



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.

They are undervalued transactions, unfair preference and transfers to defeat creditors. 1 mark There are several circumstances that the transaction will not be reversible namely, transactions in good faith, transactions that did not occurred within the relation-back period and ordinary business transactions. 1 mark For transactions that were transferred by the original transferee to a third-party at fair value and good faith, trustee also cannot reverse it. 1 mark

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?

The scope of the stay, depends on situations, is the same as if the stay initiated under the Bankruptcy Act or Chapter 5 (excluding Part 5.2 and 5.4A) of the Corporations Acts. 1 mark

As laid down by Justice Rares in the *Alari v Rizzo-Bottiglieri-de Carlini Armatori SpA*, when processing the recognition application, the Court will consider whether the foreign proceedings is a corporate rescue or liquidation. 1 mark In case of corporate rescue, a broader stay maybe given which will affect the secured creditors. For liquidation, a standard liquidation stay affecting only the unsecured liquidation will be granted. 1 mark

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 factor* clause is a contractual term that allows the creditors to terminate and/or modify the contract in case where insolvency related event occurred, including liquidations.

In 1 July 2018, a new act prohibiting the enforcement of *ipso facto* clause has come into effect. Other than some exempted contracts, an automatic “stay” will be applied to all contracts entered into on or after the date. **The unenforceability of *ipso facto* clauses is in the specific contexts, eg bankruptcy or voluntary administration.**

However, such new provision did not apply to liquidations with one exception, the creditors may wish to terminate the contract according to contract terms in case of liquidation. In circumstances where voluntary administration / a creditor scheme of arrangements ends, and immediately follows into a voluntary liquidation, the *ipso facto* moratorium will be invoked, the *ipso facto* clause will not be void which is different in bankruptcy. **Good.**

On the other hand, the liquidator has the benefits of *ipso facto* prohibition which allowing them to terminate and/or modify onerous executory contracts. The counterparty can file a proof of debts for his losses. **No. The liquidator can *disclaim* onerous executory contracts, but this does not terminate the contract and liquidators cannot modify contracts at all. It is true that if a liquidator disclaims an onerous contract, the counterparty can prove in the liquidator for his losses. Disclaimer of onerous contracts has nothing to do with *ipso facto* clauses.**

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 is more creditor-orientated when it comes to insolvency and restructuring. It can be showed in the below aspects,

The insolvency regime focuses more on protecting the creditors rights than rescuing the business. Creditors not only are able to enforce the debt and launch a bankruptcy process but also has enforcement rights after the commence of insolvency, for example, secured creditors can enforce his rights by appointing a receiver to realise the secured assets during voluntary administration/liquidation. For major creditors, the appointed receiver can be act “over the top” of the administrator in voluntary administration. Besides, the ‘clawed back period’ in voidable transactions and broad directors’ trading liabilities increased the chance for creditors to claims back its debts.

The management of the insolvent company are likely to be displaced, the debtor will lose his control to the company. For most of the circumstances, an external administrator will be appointed to take over the insolvency process. Although the debtor may choose scheme of arrangement and small business restructuring, a qualified insolvency practitioner as advisor will also be necessary to oversee the process. Control of debtor is still be compromised.

Although Australia has voluntary administration which worked as corporate rescue process, it should be noted that the statutory purpose is to maximized the return for creditors. These evidences showed that the Australia insolvency regime skews towards creditors than debtors.

In recent year, there are several new legislations that balanced the rights between the debtors and creditors.

The *ipso facto clause* reform in July 2018 has limited the creditor's rights in voluntary administration, receivership and scheme of arrangement. By restricting the creditors to terminate vital contracts, the debtor has more breathing spaces to restructure the company. The *ipso facto clause* may also be applicable to insolvent company turns into liquidation right after the end of voluntary distribution. Although support from major creditors is still essential, the reform can be viewed as a debtor-friendly reform in promoting corporate rescue.

The legislation of safe harbor in September 2017 has also softened the director insolvent trading duty in pre-insolvency stage. The director can focus on developing and implement a restructuring plan for better outcome. The distressed company can engage professional, such as, accountants and lawyers, in an early stage which allowing the company has a more survival chances. Meanwhile, instead of appointing an administrator, the liabilities immunity may also strive the directors to be more active in saving the company from formal insolvency processes.

