



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 202122-336.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 on pages 15 and 16, which deals 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 2022**. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2022. 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 **8 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:

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. 1 mark**

Question 1.2

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

- (a) Receivership. 1 mark**
- (b) Liquidation.
- (c) Deed of company arrangement.
- (d) Voluntary administration.

Question 1.3

Select the correct answer:

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

- (a) creditors' scheme of arrangement. 1 mark**
- (b) deed of company arrangement.
- (c) creditors' voluntary liquidation.
- (d) voluntary administration.
- (e) small company restructuring plan.

Question 1.4

Select the correct answer:

Newco Pty Ltd has three (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. 1 mark
- (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. 0 mark
- (e) Superannuation funds. Correct answer

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. 1 mark
- (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 company can only be placed into voluntary administration if:

- (a) the directors declare that the company's liabilities exceed its assets.
- (b) the creditors resolve that the company is unable to pay its debts as and when they fall due.
- (c) a liquidator declares that the company is insolvent or likely to become insolvent.

(d) the directors resolve that the company is insolvent or likely to become insolvent. 1 mark

Question 1.8

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. 0 marks
- (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. Correct
- (e) 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:

- (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. 1 mark

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. 1 mark
- (c) reducing the default bankruptcy period from three years to one year.
- (d) a safe harbour from insolvent trading liability.

8/10 marks

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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 three types of voidable transactions can be reversed by a bankruptcy trustee:

1. Undervalue transactions (section 120 of the Bankruptcy Act). In order to recover an undervalued transaction, two conditions need to be satisfied: (a) the transfer took place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy; (b) the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.

Further, as to the irreversible circumstances for an undervalue transaction, subsection 120(2) of the bankruptcy act provided that the following types of transactions are not reversible: (a) a payment of tax payable under a law of the Commonwealth or of a State or Territory; (b) a transfer to meet all or part of a liability under a maintenance agreement or a maintenance order; (c) a transfer of property under a debt agreement; (d) a transfer of property if the transfer is of a kind described in the regulations. And as a defence for the transferee, according to subsection 120(3), if the transactions occurred more than two years before the commencement date, or more than 4 years before the commencement date for a connected transferee, or the transferee can prove that the transferor was solvent at the time of the transfer, the transaction will not be reversible.

2. Transfers to defeat creditors (section 121 of the Bankruptcy Act). In order to avoid this type of transaction, two conditions need to be satisfied: (a) the property would probably have become part of the transferor's estate or been available for creditors; (b) the main purpose of the debtor is to prevent, hinder or delay creditors from paying. And if it can be inferred that at the time of the transfer, the transferor was or was about to become insolvent, the purpose to defeat is presumed to exist,

As to the irreversible circumstances for a transfer to defeat creditors, the subsection 121(4) provided that, the transferee will has a defence if the transferee can show any of the facts below: (a) the consideration given in the transfer was at least as valuable as the market value of the property; (b) at the time of the transfer, the transferee did not know or could not reasonably infer that the debtor had the prescribed purpose of defeating creditors; (c) at the time of the transfer, the transferee did not know or could not reasonably infer that the debtor was or was about to become insolvent.

3. Preferential payments to creditors (section 122 of the Bankruptcy Act). In order to avoid a preferential payment, two conditions need to be satisfied: (a) the transaction had the effect of giving a creditor any preference, priority or advantage over other creditors; (b) the transaction was made in the prescribed period under section 122.

As to the irreversible circumstances for preferential payments, the creditor has a defence that he or she acted in good faith, did so in the ordinary course of business and gave consideration at least as valuable as the market value of the property. Also, the bankruptcy

trustee will not be able to recover property if 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)).

2.5/3 marks

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?

Australia implements Article 20 of the Model Law through its Cross-Border Insolvency Act 2008 (CBIA). As provided in the section 16 of the CBIA, the scope and the modification or termination of the stay or suspension referred to in paragraph 1 of that Article 20 of the Model Law, as the case required, are the same as would apply if the stay or suspension arose under Australian insolvency law, including: (a) the Bankruptcy Act 1966; or (b) Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act 2001.

