



**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.
- (e) Superannuation funds. 1 mark

#### 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.
- (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. 1 mark
- (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.

10/10 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.

There are the following three types of voidable transaction provisions in the Bankruptcy Act:

- undervalued transactions
- transfers to defeat creditors
- preferential payments to creditors

Such transactions can not be reversed:

- a) if they did not occur during the relation-back period;
- b) if they 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;
- c) if the original transferee has transferred the property to a third party and the third party received the property in good faith and for market value.

3/3 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?

When recognizing a foreign proceeding under the implemented Model Law, the courts has to decide if the case requires the broader voluntary administration stay which affects secured creditors or the standard liquidation stay that affects only unsecured creditors.

Where the foreign proceeding is a corporate rescue procedure, the court has to apply the broader voluntary administration stay.

Where the foreign proceeding is a liquidation procedure, the court has to apply the standard liquidation stay.

3/3 marks

#### Question 2.3 [maximum 4 marks]

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

An *ipso facto* clause is a contract clause which provides a counterparty with a right to terminate or modify a contract or repossess property as soon as the debtor enters bankruptcy, liquidation or restructuring proceedings. 1 mark

In members' voluntary liquidation, *ipso facto* clauses are valid and enforceable. 1 mark

In creditors' voluntary liquidations and in compulsory liquidations, there is generally *not* a moratorium on *ipso facto* clauses.

However, if the liquidator wishes to maintain a contract he will not have the benefit of the moratorium on *ipso facto* clauses unless a creditors' voluntary liquidation immediately follows a prior voluntary administration or attempt to negotiate a creditors' scheme of arrangement. 1 mark

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.

In the past, Australia was considered to be a creditor-friendly system for the following reasons:

- a) Enforcement of claims against debtors in Australia was relatively easy. Unsecured creditors had the possibility to make a payment demand through a specific notice. If the debt was not paid within 21 days after the issue of the notice, unsecured creditors may apply for an individual to be made bankrupt or for a company to be wound up. Failure to comply with the payment demand created a presumption of insolvency.
- b) Secured creditors were well protected under Australian law. Outside an insolvency procedure, secured creditors were paid first. Even in liquidation or bankruptcy proceedings, secured creditors, except such with circulating interests, were paid before all other creditors. Secured creditors holding circulating security interests over company assets were paid after employee claims but before tax and other claims. The moratorium on the enforcement of claims against the debtor did not apply to secured creditors in bankruptcy and liquidation proceedings.
- c) Directors in Australia faced a strict liability regime for insolvent trading. Contravention of the insolvent trading provision usually resulted in a compensation order against the directors. Furthermore, a civil penalty, disqualification order and, if a director has behaved dishonestly, a criminal penalty may be imposed on directors.
- d) Australia's voidable transaction regime allowed to claw back assets without having to prove improper conduct and from transactions over a substantial period of years. Voidable transactions in bankruptcy were undervalued transactions, transfers to defeat creditors or preferential payments to creditors. Voidable transactions in liquidation were unfair preferences, uncommercial transactions, unreasonable director-related transactions, unfair loans or circulating security interests (under certain conditions). Transfers to defeat creditors were recoverable regardless of any relation-back period in bankruptcy proceedings and in a 10-year period ending on the relation back day in liquidation proceedings.

The above mentioned characteristics of Australia's insolvency and restructuring regime remain unchanged in the present. However, the following recent reforms have been introduced to improve the situation for the debtors:

- a) As of 1 July 2018, creditors are prevented from enforcing ipso facto contractual rights contingent on a company's insolvency or entry into an external administration or when a person becomes bankrupt.
- b) As of September 2017, company directors can avoid liability for insolvent trading by developing one or more courses of action that are reasonably likely to lead to a better outcome for the company. This so called "safe harbour" system applies:
  - (i) To debts incurred directly or indirectly in connection with the proposed course of action including ordinary trade debts incurred in the usual course of business or debts taken on for the specific purpose of effecting the plan;
  - (ii) If the company continues to pay all employee entitlements as and when they fall due; and
  - (iii) If the company continues to comply with all tax reporting obligations.
- c) As of 1 January 2021, there is a simplified creditors' voluntary liquidation process is available for companies with total liabilities of less than AUD 1 mio. and of which no current director or a former director in the last 12 months has been a director of another company that has undergone restructuring or been the subject of a simplified liquidation process within 7 years. The simplification concerns majorly procedural formalities and leads to a less thorough but more cost efficient procedure.

While it is true that recent changes to Australia's insolvency and restructuring regime were mostly in favour of debtors, the characteristics for which it has been considered creditor-friendly continue to be in force. In my view, it is therefore still a creditor-friendly insolvency and restructuring regime. The creditor-friendly aspects simply outweigh the debtor-friendly aspects.

13/15 marks – this is a great response. The summary of creditor-friendly and debtor-friendly aspects of Australia's system was thorough and relevant. A stronger answer would have more critically analysed the effect of the debtor-friendly reforms and the particular entities who are most affected. For example, very small businesses are the entities most affected by the shift such as the new small company restructuring regime.

