



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.

The three (3) types of voidable transactions that can be reversed by a bankruptcy trustee and the circumstances in which such a transaction will not be reversible are set out below –

1) undervalued transactions 1 mark

Pursuant to section 120(1) of the Bankruptcy Act 1966 (Cth) (“Bankruptcy Act”), a transfer of property by a person who later becomes a bankrupt (the “transferor”) to another person (the “transferee”) is void against the trustee in the transferor’s bankruptcy if –

- (a) the transfer took place within a period of five (5) years before commencement of the bankruptcy; and
- (b) the transferee gave no consideration or less than market value consideration for the transfer.

An undervalued transaction will not be reversible in the following circumstances –

- (a) in the case of a transfer to a related entity of the transferor:
 - (i) the transfer took place more than four (4) years before commencement of the bankruptcy; and
 - (ii) the transferee proves that, at the time of transfer, the transferor was solvent
(section 120(3)(a) Bankruptcy Act).
- (b) in the case of a transfer to a non-related entity:
 - (i) the transfer took place more than two (2) years before commencement of the bankruptcy; and
 - (ii) the transferee proves that, at the time of the transfer, the transferor was solvent
(section 120(3)(b) Bankruptcy Act).

- (c) if the transferee subsequently transferred the property to a third party and the third party acquired the property from the transferee in good faith and by giving consideration that was at least as valuable as the market value of the property (section 120(6) Bankruptcy Act).

2) transfers to defeat creditors **1 mark**

Pursuant to section 121(1) of the Bankruptcy Act, a transfer of property by a person who later becomes a bankrupt (the “transferor”) to another person (the “transferee”) is void against the trustee in the transferor’s bankruptcy if:

- (a) the property would probably have become part of the transferor’s estate or would probably have been available to creditors if the property had not been transferred; and
- (b) the transferor’s main purpose in making the transfer was:
 - (i) to prevent the transferred property from becoming divisible among the transferor’s creditors; or
 - (ii) to hinder or delay the process of making property available for division among the transferor’s creditors.

A transfer to defeat creditors will not be reversible in the following circumstances –

- (a) as provided in section 121(4) Bankruptcy Act whereby –
 - (i) the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and
 - (ii) the transferee did not know, and could not reasonably have inferred, that the transferor’s main purpose in making the transfer was the purpose described in section 121(1)(b) Bankruptcy Act; and
 - (iii) the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.
- (b) transfer of property under a debt agreement (section 121(7) Bankruptcy Act).
- (c) if the transferee subsequently transferred the property to a third party and the third party acquired the property from the transferee in good faith and for at least the market value of the property (section 121(8) Bankruptcy Act)

3) preferential payments to creditors **1 mark**

Pursuant to section 122(1) of the Bankruptcy Act, a transfer of property by a person who is insolvent (the “debtor”) in favour of a creditor is void against the trustee in the debtor’s bankruptcy if the transfer:

- (a) had the effect of giving the creditor a preference, priority or advantage over other creditors; and
- (b) was made in the period that relates to the debtor, as follows –
 - (i) in the case of a creditor’s petition, within the period of six (6) months before presentation of the petition;
 - (ii) in the case of a debtor’s petition presented when at least one creditor’s petition was pending, in the period beginning on the commencement of the debtor’s bankruptcy and ending immediately before the date of the bankruptcy of the debtor; and

- (iii) in the case of a debtor's petition presented in any other circumstances, within the period of six (6) months before presentation of the petition.

A preferential payment to a creditor will not be reversible in the following circumstances –

- (a) the transfer is to a purchaser, payee or encumbrancer in the ordinary course of business who acted in good faith and who gave good consideration at least as valuable as the market value of the property (section 122(2)(a) Bankruptcy Act). It should be noted that for existing creditors of the debtor, it will only be a defence if the creditor has given new consideration for the payment or transfer by the debtor and past consideration is not sufficient.¹
- (b) the transfer is to a person who is making title through or under a creditor of the debtor in good faith and who gave consideration at least as valuable as the market value of the property (section 122(2)(b) Bankruptcy Act).
- (c) a conveyance, transfer, charge, payment or obligation of the debtor executed, made or incurred under or in pursuance of a maintenance agreement or maintenance order (section 122(2)(c) Bankruptcy Act).
- (d) a transfer of property under a debt agreement (section 122(2)(d) Bankruptcy Act).