Moreover, in Australian practice, as decided in the *Rizzo-Bottiglieri-De Carlini Armatori* cases by Justice Rares,¹ the Australian court will not determine the scope of the stay basing on the stay effect of the particular foreign proceeding under the applicable foreign law, but will decide which Australian insolvency proceeding is the foreign proceeding in question analogous to, then determine the scope of the stay in accordance with the stay effect of that type of Australian proceeding under the respective Australian law.

2/3 marks – needed a bit more detail about the available Australian stays, their main feature differing feature (ie whether or not they apply to secured creditors), and which sorts of foreign proceedings will usually end up with which stay.

Question 2.3 [maximum 4 marks]

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

Ipso facto clause refer to any provision of a contract that provide a counterparty with right to terminate, modify or repossess rights upon the debtor's bankruptcy or insolvency events.

For contracts entered into after 1 July 2018, as the *ipso facto* moratorium came in to effect, there is an *ipso facto* prohibition which are triggered by corporate debtors entering into voluntary administration without the consent of the relevant appointee or the leave of the court.² And for a personal debtor, the *ipso facto* clause is void outright as provided by the Bankruptcy Act 1966.³

However, in liquidations, the relevance of *ipso facto* clauses depends on which type is the debtor belongs to. For a personal debtor, the *ipso facto* clauses are void completely as mentioned above. In Australia, "liquidation" always means corporate insolvency. The equivalent personal insolvency proceedings are "bankruptcies" And for a corporate debtor, the *ipso facto* clauses incorporated in its contract are generally effective and enforceable, right subject to one exception which is regarding to the treatment of utility contracts. The utility contracts cannot be terminated merely upon the appointment of liquidators. No, this is wrong. In another word, the liquidators in corporate liquidation cannot have the benefit of an *ipso facto* moratorium.

¹ *Alari V Rizzo-Bottiglieri-De Carlini Armatori* [2018] FCA 1067

² Corporations Act 2001 (Cth) ss 415D–415G, 434J–434M and 451E–451H.

³ S 301 of the Bankruptcy Act 1966.

Liquidations do not get benefit of ipso facto protection. However, ipso facto clauses that are triggered by a prior voluntary administration or attempt to negotiate a creditors' scheme of arrangement continue to be subject to the moratorium during a subsequent liquidation.

3/4 marks

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 made Australia more of a debtor-friendly jurisdiction.

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

I disagree with this statement. I am of the opinion that Australia is still a creditor-friendly jurisdiction, but recent reforms have made Australia's position more balanced between creditor-friendly and debtor-friendly. My reasons are as followed.

First, even after the reforms, Australia's insolvency regimes still focus on creditor protection and most of the rules relating to this purpose have not been changed. For example, Australia's insolvency regime has incorporated broad insolvent trading liability and broad voidable transaction provisions with many "user-friendly" presumptions. These rules impose strict duties on debtor and its directors to protect creditors from defrauding acts, help to prevent insolvency proceeding abuse, and allow liquidators to recover from the obligors responsible for the loss of the creditor and prevent creditors from suffering further losses when financial failure occurs. In Australia, failure to prevent insolvent trading can lead to civil penalties, or even criminal penalties.⁴ These strict rules cannot be seen in most jurisdictions. Second, even after the reforms implemented, Australia's rescue-type proceedings is still not as debtor-friendly as some other jurisdictions. For example, as provided in s 435A of the Corporate Act, Australian voluntary administration takes "a better return for the company's creditors" as an alternative object of the proceeding. And secured creditors still enjoy a very high priority in rescue-type proceedings. For example, secured creditors can continue enforcement proceedings commenced before the appointment of a voluntary administrator.⁵ If a secured creditor is a major creditor with security over the whole or substantially the whole of company's property, the creditor still has the right to appoint a receiver on the top of a voluntary administrator.⁶ **Good example** Moreover, as to other rescue-type proceedings in Australia, the scheme of arrangement and DOCA do not have an enhanced stay to restrict secured creditors as their equivalents provided in Singapore and other jurisdictions. And even though Australian administration proceeding has a stay effect, but the stay effect under Australian Law is not as powerful as in other jurisdictions, such as the stay effect of chapter 11 proceeding in US. Notably, the administration proceeding is not a debtor-in-possession proceeding at all. The only two type of DIP proceedings in Australia are scheme of arrangement and small business restructuring. They are all without strong stay protection. These factors discussed above all indicate that Australia is still more of a creditor-friendly jurisdiction.

