Give examples of the types of proceedings that are more appropriate for voluntary administration stays, vs proceedings that are more appropriate for standard liquidation stays. Rather than discretion, it is the nature of proceeding which determines which stay should apply (*Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 at [24]).

Good answer overall, but needed further discussion on the points above.

Question 2.3 [maximum 4 marks] 2.5/4

What is an *ipso facto* clause and what is the relevance of *ipso facto* clauses in liquidations?

[An ipso facto clause is a provision in an agreement which permits its termination (also permits the counter party to modify or repossess property) due to the Bankruptcy (Bankruptcy Act s 301), insolvency, or financial condition of a party (i.e. because the company has entered voluntary administration or because of the company's general financial position while it remains in voluntary administration (Corporations Act, s 451E).

Ipso facto clauses in contracts entered into prior to the restructuring cannot be enforced against the company until the restructuring ends. As of 1 July 2018, creditors are prevented from enforcing *ipso facto* contractual rights contingent only on a company's insolvency or entry into an external administration. Where a voluntary administrator wishes to maintain a pre-appointment contract, he or she will now be assisted by a statutory moratorium on the enforcement of *ipso facto* contractual rights by creditors. However, the *ipso facto* moratorium will not apply where a creditor seeks to enforce a contractual right on the independent basis that a company has not complied with a payment or performance obligation after it enters voluntary administration. There are specific exceptions to the *ipso facto* moratorium where the contract or arrangement under which the *ipso facto* rights arise is of a certain type, such as:
1. a derivatives contract;
2. a contract related to securities, securities financing, financial products, bonds, promissory notes or syndicated loans;
3. an underwriting contract;
4. a business or share sale agreement;
5. a factoring arrangement; or
6. some building and construction contracts. Good

A creditor is after 1st July 2018 prevented from relying on an *ipso facto* contractual clause to terminate a contract with the company solely because the company has entered voluntary administration or because of the company's general financial position while it remains in voluntary administration. It is subject to the creditor obtaining a court order permitting enforcement where it is in the interests of justice.] Good

Need to come back to the specific question asked – what is their relevance *in liquidations*? The answer is that the stay on the operation of *ipso facto* clauses only applies to restructurings (as you've identified above), so once a company is in liquidation, the *ipso facto* clause will operate and the liquidator will not be able to keep contracts with *ipso facto* clauses on foot. See Guidance Text, p 30.

QUESTION 3 (essay-type questions) [15 marks in total] 13/15

"Creditors' schemes of arrangement are costly and time-consuming and are an ineffective corporate rescue mechanism in Australia."

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

[There are three types of formal corporate rescue mechanisms in Australia:

1) voluntary administration, followed by the implementation of a DOCA (deed of company arrangement) under Part 5.3A of the Corporations Act;

2) a creditors' scheme of arrangement under Part 5.1 of the Corporations Act; or

3) for companies with liabilities of less than AUD 1 million, a restructuring process and restructuring plan under the new Part 5.3B of the Corporations Act which comes into effect on 1 January 2021.

These mechanisms are limited to companies registered under the Corporations Act.

In Australia a creditors' scheme of arrangement is a formal debt restructuring mechanism which involves a compromise or arrangement to vary the terms of debts or claims between the company and a creditor or class of creditors. Under the scheme of arrangement procedure in the Corporations Act, directors of the financially distressed company, generally prior to the onset of formal insolvency, enter into negotiations with the company's creditors in an effort to secure their support for a formal restructure of the company's debts and existing operations.

The procedure for implementing a creditors' scheme of arrangement is outlined in Part 5.1 of the Corporations Act 2001 and essentially involves the convening of a meeting of creditors to approve the scheme. If it appears to directors that there is a good level of support for the proposed scheme, particularly from major secured creditors and other key financiers and suppliers, the directors will then cause the company to make an initial application to the court for an order convening a meeting of all creditors to consider whether to approve the scheme. If creditors are proposed to be treated in fundamentally different ways under the scheme like where some creditors receive preferential treatment in the payment of their claims even though they are not secured and would not otherwise be entitled to priority in a liquidation, the court will require separate meetings of different classes of creditors to be convened. Provided requisite majority votes are obtained, the scheme proposal is then reviewed by the Court, which will sanction the scheme if satisfied it is fair and reasonable to creditors

There are certain prescribed matters which must be specifically disclosed to creditors in a proposed scheme document, including creditors' expected dividends under the scheme compared to a winding up, the extent and amount of creditors' claims and comprehensive information about the company's financial and other affairs.