In addition, the three (3) abovementioned voidable transactions will also not be reversible if the transaction took place before the day on which the debtor become a bankrupt, the person with whom the transaction took place did not, at the time of the transaction, have notice of the presentation of a bankruptcy petition against the debtor and the transaction was in good faith and in the ordinary course of business (section 123(1) Bankruptcy Act).

3/3 marks – an excellent response

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?

Section 16 of the Cross-Border Insolvency Act 2018 ("CBIA") provides that for the purposes of Article 20(2) of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law ("Model Law"), the scope of the stay under Article 20(1) of the Model Law are the same as would apply if the stay arose under Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act 2001 (Cth) ("Corporations Act"), as the case requires.

For purposes of section 16 CBIA and Article 20(2) of the Model Law, the relevant parts of Chapter 5 of the Corporations Act are² –

- (a) Part 5.1 (scheme of arrangement) – no stay applies;
- (b) Part 5.3A (voluntary administration) – sections 440A to 440JA provide for stays;
- (c) Part 5.4/Part 5.4B (court-ordered liquidation) – sections 467, 471B and 471C provide for stays; and

¹ Emma L Beechey, *Foundation Certificate in International Insolvency Law, Module 8A Guidance Text, Australia, 2021/2022* (INSOL International 2021), page 23

² *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 at para 20

(d) Part 5.5 (voluntary liquidation) – section 500 provides for a stay.

In determining the scope of a stay in relation to a corporate debtor under Australia's implementation of Article 20 of the Model law, the court will need to consider "what the case requires" as stipulated in section 16 CBIA. The Federal Court of Australia in *Tai-Soo Suk v Hanjin Shipping Co Ltd*³ held that this means that the court will need to identify which Parts of the Corporations Act would apply to the foreign proceedings if they were taking place under the Corporations Act. Following from this, the stay that should apply is not to be determined on a discretionary basis but rather by the nature of the foreign proceedings compared to the nature of the proceedings under the relevant Parts of the Corporations Act.⁴

Hence, the court will look at which proceeding in the Corporations Act does the foreign proceeding closely resemble and accordingly, the stay granted in respect of the foreign proceeding will be the same as the stay that will be granted for a similar proceeding under the Corporations Act.⁵

3/3 marks – this is a fantastic response.

Question 2.3 [maximum 4 marks]

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

Black's Law Dictionary⁶ defines the Latin term *ipso facto* as "by the fact itself; by the mere fact; by the mere effect of an act or a fact".

The Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 Explanatory Memorandum gives a succinct explanation on the meaning of an *ipso facto* clause as follows⁷ –

"An *ipso facto* clause creates a contractual right that allows one party to terminate or modify the operation of a contract upon the occurrence of some specific event. In the current insolvency context, such rights may allow one party to terminate or modify the contract solely due to the financial position of the company (including insolvency) or due to the commencement of formal insolvency proceedings, such as on the appointment of an administrator. This type of termination can occur regardless of the counterparty's continued performance of its obligations under the contract." **1 mark**

In the context of liquidations, an *ipso facto* clause will allow one party to a contract to terminate or modify the contract merely by the fact that the other party has entered into liquidation. For example, if there is an *ipso facto* clause in a lease agreement, the landlord will be entitled to terminate the lease in the event of the tenant going into liquidation. Similarly, if there is an *ipso facto* clause in a supply agreement, the supplier will be entitled to terminate the contract in the event of the company going into liquidation. **1 mark**

Such situations may have negative implications on the liquidation process. For instance, in the event the liquidator wishes to continue with the lease or the supply contract as it would be beneficial for a potential sale of the company's business but the counterparty invokes the *ipso facto* clause and terminates the contract. The invocation of the *ipso facto* clause could

³ [2016] FCA 1404 at paragraphs 22 to 24

⁴ *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 at paragraph 45

⁵ *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 at paragraphs 45 and 51

⁶ Revised Fourth Edition

⁷ At paragraph 2.3

potentially hamper the liquidator's efforts resulting in the liquidator not being able to maximise the returns for distribution to the company's creditors.