Third, the reforms implemented in Australia, are more as the rectifications to the rigidness of its creditor-friendly regime, than as the measures to build up a debtor-friendly regime. For example, even though the voluntary administration now takes "maximises the chances of the company, or as much as possible of its business, continuing in existence" as its primary object, but the way to achieve that object is through an external administration where the administrator will take over the management of the corporate debtor. Further, even though now *ipso facto* clauses are restricted under Australian law, but the restrictions only apply to corporate debtors in voluntary administration, which is limited to only one type of the rescue-

⁴ Corporations Act 2001 ss 588G (2)–588G (3).

⁵ Corporations Act 2001 s 441B

⁶ Corporations Act 2001 s 441A

type proceedings in Australia. Moreover, the “safe harbour” rules introduced by reforms implemented in 2017,⁷ strictly apply. The protection is only available for a reasonable period from the time the directors start to develop courses of action that are reasonably likely to lead to a better outcome for the company than administration or liquidation.⁸ In comparison with the broadly-covered insolvent trading rules and the director’s duty to consider the interests of creditors when making decisions,⁹ the “safe harbour” reform is more as a measure to promote corporate rescue than to build up a debtor-friendly regime.

In conclusion, Australia’s insolvency regime is still of strong creditor-friendly characteristics, however, the recent reforms implemented, which rectify the rigidness and promote corporate rescue in a degree, have strike a more balanced position between creditor-friendly and debtor-friendly, which do help to promote corporate rescue in Australia.

14/15 marks – this is an excellent response which summarised all of the developments and initiatives which have sought to bolster the rights of debtors. You could have discussed the increase in creditors’ procedural rights in the insolvency process (such as the require to require IPs to provide information and the rights to vote out IPs more easily).

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

Question 4.1 [maximum 9 marks]

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 Lyonessean. 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 Lyonessean 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 Lyonessean 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 Lyonessean liquidation.

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

The first issue here is whether the liquidation proceeding in Lyonessean can be recognized as a foreign main proceeding under the Australian law. According to the rebuttable presumption under Article 16 of the Cross-Border Insolvency Act 2008, in the absence of proof to the contrary, the debtor’s registered office is presumed to be the centre of the

⁷ Corporations Act 2001 ss 588GA–588GB.

⁸ Corporations Act 2001 s 588GA (2).

⁹ Corporations Act 2001 s 181.

debtor's main interests. Further, in order to rebut the presumption in Australia, as adopted in the leading case *Ackers v Saad Investments Company Ltd* (in liq) (2010) 190 FCR 285, the principles recognized in *Eurofoods IFSC Ltd* should be followed.¹⁰ In the *Eurofoods* case, by deciding where the COMI was in Italy or Ireland, the CJEU set up a high threshold to rebut the registered office presumption that "only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect."¹¹ In this case, only Australia and Lyonesse are the jurisdictions related to the debtor company. And as Aussiebee was incorporated in Lyonesse, it should be presumed that the COMI of Aussiebee is in Lyonesse. Even though the company has offices and warehouses both in Australia and Lyonesse, sell products from both jurisdictions, and has employers and directors working and inhabiting in both Jurisdictions. However, all the facts given as a whole, cannot prove objectively that Australia is the central administration or central business place of Aussiebee which is ascertainable by third parties. Therefore, the two jurisdictions are at least of equal importance to the debtor company and the strict threshold set by the *Eurofoods* to rebut the presumption cannot be satisfied in this case. Hence Aussiebee's COMI is in Lyonesse, and according to Article 17 of the Cross-Border Insolvency Act 2008, the liquidation proceeding in Lyonessian can be recognized as a foreign main proceeding **Good analysis of the facts.**

The second issue here is whether the Lyonessian liquidator, as a foreign representative of a foreign main-proceeding, can be granted orders entrusting Aussiebee's assets which worth AUD 20 million. According to Article 21 of the Cross-Border Insolvency Act 2008, the court has the power to grant reliefs entrusting the administration or realization of all or part of the debtor's assets located in Australia to foreign representatives. Hence in this case, theoretically, the Lyonessian liquidator can be entrusted with Aussiebee's assets, but the court should be satisfied that the interests of creditors in Australia are adequately protected first.