#### **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 Lyonesse. 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 Lyonesse 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 Lyonesse 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 Lyonesse liquidation.

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

The Lyonesse insolvency proceedings may be recognised in Australia based on the Cross-Border Insolvency Act 2008 ("CBIA"). According to section 6 CBIA, the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law ("Model Law), with the modifications set out in the CBIA, has the force of law in Australia.

Pursuant to article 20(1) of the Model Law, the recognition of the Lyonesse proceedings as a foreign main proceeding has the following effects:

- a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- b) Execution against the debtor's assets is stayed;
- c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

According to article 20(2) of the Model Law in connection with section 16 CBIA, the scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of that article, are the same as would apply if the stay or suspension arose under the Bankruptcy Act 1966 or Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act 2001 as the case requires.

The ATO's tax claim against Aussiebee is an unsecured claim. Upon recognition of the Lyonesse insolvency proceedings, it will therefore not be possible for the ATO to enforce its tax claim against Aussiebee in Australia.

Pursuant to article 21(1)(e) and 21(2) of the Model Law, the administration, realization or distribution of all or part of the debtor's assets located in the enacting state to the foreign representative is subject to an order of the court upon request of the foreign representative (and therefore not automatic). **Well spotted**

According to article 22(1) of the Model Law, in granting or denying relief under article 21, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. Pursuant to article 22(2) of the Model Law, the court may subject relief granted under article 21 to conditions it considers appropriate. **Excellent.**

In *Ackers v Deputy Commissioner of Taxation*, a Cayman Islands liquidation of a Cayman Islands registered company had been recognised as a foreign main proceeding in Australia. The foreign representative wished to remit approximately AUD 7 million, being the proceeds of sale of the Australian assets of the company, from Australia to the Cayman Islands for distribution as part of the Cayman Islands liquidation. The Cayman company owed over AUD 83 mio. in tax and penalties in Australia. Foreign tax claims were, however, not admissible to proof in a Cayman Islands liquidation. Therefore, the Deputy Commissioner of Taxation ("DCT") applied to the Federal Court to modify the recognition orders in order to allow to the DCT to take steps to enforce its claim in Australia. The Federal Court approved the application

to the extent that the DCT may take steps to enforce its claim in Australia for the purpose of recovering an amount up to the *pari passu* amount the ATO would have received if they were entitled to prove for the tax claim as an unsecured creditor in the foreign main proceeding. The Full Court upheld the decision on appeal.

Hence, the ATO should apply to the Federal Court and request the following:

- (i) That the foreign liquidator's request to entrust to her Aussiebee's assets may only be granted under the condition that she will pay to the ATO, out of the proceeds of the assets located in Australia, a *pari passu* amount the ATO would receive if the ATO was entitled to prove for the tax claim as an unsecured creditor in the foreign main proceeding.
- (ii) That the transfer overseas of Aussiebee's assets located in Australia be made subject to a court order and the court may only grant such a transfer once it is satisfied that Aussiebee's liquidator fulfilled its obligation towards the ATO as stated above.

In case the Federal Court already approved the liquidator's request before the ATO could file an application as stated above, the ATO may apply for a modification of the Federal Court's order as outlined above based on article 22(3) of the Model Law. **Good**

An alternative course of action for the ATO could be to argue that Aussiebee's COMI is not in the Lyonesse but in Australia and apply for the initiation of a main insolvency proceeding in Australia. In an Australian insolvency proceeding, ATO's tax claim would be admissible to prove. **Excellent, many students did not spot this additional argument.**

There are some elements which would support the argument that Aussiebee's COMI was located in Australia, such as offices, warehouses and employees in Australia as well as the majority of Australians on Aussiebee's board of directors.

However, pursuant to article 16(3) of the Model Law, the debtor's registered office is presumed to be its COMI in the absence of proof to the contrary. Hence, the ATO would have to prove that Aussiebee's COMI is located in Australia for this alternative course of action to be successful which could be difficult.

Given that Aussiebee's COMI is not clearly in Australia, the chances of success for this alternative course of action are not as good as the ones for the above described application under article 22 of the Model Law. Therefore, it is recommended to submit an application based on article 22 of the Model Law as outlined above.

**9/9 marks**

#### **Question 4.2 [maximum 6 marks]**

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 an 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?

HA made a small profit from its Perth re-refining plant. This profit was, however, not sufficient to meet the judgment debt and to start repaying CBA at the end of 2021. Furthermore, there is no more funding available for HA's operations.

In view of HA being insolvent, the company could be wound up through liquidation. In order to do so, HA's Board of directors could call for a shareholders meeting, declare that they believe that the company is insolvent and ask the shareholders to resolve for the company to be wound up and appoint a liquidator (creditors' voluntary liquidation).

Given that the Perth re-refining plant is profitable, the Board of directors could also attempt to rescue HA. For a successful rescue, HA would, however, need fresh liquidity to fund its operations which is not available (all possibilities for refinancing HA's debts have been exhausted).