Due to recent reforms in the insolvency regime in Australia, in the case of bankruptcies, *ipso facto* clauses which provide a counterparty with the right to terminate or modify a contract if the debtor becomes a bankrupt are void by virtue of sections 301 and 302 of the Bankruptcy Act. However, the same is not the case for companies in liquidation. **1 mark**

Whilst there have been reforms that impose a moratorium on *ipso facto* clauses against companies that are subject to a creditors' scheme of arrangement (section 415D Corporations Act), a voluntary administration (section 451E Corporations Act), a receivership where the receiver is appointed over the whole or substantially the whole of the company's property (section 434J Corporations Act) and a restructuring (section 454N Corporations Act), save for one exception, there is no such moratorium for a company in liquidation. The only exception is where a creditors' voluntary liquidation immediately follows a prior voluntary administration or attempt to negotiate a creditors' scheme of arrangement.⁸ **1 mark**

4/4 marks – exemplar response

PRELIMINARY TOTAL: 20/20

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.

Before making a conclusion on the statement above, we will first examine the creditor-friendly and debtor-friendly features of the Australian insolvency regime.

We will first consider the creditor-friendly features. The following are some of the creditor-friendly features of the Australian insolvency system –

- (a) Debtors rarely have any control in the bankruptcy or insolvency process as the majority of Australia's bankruptcy and insolvency processes involve the appointment of an external administrator and are not debtor-in-possession processes. This is evidenced by the fact that in the event of a company going into liquidation, voluntary administration or receivership, the directors remain formally in office but the directors cannot exercise their powers. Instead, it is the external administrator, that is, the liquidator, voluntary administrator or receiver, that exercises the powers that were formerly exercised by the directors (section 198G Corporations Act).

There are only two (2) formal debtor-in-possession processes namely schemes of arrangement and small business restructurings. However, even in small business restructuring, although the directors can continue to exercise their powers (section 453K(1) Corporations Act), the exercise of the powers are still subject to the advice of a qualified insolvency practitioner (section 453E Corporations Act).

⁸ Emma L Beechey, *Foundation Certificate in International Insolvency Law, Module 8A Guidance Text, Australia, 2021/2022* (INSOL International 2021), page 32

- (b) In general, secured creditors are entitled to enforce their rights and deal with their security during, and outside of, bankruptcy and liquidation and in certain circumstances, during a corporate rescue process.

For instance, in respect of individuals –

- (i) before filing a debtor's petition for bankruptcy, the debtor may present to the Official Receiver a declaration of an intention to present a debtor's petition (section 54A Bankruptcy Act). If the Official Receiver accepts the declaration, there is a 21-day moratorium which prevents unsecured creditors from enforcing their claims against the debtor or the debtor's property (sections 54C and 54E, Bankruptcy Act). However, this moratorium does not apply to secured creditors and does not affect a secured creditor's rights to realise or otherwise deal with its security (section 54L Bankruptcy Act);
- (ii) once a debtor becomes a bankrupt, all property of the debtor becomes vested in the bankruptcy trustee (section 58(1) Bankruptcy Act) and save for certain specified actions, there is a moratorium on any action or remedy against the debtor or the debtor's property in respect of a provable debt (section 58(3) Bankruptcy Act). The vesting of the debtor's property in the bankruptcy trustee and the moratorium on legal action does not affect the right of a secured creditor to realise or otherwise deal with his or her security (section 58(5) Bankruptcy Act); and
- (iii) in respect of the alternatives to bankruptcy namely personal insolvency agreements (Part X, Bankruptcy Act) and debt agreements (Part IX, Bankruptcy Act), these do not affect the rights of secured creditors to realise or otherwise deal with their security (sections 185XA and 229(3)(a), Bankruptcy Act).

