



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]: 41 out of 50 = 82% Well Done!

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

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] 0/3

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.

Unfair preferences; uncommercial transactions; and unreasonable director-related transactions.

Another party to an unfair preference or an uncommercial transaction (but not the other party to an unreasonable director-related transaction) may uphold the transaction if it can show that reversal of the transaction would materially prejudice a right or interest, and that they acted in good faith, being not aware of the insolvency or potential insolvency of the company (and no other reasonable person in their position would), and finally that they provided valuable consideration or altered their position in reliance on the transaction.

The question was about *personal bankruptcy*, not company liquidation.

Question 2.2 [maximum 3 marks] 2/3

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?

Australia's courts are required to consider what "the case requires" when considering a recognition application in relation to corporate debtor. Good. Needed to identify that this is specified in s 16 CBIA as being the same as would apply if the stay arose under Chapter 5 of the Corporations Act. That requires an analysis of the real purpose of the foreign proceeding to determine whether it is in the nature of a business rescue proceeding, or a more standard liquidation. Good. Could add that it is not an exercise of discretion, and reference *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 at [24]. The type of stay that the court may grant under Article 20 will depend on the outcome of that analysis, because a voluntary administration stay, of the type that would be applied in a business rescue proceeding, applies to secured creditors; whereas a standard liquidation stay will only affect unsecured creditors. Good.

Question 2.3 [maximum 4 marks] 3.5/4

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 a contract that allows one party to terminate or modify the contract upon the occurring of an insolvency-related event affecting the other party. **Need to have more detail about these insolvency events- e.g. upon a debtor's bankruptcy (s 301 Bankruptcy Act), or upon the company entering voluntary administration or because of the company's general financial position while it remains in voluntary administration (s 451E Corporations Act).**

In Australia, the trustee in bankruptcy has the benefit of an enforcement prohibition against such clauses being enforced. However, liquidators do not have that luxury except in one circumstance, that is where a voluntary administration or attempt to negotiate a creditors' **scheme of arrangement** immediately precedes a voluntary liquidation. **Good.** This moratorium took effect on 1 January 2021.

It is important to note however that whereas in personal bankruptcy, *ipso facto* clauses are void as against the trustee, in the liquidation scenario above only a moratorium against enforcement is provided – it does not render the provision void. **Exactly.**

QUESTION 3 (essay-type questions) [15 marks in total] 12/15

"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.

It has been said that creditors' schemes of arrangement are costly and time-consuming and are an ineffective corporate rescue mechanism in Australia. For the reasons that follow, the writer agrees with the above statement. A creditors' scheme of arrangement is one of the three types of formal corporate rescue available in Australia and, in the writer's view, it is the least effective.

The Corporations Act allows directors of a company that is in financial distress to negotiate with, and obtain support from, the company's creditors to enable the company to restructure its debts and operations. Whilst this gives clear advantages to a debtor company, in practice the process is costly, time-consuming and ineffective.

First, two court hearings are required before the scheme can become effective. The need for court intervention twice is both costly and time-consuming. Contrast this with voluntary administration, which can occur without any court involvement. **Good**

Secondly, the debtor company must undertake a comprehensive disclosure to its creditors in its proposed scheme documents, including advice as to what creditors would receive under the scheme as opposed to formal winding up of the company, and also substantial information about the company's financial position and its affairs. This process is time-consuming. **The same is true of a voluntary administrator's report addressing whether the creditors should approve a DOCA, so this is not really a point of distinction.**

Thirdly, if it looks like the scheme will be supported by creditors, the directors of company will then make their first application to court to approve the scheme. If under the scheme different creditors will be treated differently (which, it is submitted will often be the case), then the court

will require that separate meetings for each class of creditor be arranged. This is a further time-consuming process. **Good.**

Fourthly, if a scheme has been approved by its creditors, then a second court hearing will be convened for formal approval of the scheme. The court has the power to decline its approval if it considers that there has been a defect in the procedure such as a failure to fully disclose all material matters to creditors, or if the meetings of creditors have not been properly convened or if some aspect of unfairness or injustice would result from the court's approval of the scheme. If this occurs, further court hearings will be required. In this way, the scheme of arrangement process allows for a dissenting creditor to cause further delay and expense. **Good point.**