During the outbreak of COVID-19, a new insolvency for small business restructuring has come into effect on 1 January 2021. Given that Australia has numerous SME business, the debtor-in-possession could be viewed as a step moving forwards to a more debtor-friendly insolvency regime. Instead of the "one size fits all" restructuring scheme, small business owner can now choose a less complicated, time consuming and costly process to help their distressed business which will improve the chance of survival.

Considered above developments in Australia insolvency regime, I will agree to that statement.

10/15 marks – this is a good response. You mentioned a number of key reforms which have shifted the regime towards the interests of debtors. The explanation of these reforms was somewhat unclear, in particular, the prohibition on *ipso facto clauses*. This response could have been made stronger by concluding on the effectiveness of the reforms in balancing the interests of debtors.

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 Lyonessian liquidation.

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

The case involves a corporate group insolvency and determination of COMI for both companies are necessary before ATO can take action to protect its position. **Good, many students missed the COMI issue.**

In *Ackers v Saad Investments*, determination of COMI follows the principles established in *Re Eurofood IFSC Ltd* and has to look into the ascertainable factors of each company.

Aussiebee is incorporated in Lyonesse and conducted its operations through its establishments in Lyonesse and Australia. Although the composition of employees and management comprised of Australian and Lyonesse, it is of no doubt that the Aussiebee is not a “letter box” company and presumption of registered office as the place of COMI is not rebutted. The recognition of foreign main proceedings made by Lyonessian liquidator will be granted. Meanwhile, NewYums incorporated and operated in Australia, COMI of NewYums is in Australia.

By recognising the foreign main proceedings, NewTums will be likely to dispose and the proceeds will be remitted to Lyonessia for dividend distribution. Meanwhile, ATO cannot file prove in Lyonessian liquidation, the ATO interests for recovering the tax revenue will be undermined. ATO should file an application to court to modify the recognition orders to take recovery action, such as, action to obtain payment of the tax debt on a *pari passu* basis from the proceeds.

According to *Ackers v Deputy Commissioner of Taxation*, article 22 of Model Law the interests of the creditors should be protected before granting relief under the Model Law. In this ATO interests were not protected, the court will likely amend the recognition order allowing ATO to enforce its claim on the tax debt.

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 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?

HA may face compulsory liquidation in case it cannot pay the damage to BOR. The presumption of insolvency is established if HA has failed to comply with the statutory order within the prescribed 21-day time period for a value of at least AUD2,000. When the winding up order is made, the creditor can appoint registered liquidator to take over the management of the HA. The liquidator will possess re-refining plants in Perth and Sydney which will possibly realise the plants for dividend distribution.

Regarding the HA loan provided by HGL, the loan appears to be in commercial terms and not extortionate in nature which did not constitute to be an unfair loan. There is a clause that requires HA to repay HGL in full which appears to be an executory contract. In liquidation case, the liquidator will have the power of statutory *ipso facto* prohibition stopping HA to repay HGL the loan. **No. No ipso facto prohibition in liquidation. I think you mean disclaimer. The liquidator does not need to disclaim the loan. Once the company is in liquidation, the creditor is prevented from trying to enforce repayment.** Consequently, HGL may file a proof of debt with supporting documents regarding its loan and ranked as ordinary unsecured creditors for dividend distribution. **Yes.**

For the three trucks under secured loan but was not properly registered in Personal Property Securities Register, CBA may lose the security in case of insolvency (also known as "unperfected security interest"). Assuming the security was not registered at least 6 months before the commencement of the liquidator administration, the unperfected security interest will be vested in HA immediately before liquidation. **Yes, well spotted.**

The directors of HA may be personally liable for trading liabilities regarding the additional borrowing incurred during October 2020 to October 2021. **Not just the directors. Also HGL as holding company will have insolvent trading liability.** The directors are aware of HA insolvency in October 2020 and the profit generated from Perth plant is insufficient to pay its debts, additional borrowings may weaken HA's financial position leading to its insolvency. Unless the directors are able to prove that there is reasonable grounds and expectation to expect solvency based on reliable information at that time, the directors may face civil penalty, a disqualification order and criminal penalty, if the directors behave dishonestly. The

safe harbour rule will not be applicable as the borrowings was not part of the plan leading a better outcome to HA. **Good.**

You missed the possibility of putting HA into voluntary administration. That is the best option, because it could avoid liquidation:

- 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.
- The VAs, or HGP, could propose a DOCA 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 creditor of HA, so they will out-vote the other creditors and will presumably want a DOCA rather than a liquidation.

3.5/6 marks

*** End of Assessment ***

TOTAL MARKS: 41.5/50