



## 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. 0 marks
- (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. Correct answer
- (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.

9/10 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.

First, unfair preferences. If new goods or services are provided to the company by the creditor in return of payment, the transaction may not be reversed. 0 marks

Second, uncommercial transactions. If the party acts in good faith, is not expected to be aware of the company's insolvency at the transaction and has provided valuable consideration, the transaction may not be reversible. 0 marks

Third, unreasonable director-related transactions. If the company was still solvent when the transaction was entered into or did not become insolvent by do so, the transaction will not be reversible. 0 marks

0/3 marks – the question was about voidable transactions in *personal bankruptcy* not company liquidation.

#### 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?

If the foreign proceeding is clearly a rescue procedure, the Australia court will consider a voluntary administration stay which affects secured creditors. If the foreign proceeding is more analogous to liquidation, the court will use the standard liquidation stay in Australian law. 1 mark

Sometimes the questions lie in whether the foreign proceeding is a rescue one or not.

2/3 marks – fails to mention chapter 5 of the Corporations Act, the lack of court discretion, and the difficulties when the foreign proceeding is not clearly analogous to any Australian proceeding.

### 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 often exists in the supply and sale contracts. It gives the supplier the power to terminate the obligation of the supplier when the other party goes bankrupt. **1 mark**

In a liquidation, generally speaking, the liquidator does not have the benefit of *ipso facto* enforcement prohibition, so that a supplier or other contractor is generally able to terminate the contract with the company as soon as the company enters liquidation. **1 mark**

There is one exception. If a creditor's voluntary liquidation immediately follows a prior voluntary administration or attempt to negotiate a creditors' scheme of arrangement, a moratorium of *ipso facto* will be introduced and the *ipso facto* clauses will not be void. **1 mark**

**3/4 marks – fails to properly define *ipso facto* clause (ie does not refer to the right to terminate a contract because the company has entered VA: s 451E Corporations Act)**

### 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 agree with this statement. The insolvency system of Australia has been very creditor-friendly, especially is very friendly to secured creditors in the following parts.

- Secured creditors are entitled to enforce their rights during the liquidation proceedings.
- The aim of DOCA of voluntary administration is not only rescue the business, but also enable a maximum return of distribution of estates among creditors.
- The major creditors with securities over the whole or substantial the whole of a company’s property are entitled to appoint a receiver over the top of a voluntary administrator
- Australia has broad insolvency trading liability, allowing a liquidator to recover substantial sums from directors.
- Australia’s voidable transaction regime allows transactions to be clawed back from certain creditors over a period of years.

However, these features have adverse impact on corporate and the business rescue which may be in the interests of employees, small suppliers and other stakeholders. So, some recent reforms are underway to encourage a stronger corporate and business rescue culture and promote a move away from the existing dominance of creditors’ rights. Specifically:

Subject to certain exceptions, as of 1 July 2018, creditors are prevented from enforcing *ipso facto* contractual rights contingent only upon a company’s insolvency or entry into an external administration.

As of September of 2017, company directors can take advantage of a “safe harbor” from insolvency trading liability so they can continue to allow the company to incur debts with an informal restructuring attempt under the supervision of an appointed experts.

9/15 marks – this is a reasonably good response. You noted a number of characteristics of Australia’s system which are particularly creditor-focused and the recent developments which has somewhat shifted the focus towards debtors. A stronger response would have made a conclusion on the state of Australia’s system in light of these reforms and whether they have done enough to balance the interests of creditors and debtors or whether it remains tilted towards the interests of creditors. Further, your response could have highlighted which debtors and which creditors are particularly affected. For example, reforms to benefit debtors are particularly prominent in the context of small businesses and less present in large corporations.

#### **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 Lyonesian. Aussiebee employed 40 staff: 20 in Sydney and 20 in Lyonesse. Aussiebee’s CEO is an Australian, but resident in Lyonesse. Aussiebee’s CFO is an Australian, resident in Australia.

Aussiebee is insolvent. NewYums, however, remains solvent.

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

Aussiebee owes AUD 12 million in taxes in Australia, payable to the Australian Taxation Office (ATO). Assume that revenue creditors such as the ATO are not entitled to prove in the Lyonesian liquidation.

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

Australia has adopted the Model Law. According to the Model Law, ATO could claim the COMI of Aussiebee is in AU though the company is registered in Lyonesse. But it could be hard because Aussiebee have warehouses and staff in Lyonesse. **Good, although would have been even better if you had analysed the facts in a bit more detail.**

Even Australia court recognizes the liquidation proceeding as the main proceeding, ATO still has the rights to initiate a concurrent proceeding for the reason that the debtor has establishment in AU. **Good additional point.**

According to *Ackers v Deputy Commissioner Taxation* case, ATO could claim to recover from the assets of debtor when the foreign insolvency representative is realising assets (the shares) , under the condition that ATO is entitled to prove in the main proceeding. **Not quite, but close: the ATO could get an order from the Australian Court that the ATO can recover from the shares (before the rest of the shares are handed over to the foreign representative)**



the amount that the ATO *would have received* if it had been allowed to prove in the main proceeding.

To sum up, if ATO does not initiate a concurrent proceeding in AU, it is unlikely to get a share in the main proceeding, but it has a chance in the concurrent proceeding.

7/9 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 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?

1. If HA is insolvent, the directors of HA have an obligation to apply for insolvency proceeding. The directors could apply for a voluntary administration proceeding.
2. Australia has broad insolvency trade liability. If HA was already insolvent after October 2020, the 5 million debts incurred between October 2020 and October 2021 could fall

into the scope of insolvency trade category. Yes. Note that the directors, and HGL as the parent company, are all exposed to liability for insolvent trading.

3. The directors could take advantage of the “safe harbour” from insolvent trading liability, claiming that they incur debts to implement an informal restructuring attempt under supervision of an experts. No indication here that there were restructuring steps being taken, or a suitably qualified expert advising, but good that you at least thought of this as a suggestion.
4. The mortgage of trucks will come into effect after the registration of PPSR, so the trucks are still available for further financing *in rem*. I think you are saying here, but you could have better explained: 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 sell the trucks to provide a return to unsecured creditors.
5. Before HA enters into insolvency proceeding, HA cannot pay back to HGL or other related parties before schedule, or it could be deemed as voidable.
6. If the JV has already ceased operation, HA could first try to liquidate the JV to improve the cash flow of HA.
7. The VAs, or HGP, could propose a DOCA if they can find a purchaser for the Perth plant.
8. 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 creditor of HA, so they will out-vote the other creditors and will presumably want a DOCA rather than a liquidation.

4/6 marks

**\* End of Assessment \***

**TOTAL MARKS: 34/50**