A possibility to get new finance could be to use the three trucks as collateral for a new loan. There is a mortgage on the three trucks but it is not registered. If a new lender is also given a mortgage over the trucks and registers the mortgages before CBA does, the new lender's mortgage will enjoy priority over CBA's mortgage. Such a course of action could, however, result in a loss of trust of other business partners and is therefore not advised.

Furthermore, it is to be mentioned that the clause in the loan agreement for AUD 30 million with the major shareholder of HGL, which provides that the loan becomes automatically due and payable in full if HA enters into any formal insolvency or restructuring process in Australia, constitutes an ipso facto clause and is not enforceable as such during a voluntary administration.

Under these circumstances, the best option for HA seems to be a voluntary administration with the goal to sell the profitable Perth re-refining plant as a going concern, liquidate the rest

of the assets and distribute the proceeds to the creditors. It is to be expected that such a voluntary administration will produce a better return for the company's creditors than an immediate liquidation of HA.

In order to initiate a voluntary administration the majority of HA's directors have to resolve that, in their opinion, the company is insolvent or is likely to become insolvent at some future time and that an administrator should be appointed. The administrator appointed based on this decision takes full control of the company's business, property and affairs and is entitled to perform any function or exercise any power on behalf of the company. The directors of HA remain in office but their powers are suspended for the period of the voluntary administration. The first task of the administrator is to convene and hold a first meeting with the creditors within eight business days of their appointment. At this meeting, the creditors have the possibility to remove and replace the administrator and/or to appoint a committee of inspection to represent the interests of all creditors in their dealings with the administrator.

In general, all secured and unsecured creditors cannot enforce their rights during voluntary administration except with the consent of the voluntary administrator or the leave of the court. Exceptions to this moratorium exist only for:

- A creditor with a with a security interest over the whole, or substantially the whole, of a company's property and who appoints a receiver within the decision period of 13 business days from the commencement of the voluntary administration or from receiving notice of the appointment of the voluntary administrator;
- Subject to a contrary order of the court, a secured creditor, or an owner or lessor, that seeks to either continue with enforcement action commenced prior to the appointment of the voluntary administrator or to otherwise recover perishable property.

This moratorium gives the administrator the necessary time to investigate the company's affairs and issuing a recommendation to creditors as to how they should vote on the company's future. This decision is to be taken by the creditors at the second meeting of creditors.

The administrator must convene and hold the second meeting within 25 business days of being appointed. This deadline can be extended by the creditors to up to 45 days and/or by the court where an extension is warranted.

At the time of convening the second meeting of creditors, the voluntary administrator must send creditors:

- a report about the company's business, property, affairs and financial circumstances; and
- a statement setting out various matters, including:
  - o the administrator's opinion, with supporting reasons, on whether it would be in creditor's interests for the company to be returned to directors, for a DOCA to be executed or for the company to be immediately placed in liquidation; and
  - o whether there have been any dispositions of the company's property which may be recovered under the voidable transaction provisions of the Corporations act.

The directors of the company have to assist the administrator in this task by providing him with a report as to the affairs of the company and to otherwise assist the administrator as required.

The administrator has the possibility to continue the contracts necessary for continue operation the Perth re-refining plant. If HA's trucks are needed for continuing the operation of the Perth re-refining plant the moratorium in effect during the voluntary administration makes it difficult for CBA to enforce its mortgage over the trucks.

**Immediately before HA enters voluntary administration, the mortgages over the trucks will vest in the voluntary administrator because CBA failed to register its security interests on the PPSR. Unperfected (ie unregistered) interests vest in the voluntary administrator immediately before the commencement of a voluntary administration (*Personal Property***

*Securities Act, s 267*). The voluntary administration can then continue to use the trucks, or sell the trucks to provide a return to unsecured creditors.

If not all claims of the creditors can be satisfied the directors of HA and HGL should be aware they and HGL as holding company might be made liable for insolvent trading.

A director is liable for insolvent trading where:

- he or she was a director at the time a debt was incurred;
- the company was insolvent when the debt was incurred, or became insolvent as a result;
- there were reasonable grounds for suspecting the company was insolvent or would become so by incurring the debt;
- the director failed to prevent the company from incurring the debt; and
- the director was aware that there were reasonable grounds for suspecting the company was insolvent when it incurred the debt or a reasonable person in a like position in the company's circumstances would be so aware.

According to the directors, HA was insolvent since October 2020 but continued to trade, incurring debts to trade creditors as well as borrowing AUD 5 million from HGL.

The above listed conditions for liability for insolvent trading seem fulfilled. Therefore, the directors are likely to be liable for the debts incurred to trade creditors since October 2020. In order to avoid liability, the directors should have stopped trading or take all reasonable steps to prevent the company from incurring additional debts, including by appointing a voluntary administrator.

Given that the directors of HA are also the directors of HGL, HGL is also liable for insolvent trading. The directors are, therefore, not liable for the additional loan of AUD 5 million HA borrowed from HGL due to insolvent trading.

An excellent answer. Although you missed one issue, you clearly have an excellent grasp on the material and considered interesting possibilities beyond the expected answer.

5.5/6 marks

TOTAL MARKS: 46.5/50

**\* End of Assessment \***