Significantly, if the court orders a meeting of creditors to be convened, a resolution approving the scheme at the meeting subsequently held requires the support of:

1. a majority of creditors in fact present and voting at the meeting (whether in person or by proxy, attorney or corporate representative); and

2. 75 per cent of the total amount of the debts and claims of creditors present and voting at the meeting.

Those voting conditions apply to each separate class if multiple meetings of different classes of creditors are required, so that a scheme cannot proceed unless all classes of creditors vote in favour of it by the required majorities.

If the scheme is approved, a second court application is then required for the court to formally approve the scheme. The court will generally do so if there has been full disclosure of all material matters concerning the scheme to creditors, the meeting or meetings of creditors have been properly convened and there is no clear circumstance of unfairness or injustice.

If court approval is obtained, the scheme will be implemented in accordance with the specific terms of the scheme document, including by paying out creditors over time and completing the terms of any restructured debt facilities provided for in the scheme. An administrator of the scheme is not specifically required by the Corporations Act or by ASIC, although it will often be appropriate for an administrator to be appointed if the implementation of the scheme will occur over a protracted period.

Considering the question that Creditors' schemes of arrangement are costly and time-consuming and are an ineffective corporate rescue mechanism in Australia, I beg to disagree.

On a critical note, lets see the disadvantages of Creditors Scheme of Arrangement:-

1) A creditors' scheme of arrangement is a complex and costly process given the requirement for two court applications and possibly more if material circumstances arise which need to be brought to the attention of the court.

However in contrast, the voluntary administration/DOCA process does not require court approval and indeed may not involve the court at all if a voluntary or deed administrator does not apply to the court to seek directions at any stage and no creditors approach the court to challenge the conduct of the administrator or the terms of the DOCA.

2) The added complexity of a creditors' scheme of arrangement means that it will take a minimum of three months to be fully implemented, although in practice a time period of six months or more for implementation is quite common.

On the other hand, it is possible for a DOCA to be completed fairly quickly after the 25 to 30 business day voluntary administration period, depending on the nature of the arrangements proposed by the DOCA.

Nevertheless, a creditors' scheme of arrangement offers two significant advantages which cannot be achieved under a DOCA:

1) A successful scheme can bind dissenting secured creditors, but a DOCA generally only binds those secured creditors who vote in favor of it,
2) It can include the release of creditors' rights against third parties other than the company.
3) A scheme need only be voted on by those classes of creditors whose rights are affected by it, whereas a DOCA must be voted on and approved by all secured and unsecured creditors as one homogenous group; and
4) A DOCA is not generally able to include effective releases given by creditors in favor of third parties, whereas a scheme can

The aforementioned advantages permit a more innovative and a wider ranging corporate restructuring to be implemented under a creditors' scheme of arrangement than that

available under a DOCA.
Schemes of arrangement are becoming a more frequently used restructuring tool given the reach they can have, including on third parties and given the avoidance of any formal insolvency process. Good With the increase in the use of schemes there will also be a commensurate increase in judicial consideration of issues that need to be addressed in order to ensure schemes continue to be a useful, practical and workable solution for companies looking to restructure.

Considering this, following the Global Financial Crisis and in light of the increasing complexity of corporate and financial arrangements in general, there has been a increasing trend of creditors' schemes of arrangement in more recent years, with schemes used to effect some of Australia's largest and most high-profile corporate restructurings]

A good answer. Some additional points: DOCAs can be terminated by the Court, schemes have already been approved by the court so they provide greater certainty. Importantly, there is no moratorium in the lead up to a scheme, whereas there a broad moratorium during VA which allows breathing space while a DOCA is prepared.

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

Question 4.1 [maximum 9 marks] 4/9

Aussiebee Pty Ltd (Aussiebee), a company incorporated in the fictional country of Lyonesse, sells chocolates flavoured with Australian native plants. The chocolates are manufactured in Australia by NewYums Pty Ltd (NewYums), an Australian-incorporated wholly-owned subsidiary of Aussiebee.

Aussiebee has offices and warehouses in both Sydney and in Lyonesse. Aussiebee regularly sells its chocolates all over the world, from both its Lyonesse and its Sydney offices and warehouses. AussieBee and NewYums share a board of directors, made up of six Australians and one Lyonessian. Aussiebee employed 40 staff: 20 in Sydney and 20 in Lyonesse. Aussiebee's CEO is an Australian, but resident in Lyonesse. Aussiebee's CFO is an Australian, resident in Australia.

Aussiebee is insolvent. NewYums, however, remains solvent.