In respect of companies –

- (i) while a company is being wound-up in insolvency or by the court, or a provisional liquidator is acting, there is a moratorium on proceedings against the company or its property and against enforcement actions in relation to the company's property, except with the leave of court (section 471B Corporations Act). However, the moratorium does not affect secured creditors' rights to realise or otherwise deal with their security interest (section 471C of the Corporations Act); and
 - (ii) during the voluntary administration or restructuring of a company, save where consent of the administrator or leave of court has been obtained, there is a statutory moratorium on the enforcement of secured and unsecured creditors rights over the company and its property (sections 440B and 453R, Corporations Act). However, a creditor with a security interest over the whole, or substantially the whole, of the company's property can enforce its security interest, within the decision period of thirteen (13) business days from the commencement of the voluntary administration or restructuring (sections 441A and 454C, Corporations Act).
- (c) While a company is being compulsorily wound-up or after the resolution for voluntary winding-up, there is a moratorium on any actions by unsecured creditors against the company and its property. However, the court may, in appropriate circumstances, grant leave for court proceedings to be commenced or continued against the company (sections 471B and 500(2), Corporations Act).
- (d) An administration of a company's affairs with a view to executing a deed of company arrangement, also known as a "voluntary administration", is the primary formal

corporate rescue process in Australia. One of the aims of voluntary administration is to maximise the chances of an insolvent company, or as much as possible of its business, continuing in existence (section 435A(a) Corporations Act).

However, the same provision goes on to state that where it is not possible for the company or its business to continue in existence, the aim of a voluntary administration should be to ensure better returns for the company's creditors and members than would result in an immediate winding-up of the company (section 435A(b) Corporations Act 2001).

Hence, even in a corporate rescue process, the aim can very well be the maximisation of returns for distribution to the creditors of a company. This is evidenced by the fact that voluntary administration is generally used as a mechanism to achieve business rescue via a going concern sale of the company's business to another entity,⁹ which would then most likely lead to liquidation of the stub company.

- (e) During the voluntary administration of a company, save where consent of the administrator or leave of court has been obtained, there is a statutory moratorium on the enforcement of secured and unsecured creditors rights over the company and its property (section 440B, Corporations Act). However, subject to a court order to the contrary (sections 441D and 441H, Corporations Act), a secured creditor, or an owner or lessor, can seek to continue enforcement action commenced prior to the appointment of the voluntary administrator (sections 441B and 441F, Corporations Act) or to otherwise recover perishable property (sections 441C and 441G, Corporations Act).
- (f) Pursuant to the Insolvency Law Reform Act 2016 (Cth) ("ILRA") the oversight role of creditors has been made co-extensive during both personal and corporate insolvency to ensure that the insolvency practitioners remain accountable and responsible during the bankruptcy or insolvency administration. These oversight roles are provided by the following provisions –
 - (i) Rule 75-15, Insolvency Practice Schedule (Corporations), Schedule 2 of the Corporations Act ("IPSC") and Rules 75-15, Insolvency Practice Schedule (Bankruptcy), Schedule 2 of the Bankruptcy Act ("IPSB") whereby the trustee of a regulated debtor's estate (persons who are bankrupt or whose property is subject to a personal insolvency agreement) and liquidators, are obliged to convene a meeting of creditors at any time during the insolvency administration if reasonably directed to do so by the creditors;
 - (ii) Rules 70-40, 70-45 and 80-40 of the IPSB and IPSC respectively, whereby creditors may request the trustee of a regulated debtor's estate or a liquidator, provisional liquidator, voluntary administrator or deed administrator to provide information, a report or a document to creditors and the request must generally be complied with unless it is unreasonable or the material irrelevant; and
 - (iii) Rules 80-35 and 85-5 of the IPSB and IPSC respectively, whereby the committee of inspection or a majority of creditors may give directions to the trustee of a regulated debtor's estate or a liquidator, provisional liquidator, voluntary administrator or deed administrator and such trustee or external administrator must have regard to the directions but is not required to comply with the directions if they can give reasons for not complying. In the event of any conflict between directions given by the creditors and by the committee of

⁹ Emma L Beechey, *Foundation Certificate in International Insolvency Law, Module 8A Guidance Text, Australia, 2021/2022* (INSOL International 2021), page 47

inspection, directions given by the creditors override any directions given by the committee.

