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

QUESTION 1 (multiple-choice questions) [10 marks in total] 8/10

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] 5/10

Question 2.1 [maximum 3 marks] 1/3

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.

[The following are the types of voidable transactions 1)undervalued transactions, 2)Transfer to defeat creditors, 3)Transactions where consideration is given to a third party. The voidable transactions that can be recovered are unfair preferences of over $30,000 that were paid to related parties of the company in the three months prior to the commencement of the liquidation. No- this question was about *personal bankruptcy*, not company liquidation. Further the circumstances in which such a transaction will not be reversible is that if the transferee acted in good faith and transferred market value legal consideration at the time of purchase (this is in case of transfer to defeat creditors)] (s 120(1)). Also, transactions which occurred during the relation 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, are not recoverable under the voidable transaction provisions (s 123).

Question 2.2 [maximum 3 marks] 1/3

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?

[The cases are voluntary administration which affects secured creditors or the standard liquidation stay that affects only unsecured creditors. Good- this refers to the consideration of what "the case requires" It will be more appropriate for foreign proceedings that are more analogous to liquidation, further it also depends on the business rescue or liquidation]

Good, but your answer needed more detail. Needed to specify that Australia has specified the scope of the stay under Article 20 of the Model Law (in *CBIA*, s 16) as being: the same as would apply if the stay or suspension arose under: (a) the *Bankruptcy Act 1966*: or (b) Chapter 5 (other than Parts 5.2 and 5.4A) of the *Corporations Act 2001*; as the case requires. You then needed to emphasise that it is **not a question of discretio**n but rather which stay should apply according to **the nature of the proceeding**: *Tai-Soo Suk v Hanjin*

Shipping Co Ltd [2016] FCA 1404 at [24]. Good noting of the need to consider whether the proceeding is a business rescue or liquidation, but needed to specify that where the foreign proceeding is a business rescue procedure a broader voluntary administration stay is more appropriate, whereas if the procedure is more analogous to liquidations, the standard liquidation stay will be more appropriate.

Question 2.3 [maximum 4 marks] 3/4

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

An ipso facto clause is a contractual provision that allows one party to the contract to terminate or modify the operation of the contract upon the occurrence of a specified insolvency related event in respect of another party. In liquidation the company will be placed in voluntary administration. However in liquidation cases the ipso facto state does not operate

Good, but again needed more detail. *Ipso facto* clauses cannot be enforced in bankruptcy or VA. In VA, their enforcement is subject to the creditor obtaining a court order permitting enforcement where it is in the interests of justice (*Corporations Act*, s 451F). Exceptions, being *ipso facto* clauses that can still be enforced in VA, are listed on pp 48-49 of the Guidance Text.

QUESTION 3 (essay-type questions) [15 marks in total] 12.5/15

"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.

[In my opinion most countries around the world are creditor friendly and the reason being that it serves the purpose of Insolvency, i.e to recover in an effective and efficient manner. "Creditors" scheme of arrangement are one of the best way of corporate rescue mechanism in Australia. The directors of a financially distressed company, prior to the onset of formal insolvency, enter into negotiations with the company's creditors in an effort to secure their support to have a formal restructure. Yes there is a lot of court involvement which is once the good level of support is gathered, it will be followed by a meeting of all creditors whether to approve the scheme. If the scheme is approved, a second court application is then required for the court to formally approve the scheme. The scheme will be implemented in accordance with the specific terms of the scheme documents, like the process by paying out the creditors over time and completing the terms of any restructured debt facilities provided for in the scheme. The plus point is that no administrator is required for the scheme and it is recommended that an administrator is appointed to have a smooth functioning. On the other hand the moratorium of ipso facto rights under the contrast [contracts] entered into with a company applies only during voluntary administrations the exclusions are while a creditors scheme of arrangement is negotiated and Implemented. This enhances the prospect of a scheme being effectively used as a corporate or business rescue mechanism which will be binding on all creditors and also managing the minority creditors. Now the only downside is that the involvement of the court cause voluntary administration/DOCA process does not require court approval and no creditors approach the court to challenge the conduct of the administrator or the terms of the DOCA. The time period is a minimum of three months for it to be implemented though DOCA is completed within 25 to 30 business days. The best takeaway in a creditors scheme of arrangement is that it offers two significant advantages