It should be noted, when considering the "adequate protected" prerequisite, the rules adopted in *Akers & Ors v Deputy Commissioner of Taxation* case should be followed.¹² The fact of the *Akers & Ors v Deputy Commissioner of Taxation* case is very similar to this case. The foreign debtor also owed a huge sum in tax and penalties in Australia but was not provable in the foreign proceedings which had been recognized. In that case, the courts held that, *inter alia*, there is no restriction in the Model Law regarding to recover local tax, and to grant or modify the reliefs under the Model Law, the court must ensure that the interest of local creditors are protected. In that case, the courts gave leave to the DCT to enforce its claims and expressly stated that the ATO can only recover its entitlement *pari passu* as an unsecured creditor in the foreign proceeding. Therefore, in this case, the Deputy Commissioner of Taxation can also follow the rules adopted in *Akers & Ors v Deputy Commissioner of Taxation* case, and apply to the court for giving leave to enforce its 12 million claims as an unsecured creditor and be paid *pari passu* as unsecured creditors in Lyonessian liquidation. As Aussiebee's holds assets in Australia, the DCT can take enforcement measures against those assets to recover its fair entitlements, but only to the extent of its entitlement *pari passu* as an unsecured creditor in the foreign proceeding.

8.5/9 marks – The one other thing you could have considered: if the ATO could establish that Aussiebee's COMI was in Australia, it could then have applied to wind up Aussiebee as a foreign company carrying on business in Australia.

Question 4.2 [maximum 6 marks]

¹⁰ Case C- 341/04 *Eurofoods IFSC Ltd* [2006] ECR I- 03813 (Eurofood).

¹¹ *Ibid*, at 35.

¹²[2014] FCAFC 57; (2014) 223 FCR 8 Venue

Hyrofine Australia Pty Ltd (HA) is a company incorporated in Australia. It is in the business of re-refining waste oil from electric substations in Australia and selling the re-refined oil. All of the shares in HA are owned by HA's parent company, Hyrofine Group Ltd (HGL), also incorporated in Australia. The same Board of directors controls both HGL and HA.

HA operated an oil re-refining plant near Sydney, Australia as a joint venture with Best Oil Refining Pty Ltd (BOR). The joint venture proved to be unprofitable and the plant ceased operations in mid-2020.

HA's major remaining asset is a second re-refining 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 HGL as an unsecured loan for AUD 30 million. The loan agreement provides that the loan is repayable by monthly instalments over a term of 5 years with the first payment due at the end of 2021. The loan agreement also provides that the loan becomes automatically due and payable in full if HA enters into any formal insolvency or restructuring process in Australia.

HA also owns three large trucks that transport waste oil to the Perth re-refining plant and transport re-refined oil to HA's customers. Those trucks were purchased with a AUD 3 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 2020, BOR commenced proceedings against HA in the Supreme Court of New South Wales for damages in respect of the failed joint venture. On 1 October 2020, the Supreme Court found in favour of BOR, ordering that HA pay AUD 4.6 million in damages to BOR.

Between October 2020 and October 2021, HA continued to trade, incurring debts to trade creditors as well as borrowing AUD 5 million from its parent company HGL. It made only a small profit from its Perth re-refining plant.

In October 2021, you are called in to advise the Board of directors of HGL and HA about the financial predicament of HA. The Board tells you that HA has been insolvent since the judgment was handed down in October 2020, because HA does not earn enough from its second refining plant to meet the judgment debt and to start repaying CBA at the end of 2021. The Board also tells you that there is no more funding available for HA's operations, and that they have exhausted all possibilities for refinancing HA's debts.

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

I will advise the Board to initiate HA's voluntary administration as soon as possible and try their best to prepare for proof of the "course of action" developed between October 2020 and October 2021. To reach that conclusion, the board should be aware of the following main issues as followed.