Fifthly, assuming the scheme is approved, then the scheme is carried out according to its terms. In all likelihood this meaning meeting obligations to creditors over a longer period than usual, and in the case of a lengthy scheme, an administrator is likely to be appointed, who's costs are to be paid by the company. Again, delays and costs become a feature of the scheme of arrangement. **Good points.**

Sixthly, a moratorium on the enforcement of *ipso facto* clauses applies (clauses that allow one party to end the contract upon the insolvency of the other) during both negotiation and implementation of a scheme. If the scheme is not implemented, then the company nevertheless gains the protection of this moratorium during the negotiation, which prejudices creditors' by delaying their ability to enforce their legitimate contractual rights. **This is true, but the same is true of a voluntary administration. And in a voluntary administration, there is also a broad stay on all creditor action.**

When all of this delay is added together, the reality is that creditors' schemes of arrangement take a minimum of three months to be fully implemented and commonly take six months or more. The reality is that the financial position of the company is likely to be very different 3-6 months after it commences negotiations with creditors. **Good point, although for large corporate groups, the major finance creditors will already have agreed to finance the company through to successful completion of a scheme, before the scheme is proposed to the court.** One wonders whether in many cases, the scheme ultimately fails and ends in the formal winding up of the debtor company. If that is the case, then not only is the scheme ineffective, but it also serves as an expensive and time-consuming way of depleting assets that would otherwise be available to creditors upon winding up. **These are good points that show that you have thought about the issues. But the reality for large corporate groups is that schemes can be worth the cost and delay because they are very flexible and they are approved by the court, so there is not the risk of them being set aside by the court in the way a DOCA might be set aside.**

One positive of the creditors' scheme of arrangement is that it is possible to bind parties other than the debtor company and its creditors. **Good** However, it is submitted that this positive feature does not outweigh the negatives described above.

I am impressed at the independent thought you have applied in writing your answer. You could have improved some of your points by comparing schemes with DOCAs.

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

Question 4.1 [maximum 9 marks] 9/9

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 Lyonesian. 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 Lyonesian 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 Lyonesian 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 Lyonesian liquidation.

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

Whereas there is a presumption in the MLCBI that a debtor's centre of main interests is the place of its registered office, the term is not defined in the MLCBI. In *Eurofood*, the ECJ held held that the presumption is capable of being rebutted by reference to criteria that are both objective and ascertainable by third parties. *Eurofoods test approved and adopted in Australia in Ackers v Saad Investments*.

In the case of Aussiebee, it is incorporated in Lyonesse. It is therefore assumed that its registered office is in Lyonesse, in which case a presumption arises that Lyonesse is Aussiebee's centre of main interests. However, we also know that Aussiebee has offices and warehouses in both Lyonesse and Australia, sells products from offices and warehouses in both countries, and employs an equal number of staff in each country. The majority of its board is Australian (6:1); its CEO is an Australian residing in Lyonesse, and its CFO is an Australia resident in Australia. In *Ackers v Saad*, Saad was incorporated in the Cayman Islands but, similar to Aussiebee, had a significant connection with Switzerland. For example, Saad's records and books were maintained by a Swiss company. In that case, the Federal Court of Australia held that Saad's centre of main interests remained in the Cayman Islands. It is doubtful that Aussiebee's centre of main interests is in Australia. From the information provided, it appears that Aussiebee has equal interests in both countries, and it is therefore unlikely that the presumption would be rebutted. The Lyonesian liquidation is therefore the foreign main proceeding. *Very good consideration of the COMI issue, well done. Many students completely overlooked this issue.*

It is therefore likely that LL's application to have the Lyonesian liquidation of Aussiebee recognised in Australia as a foreign main proceeding will succeed.

The ATO's claim for tax debt against Aussiebee cannot be proven in the Lyonesian liquidation. The question then is, what can the ATO do to protect or improve its decision?

Under Article 21 of the MLCBI as enacted in Schedule 1 of the CBIA 2008 (Cth), the LL may apply to the Court for an order entrusting the assets of Aussiebee to her. However, article 22 provides that in granting such an order, the court must be satisfied that the interests of the

creditors and other interested persons, including the debtor, are adequately protected. The court may impose conditions on relief granted under article 21. It may also, either at the request of the foreign representative, or a person affected, or on its own motion, modify or terminate relief granted under article 21.