A liquidator has been appointed to Aussiebee in Lyonesse. She applies to the Federal Court of Australia for recognition of the Lyonessian liquidation as a foreign main proceeding, and for orders entrusting Aussiebee's assets (including Aussiebee's shares in NewYums which are worth AUD 20 million) to her, so that she can realise them for the benefit of creditors in the Lyonessian liquidation.

Aussiebee 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 Lyonessian liquidation.

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

[The facts of this case are similar to the case law as laid down in Ackers vs. Deputy Commissioner of Taxation
In 2010, the Federal Court in *Ackers (as joint foreign representative) v Saad Investments Company Limited (in official liquidation) (a company registered in the Cayman Islands) [2010] FCA 1221* made orders under the *Cross-Border Insolvency Act 2008* and the *UNCITRAL Model Law on Cross-Border Insolvency* recognising Saad's 'centre of main interests' as the Cayman Islands and that the winding-

up proceeding in the Grand Court of the Cayman Islands was the 'foreign main proceeding' . The effect of the orders would be to allow the whole amount of Saad's remaining Australian assets to be remitted to the Cayman Islands, as its centre of main interests, where the Commissioner of Taxation could not prove for any distribution from its estate.

The liquidators of Saad realised approximately AUD7 million from the sale of the company's Australian assets. They intended to have this money remitted to the Cayman Islands for distribution to the creditors proving in the liquidation. The Deputy Commissioner claimed he was a creditor in the amount of about AUD83 million, comprising a primary tax liability of AUD47 million arising from the sale of the Sunshine Gas shares and a liability for a penalty of AUD35 million. The difficulty for the Deputy Commissioner was that the Cayman Islands do not recognise foreign tax liabilities, so his proof was not accepted. If his proof had been accepted in full, he would have received a distribution of at least AUD16.6 million (at the return rate of 20 cents in the dollar).

The Deputy Commissioner applied to the Court to be permitted to proceed against the AUD7 million of funds available in Australia for the claimed tax and penalties. At first instance Rares J found in the Deputy Commissioner's favour and did not allow the funds to be remitted to the Cayman Islands. It was submitted that Article 22 of the UNCITRAL Model Law, allows the court to modify the effect of recognising a foreign winding up proceeding so as to ensure adequate protection of creditors' interests.

The liquidators appealed, arguing that the decision was contrary to the principle of universalism which underpinned the Model Law, treating a cross-border insolvency as a single process in the foreign main proceeding, with other courts assisting in that single proceeding.

On Appeal, as cited in Akers as a joint representative of Saad Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation *[2014] FCAFC 57*, Allsop CJ (with whom Robertson and Griffiths JJ agreed) dismissed the appeal. His Honour considered Art 21(2) of the Model Law to be key, which provides the Court should only grant leave allowing assets in the local jurisdiction to be turned over to the foreign main proceeding if satisfied that the interests of local creditors are adequately protected. His Honour noted that 'the sacrifice of the rights (or the value in the rights) of local creditors upon an altar of universalism may be to take the general informing notion of universalism too far', and said it may be more appropriate to describe the Model Law regime as '"modified universalism" for what such an appellation is worth' .

The above lengthy case summary seems to have been drawn from the web. Your time would have been better spent applying *Ackers v Saad* in detail to the facts in the problem question.

The decision is significant as it can be applied to the case of Aussiebee Pty Ltd as any Australian creditor who would otherwise be stripped of rights, or even the value of rights, by reason of recognition of a cross-border insolvency. The order provided as an example a debt which may be an unenforceable penalty in the centre of main interests. Allsop CJ's comments on protection of value of rights could also see local creditor protection extend when Australian law would provide a creditor with more than the *parri passu* otherwise available in the foreign proceeding. Correct.

In this case as stated above ATO has right over the assets of Aussiebee and apply to the Federal Court of Australia for protection of its rights as a local creditor

You also needed to consider COMI on the recognition application. The ATO should intervene on the recognition application, arguing that:

- The COMI of Aussiebee is Australia, not Lyonesse, and so the assets of Aussibee should not be entrusted to the Lyonessian liquidator.
    - *Ackers v Saad Investments* is the leading Australian decision on COMI. It followed and expressly adopted the principles in *Re Eurofoods IFSC Ltd* that COMI is to be determined having regard to the objectively ascertainable factors of the debtor.
    - Need to displace presumption that place of incorporation is COMI
    - Six of the seven directors are Australians
    - The CEO is Australian (although resident in Lyonesse)
    - The CFO is Australian and resident in Australia
    - Sells Australian product, manufactured by its subsidiary in Australia.
    - Do not know whether Aussiebee holds itself out to be an Australian-based company, but its name and its product seem to indicate that it does.]