1. Whether the Board should take steps to prevent further "insolvent trading" liabilities. As the Board was already aware that HA has been insolvent since the judgment rendered in October 2020, ever since the "insolvency event", the directors owed statutory duties to prevent insolvent trading made by HA. According to section 588G of the Corporations Act 2001, if the company is insolvent at the time of trading or becomes insolvent by incurring that debt, or there were reasonable grounds to suspect so, a director will be liable for its failure to prevent such insolvency trading.

In this case, as stated by the Board, there is no more funding available for HA's operations and all possibilities for refinancing HA's debts are exhausted. Hence from now on, the subsequent trading may all constitute insolvent trading. As an insolvent trading is also a breach of a director's duties, ASIC, a liquidator or a creditor is empowered to initiate proceedings against the director or directors for giving personal compensation and can even lead to civil penalties, or even criminal penalties if the failure was dishonest.¹³ Therefore, for the directors in this case, as there is already no reasonable grounds to expect solvency, the available defence now under section 588H is to take all reasonable steps to prevent the company from incurring further debts, including appointing a voluntary administrator. The directors may even resign from the board to avoid personal liability for insolvent trading as in some cases.¹⁴ And according to section 588V, HGL, as a holding company of HA, is also liable for the insolvent trading liabilities. **Well spotted.** And the defence available under section 588W is also to take all reasonable steps to prevent further debts. In this case, appointing a voluntary administrator should be the best option.

2. Whether the "safe harbour" rules apply to the debts between October 2020 and October 2021. As HA was already insolvent in October 2020, those debts incurred in trading and the borrowing from HGL may all constitute insolvent trading. However, if the directors can prove that they have developed a course of action that are reasonably likely to lead a "better outcome". After considering the relevant factors, if the court is satisfied the the trade debts incurred between October 2020 and October 2021 is in connection to that course of action , those debts owed to trade creditors may enjoy the "safe harbour" protection under section 588G of the Corporations Act 2001. However, the "safe harbour" rules do not apply to the borrowing from GHL, hence it cannot enjoy the "safe harbour" protection. **Good.**

3. Other issues in relation to appointing a voluntary administrator. As to the borrowing of a major shareholder of HGL, as the loan agreement has provided an *ipso facto* clause that the debts become automatically due and payable in full if HA enters into any formal insolvency or restructuring process in Australia. Even though *ipso facto* clauses are generally effective in Australia, they are prohibited to have effect to voluntary administration. In this regard, if the Board decide to initiate voluntary administration, that *ipso facto* clause will be prohibited from giving effect which will increase the possibility of HA's survival. Further, as to the loan provided by CBA, since the mortgages are not registered on the Personal Property Securities Register according to section 267 of the Personal Property Securities Act 2009, an unperfected security interest will be vested in the grantor immediately upon the appointment of administrator. The CBA can only be paid *pari passu* as an ordinary creditor and the collateral will become part of the estate, this also increases the possibility for HA's survival.

Therefore, I will advise to the Board of HA, in this case to initiate a voluntary administration proceeding for HA as soon as possible, is the best option for HA and HGL. And as the procedures provided in section 436A of the Corporations Act 2001, it should be not hard for the majority of HA's directors reach a resolution and appoint a voluntary administrator to initiate the proceeding.

A good answer, you spotted all of the issues and found the best insolvency process to deal with them. But what happens after voluntary administration? The company must go from VA into either liquidation or DOCA. The best solution seems to be:

- **The VAs, or HGP, could propose a DOCA if HGP is willing to tip in some cash to create a fund to pay creditors (which would incentivise creditors to vote for the DOCA), or if they can find a purchaser for the Perth plant.**
- **All creditors will get to vote on the DOCA, HGP appears to only be owed \$5m so it will not be able to out-vote the other creditors. But HGP's major shareholder is the major**

¹³ Corporations Act 2001 ss 588G(2)–588G(3).

¹⁴ *Morley v Statewide Tobacco Services Ltd* (1992) 8 ACSR 305.

creditor of HA, so they will out-vote the other creditors and will presumably want a DOCA rather than a liquidation.

5/6 marks

*** End of Assessment ***

TOTAL MARKS: 43/50