The case of *Ackers v Deputy Commissioner of Taxation* concerned a similar set of facts to the present. That case also involved Saad, the Cayman Islands company referred to above. In that case, the DCT filed an interlocutory application (as is permitted under article 22) in the liquidators' recognition proceeding. Utilising its powers under article 22, the Court granted the recognition orders, but required the liquidators to undertake not to transfer out of Australia the proceeds of any asset sales without first giving 14 days' notice. The court also ordered the DCT not to take enforcement steps in relation to the revenue debt owed by Saad. Later, the Saad liquidators gave notice of their intention to transfer funds from the sale of assets outside Australia, and the DCT successfully sought orders from the court seeking modification of the recognition orders including *inter alia* allowing the DCT to obtain payment of Saad's revenue debt out of the assets on a *pari passu* basis with other creditors. The liquidators appealed the decision but the full Federal Court dismissed their appeal.

Accordingly, following the successful approach taken by the DCT in *Ackers*, the ATO should be advised to file an interlocutory application in the LL's recognition proceeding under article 22, seeking the same orders that were granted in that case. **Excellent.**

Question 4.2 [maximum 6 marks] 4.5/6

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.

Shipmax's liquidator will have three objectives: **Good**

1. Bring the operations of Shipmin to an end in the best way; and
2. Defend CBA's claim against the \$20m payment from Shipmin to Shipmax; and
3. Defend CBA's claim of security over the \$15m ship.

Because Shipmin appears to only have \$15m of assets, and \$200m of debts, it is assumed that Shipmin is insolvent. Therefore Shipmax's liquidator can wind up the operations of Shipmin by a creditor's voluntary liquidation. **Voluntary administration is also a possibility.** Shipmin owes 180m to Shipmax, and 20m to CBA, a ratio of 90:10. **Excellent observation.**

A liquidator of Shipmin can be appointed by special resolution of shareholders if the directors believe the company is insolvent. Because Shipmax's liquidator is effectively the director of Shipmin, and all shares in Shipmin have vested in Shipmax's liquidator, Shipmax's liquidator

may unilaterally put Shipmin into liquidation and appoint him/herself as liquidator. **Good** Because Shipmin's liabilities exceed \$1m, it will not be eligible for the new 'simplified liquidation process'. **Excellent that you covered off on this point.**

Once Shipmin is placed in liquidation, Shipmax's liquidator (hereafter referred to as 'the liquidator'), may among other things proceed to take possession of Shipmin's property and realise and distribute it to creditors.

It is likely that CBA will bring a claim against Shipmax alleging that the \$20m payment to it by Shipmin was an unfair preference and therefore a voidable transaction. **Well spotted, most students missed this. But note that the unfair preference claim must be brought by a liquidator (or the liquidator can assign the claim to CBA).** CBA will allege that Shipmin made that payment to Shipmax (1) within in the six-month period prior to Shipmin's liquidation and (2) at a time when Shipmin was insolvent and (3) enabled Shipmax to recover more than it would have if it received a proportionate distribution of Shipmin's assets as an unsecured creditor in a liquidation of the company.

Shipmax will have a defence to that claim if it can show that it acted in good faith, was not aware of Shipmin's insolvency, and provided valuable consideration or changed its position in reliance on the transaction. On this basis, it is unlikely that Shipmax will be able to defend CBA's claim. As Shipmin's owner, Shipmax cannot claim to be unaware of Shipmin's insolvency. **Exactly.**

It is also likely that CBA will claim to hold security over Shipmin's \$15m ship. However, CBA's mortgage over that ship has not been registered, and is therefore 'unperfected'. That security interest will vest in Shipmin upon Shipmin's liquidation. On this basis, CBA is an unsecured creditor and may only claim in Shipmin's liquidation as an unsecured creditor. **Good.**

The liquidator should be advised that by taking the above steps, it can bring the operations of Shipmin to a close, and (without accounting for the liquidation costs): **Excellent**

1. Retain 90% of the proceeds of the \$20m ship (\$18m). It will have to pay 10% (\$2m) to CBA because the \$20m payment to Shipmax by Shipmin was an unfair preference;
2. Obtain 90% of the proceeds of the \$15m ship (\$13.5m). It will have to pay 10% (\$1.5m) to CBA as an unsecured creditor.

A better alternative is likely to be voluntary administration Immediately before the Shipmin enters voluntary administration, the mortgage over the ship will vest in the voluntary administrator (*Personal Property Securities Act, s 267*). 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.

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 unsecured debt to Shipmax (\$200m) swamps the now-unsecured debt to CBA (\$20m).