which definitely cannot be achieved under a DOCA that it binds dissenting secured creditors (provided the statutory voting majorities are meant, which on the downsize are not easy to achieve in practice and it can include the release of creditors right against third parties other than the company. Due to this permit a more novel and wide ranging corporate restructure can be implemented under a creditors scheme of arrangement which is available in DOCA. [Under a scheme of arrangement a scheme fund is established for distribution to the shareholders claimants, comprising a specified amount to be paid by the company and any insurance proceeds that it might be able to claim from its insurers in respect of the shareholder claims. All claims of each shareholder claimant against the company or director of officers, arising from any dealings or transactions in the shares of the company will be extinguished and replaced with an entitlement to share rateably in the scheme fund. A proper claims resolution process will be establish and administered by the scheme administrators whereby the scheme will be adjudicated and quantified. The shareholders claimants will covenant not to commence or continue any court proceedings in respect of the scheme claims.] – some schemes have these features, but not all schemes. The point with schemes is that they can provide for any arrangement that the creditors agree to. The biggest benefits are that it a binding effect of schemes which is that if approved at the scheme meeting it becomes binding on all shareholders claimants, including those who did not attend the meeting and those who attended but voted against the scheme. Second is the stay on proceedings under section 411(6) once a scheme has been proposed, the Court on a summary application by the company make orders restraining further proceedings against the company. For the court proceedings to have a stay there needs to be a scheme “proposal”. In Boart Longyear(2017) NSWSC 537, Justice Black observed that a proposal of a scheme may exist at least at the time when the draft scheme documents are submitted to ASIC. When dealing to grant a stay on proceedings the court will consider whether the stay will be conducive to the orderly and efficient consideration of the proposed scheme. Third is the Ipso Facto Stay there is a reduced risk of contractual counterparties terminating key contracts or secured parties taking enforcement actions against the company, simply by reason of its proposing a creditors scheme. Fourth is the releases of third parties, in DOCA schemes can be used to release creditors claims against both the Company as well as third parties, including directors and officers of the company. Lastly the biggest benefit is that no requirement of insolvency it is not necessary for the company to be insolvent, or likely to become insolvent at some future time, in order for it to propose a creditors scheme. It also has some more benefits like to avoid or reduce litigation funder premium, expedited pay-out and certainty this will help In achieving a quick pay-out for the shareholders claimants and direct interacting with shareholders claimants which will help put forth the company’s perspective. Their vulnerable roots the schemes are experiencing a rebirth and are being extensively used in Australia with becoming a more popular restructuring tools.

Very good answer

QUESTION 4 (fact-based application-type question) [15 marks in total] 5.5/15

Question 4.1 [maximum 9 marks] 3/9

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?