Question 4.2 [maximum 6 marks] 2/6

Shipmin Pty Ltd (Shipmin) is a company incorporated in Australia. Shipmin owned two cargo ships, one valued at AUD 20 million, the other at AUD 15 million. About 3 months ago, Shipmin sold the AUD 20 million cargo ship and paid the full proceeds of AUD 20 million to its parent company Shipmax Ltd (Shipmax) to reduce Shipmin's intercompany debt to Shipmax. Shipmax is also incorporated in Australia and owns 100% of the shares in Shipmin.

Shipmin now owns only the one cargo ship with a value of AUD 15 million. Shipmin owes AUD 20 million to the Commonwealth Bank of Australia (CBA), which is secured by a mortgage over the remaining ship. The mortgage is not registered on the Personal Property Securities Register.

Shipmin's debt to CBA has been guaranteed by Shipmax. Shipmin owes Shipmax AUD 180 million in inter-company debt. Shipmin has no other creditors.

Shipmax has been placed into liquidation. Advise Shipmax's liquidator on the best way to bring the operations of Shipmin to an end and maximise the return to Shipmax from the assets of Shipmin.

[It is pertinent to note that Security interests may be granted over land or over any personal property, both tangible and intangible. Security interests should be registered either in the relevant state land registry (for mortgages) or on the national Personal Property Securities Register (PPSR) (for all other security interests). Failure to register a security interest will result in other security interests taking priority over the unregistered interest and may result in loss of a security interest on the commencement of an external administration or bankruptcy/ liquidation. Between registered security interests, those registered first take priority over later-registered security interests. Too general, the only relevant part is the part highlighted.

We have been informed that the mortgage over the ship is not registered in the Personal Property Securities Register and hence Commonwealth Bank of Australia's mortgage is more of a unsecured claim. On the commencement of a voluntary administration or liquidation, CBA's security interest will *vest in the company*, so CBA's claim will be an unsecured claim (not "more of a unsecured claim"). But good that you picked up on the point that the unregistered security will not survive an external administration. However the same has been guaranteed by Shipmax.

The Liquidator of Shipmax will have to file a claim against Shipmin for AUD180 million owed to it and Shipmin will come under liquidation. This is one possibility. It would be better if Shipmax used its powers as sole shareholder to have the directors of Shipmin pass a resolution placing the company into voluntary administration, or creditors voluntary liquidation. In such a scenario where multiple companies in a corporate group are being wound up by the same liquidator simultaneously, the Corporations Act makes provision for the liquidation of those companies to proceed on a pooled basis, either by

a) voluntary pooling, which occurs when, following a determination by the liquidator that liquidation should occur on a pooled basis, 75% of unsecured creditors by value and 50% of unsecured creditors by number of each of the companies in the proposed pooled group approve the liquidator's determination; or

b) court-ordered pooling, which occurs when, on the application of a liquidator, the court orders that it is just and equitable for liquidation to proceed on a pooled basis. What is the relevance of pooling on the facts of this case? Would it provide any benefit to Shipmax?

However, there is no provision in Australia for broader "contribution orders" of the kind seen in the United States under the substantive consolidation process, and New Zealand to be made by the court for the purpose of bringing a solvent group company into the pool where it is in the interests of justice to do so. While, legislation is shortly due to be passed by the Australian Senate to permit contribution orders to be made against a solvent group company in those circumstances to ensure additional funds are made available to pay employee entitlements, there will still not be any general mechanism for the court to make a pooling order to benefit all creditors of an insolvent company within a corporate group.] Not relevant.

The voluntary administration can then sell the ship to provide a return to unsecured creditors, or the creditors can vote to place Shipmin into a DOCA. Shipmax will carry any vote on value, as there are only two creditors and Shipmax holds the overwhelming majority of the debt.

However, note that a liquidation would be risky, because Shipmax may find itself the target of:

- a preference claim by the liquidator for the $20 million already repaid to Shipmax in the last 12 months. Shipmax as the parent company would have had knowledge of Shipmin's insolvency.
- creditor-defeating disposition claim (see Guidance Text, pp 75-76)

If Shipmax can get Shipmin into a DOCA whereby the remaining ship is sold and the proceeds paid equally to all unsecured creditors, Shipmax will receive most of the assets of Shipmin, as its unsecred debt to Shipmax ($200m) swamps the now-unsecured debt to CBA ($20m).