[Liquidation is also known as winding up for companies in Australia, secured creditors are allowed to secure their rights in the liquidation process for an insolvent company. In the voidable transaction regime, and in corporate liquidation it allows transactions to be clawed back for the benefit of creditors over a substantial period of years and without having to improper conduct such an intention to defeat creditors. Voidable transactions are not relevant to this question. The liquidation process applies to an unregistered foreign company that is, or was, carrying on business in Australia further the Corporation Act also provides that if the company is already being wound up overseas, an Australian liquidator can be appointed by an Australian Court. Not relevant. The Australian corporate insolvency law applies to all of the company's assets worldwide. Not relevant.Collecting and realising the assets of the company in a creditors voluntary liquidation or compulsory liquidation, the liquidator proceeds to distribute the assets eventually encapsulating the pari passu principle, that is the available assets are to be distributed equally among all creditors that have submitted proofs of debts accepted by the liquidator. Not relevant. In Litigation funding the Australian Taxation Office, has fund available to it for funding litigation by liquidators where there is likely to be a return to the tax office on its proof of debts if the litigation is successful. Not relevant. As per the Article 13 of the Model Law which deals with access of foreign creditors to Australian proceeding, Australia has adopted the alternative version of Article 13(2), in such a way that the existing exclusions of foreign tax and society security claims from Australian insolvency proceedings is preserved. Not relevant – it is only the treatment of foreign tax creditors under Lyonessian law that is relevant to the question. In Ackers V Deputy Commissioner of Taxation: The decision of the Full Court of the Federal Court of Australia concerned the application of Article 22 of the Model Law where by the court must be satisfies that the interests of the creditors are adequately protected and when granting relied under Article 19. The Cayman Island Liquidation of a Cayman Island registered company has been recognised as a foreign main proceedings in Australia. The foreign representatives wished to remit approximatelt AUD 7 million, being the proceeds of sale of the Australian assets of the company, from Australia to the Cayman Island for distribution there as part of Cayman Island liquidation. The company owed over AUD 83 million in tax and penalities in Australia. A debt payable to a foreing revenue creditor is not admissible to proof in a cayman Island liquidation (nor is such a debt admissible to proof in an Australian Liquidation) On the application of the Deputy Comissioner of Taxation, the federal court modified the recognition orders, giving leave to the DCT to take steps to enforce its claim in Australia, expressly for the purpose of recovering an amount up to the pari passu amount the ATO would have received if he were entitled to prove for tax debts as an unsecured creditor in the foreign main proceedings. On appeal, the full Court upheld the decision, finding that the modification of the recognition orders was an appropriate way to ensure that

the interest of the DCT as a creditor were adequately protected] Yes, this is the relevant case, but you needed to apply it to the facts in this case.

You missed the other issue: is Aussiebee's COMI in Lyonesse or in Australia?

Question 4.2 [maximum 6 marks] 2.5/6

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.

1. [In my opinion the Shipmin Liquidation should file in for Voidable transactions which are under part 5 your answer here].7B of the Coporations Act and state that unfair preferences, uncommercial transactions; unreasonable director- related transactions; unfair loans or circulating security interest. In this case it is a scenario of unfair predederences and uncommercial transaction. Good. In this case, the payment to Shipmax is clearly an unfair preference. It does not really fit the requirements for an uncommercial transaction, since Shipmin owed the debt to Shipmax so it was not uncommercial to pay that debt. Here one of the cargo was sold for a price of $20 million to reduce shipmixs intercompany dent to shimax. Shipmax is now only left with one cargo which is secured over the remaining ship and the mortgage is also not registered on the Personal Property Securities Resgister. Needed to go on to observe that the unregistered security will vest in the liquidator (or voluntary administration) on commencement of a liquidation (or voluntary administration). The transaction undertaken by shipmax has occurred when the company was insolvent or otherwise caused the company to become insolvent it is "uncommercial" in the sense that it would not have been entered into by a reasonable person in the company's circumstances, having regard to the benefits and detriments arising from the transactions. Now in this case the liquidator can apply to the court for an order challenging the transactions. Therefore what we gather from this case is that a reasonable person in the company's circumstance would have not entered into at a time when the company is insolvent or becomes insolvent. The purpose is to prevent companies disposing of their assets which resulted in the recipient receiving a gift or obtaining a bargain of such commercial magnitude that it could not be explained by normal commercial practice. In McDonald v Hanselmann (1998) 28 ACSR 49, SC (NSW) it was a sale of certain manufacturing equipment together with client base and goodwill to the Managing Directors Son at an undervalued price. The meaning of "transaction" means a transactions to which the body is a party, and includes a conveyance or transfer, a charge created over company property and a payment

made. It is apparent from the definition is that the company must be a party to the transaction, a requirement that is received a broad interpretation by the courts, particularly in circumstances where the transaction under scrutiny involves individual steps in the course of dealing so as to give one aspect a different characteristic from that which the totality of dealing would suggest. The principle in liquidations is that the company assets are sold to repay creditor and the business closes down. The aim is to provide a dividend for all classes of creditors, that's why the liquidator will try to get the maximum value of the assets and the creditors to accept it.

Voluntary administration followed by a DOCA would be better than liquidation. That way, Shipmax can avoid having to repay an unfair preference in a liquidation.

Total Mark: 31/50