- (g) Though the Australian insolvency regime has two (2) alternatives to bankruptcy for individuals namely personal insolvency agreements (Part X, Bankruptcy Act) and debt agreements (Part IX, Bankruptcy), the implementation of these two (2) alternatives are still subject to the approval of a majority of the creditors of the debtor.
- (h) So as to maximise returns to creditors, the Corporations Act and the Bankruptcy Act provide the liquidator and bankruptcy trustee respectively with the powers to claw back assets that were the subject of voidable transactions such as unfair preferences, uncommercial transactions and preferential payments over a substantial period of years and without having to prove improper conduct. It is pertinent to note that such recoveries for voidable transactions can only be pursued in a liquidation and not under any of the corporate rescue processes.
- (i) There are broad insolvent trading liabilities for directors and holdings companies that allowed a company to incur debts whilst insolvent (sections 588G and 588V, Corporations Act). In the event of a finding of liability for insolvent trading, the liquidator can recover the losses and damages arising therein from the directors and the holding company (sections 588M and 588W, Corporations Act).

Notwithstanding the above, there are certain debtor-friendly features of the Australian insolvency regime in the form of the corporate rescue processes and certain recent reforms to the corporate insolvency process in Australia. The recent reforms seek to promote a stronger corporate and business rescue culture rather than the end of a company's life being the only option in the event of financial difficulties.

We will now consider some of the debtor-friendly features of the Australian insolvency system as set out below –

- (a) The Corporations Act provides for three (3) types of formal corporate rescue processes in Australia namely the voluntary administration, followed by the implementation of a deed of company arrangement (“DOCA”) under Part 5.3A of the Corporations Act, a creditors’ scheme of arrangement under Part 5.1 of the Corporations Act and a restructuring process for companies with liabilities of less than AUD 1 million under Part 5.3B of the Corporations Act. The aims of these formal corporate rescue processes are to rehabilitate a company in financial distress rather than ending the life of the company.
- (b) In respect of the dominant type of corporate rescue in Australia, that is, the voluntary administration, section 435A of the Corporations Act expressly states that the primary objective is maximising the chances of the company, or as much as possible of its business, continuing in existence (section 435A(a) Corporations Act). Only where the continued existence of the company or its business is not possible, does the secondary objective of ensuring a better return for the company’s creditors and members than would result from an immediate winding-up of the company, kick-in (section 435A(b) Corporations Act). The primary objective of a voluntary administration has also been emphasised by the High Court of Australia in *Mighty River International Ltd v Hughes*.¹⁰
- (c) In respect of individuals, the Australian insolvency regime provides two (2) alternatives to bankruptcy namely, personal insolvency agreements (Part X,

¹⁰ (2018) 265 CLR 480

Bankruptcy Act) and debt agreements (Part IX, Bankruptcy). The debtor plays a key role in negotiating the terms of the agreement with creditors before a trustee or administrator is then appointed to administer the agreement. These two (2) alternatives avoid the negative implications of a bankruptcy such as the negative reputational impact and the restrictions that come with being a bankrupt.

- (d) Section 73 of the Bankruptcy Act provides a bankrupt with an avenue to seek an annulment of the bankruptcy by proposing to his or her creditors, a composition in satisfaction of his or her debts or a scheme of arrangement of his or her affairs.

If the proposal is accepted by a special resolution of the bankrupt's creditors, the bankruptcy is annulled on the day the special resolution was passed (section 74(1) Bankruptcy Act). Where a bankruptcy is annulled, the property of the bankrupt still vested in the trustee either vests in such person as appointed by the court or reverts to the bankrupt (section 74(6) Bankruptcy Act).

- (e) In respect of *ipso facto* clauses, recent reforms in Australia now have the following impact on *ipso facto* clauses –
- (i) in respect of individuals, *ipso facto* clauses which provide a counterparty with the right to terminate or modify a contract if the debtor becomes a bankrupt are void by virtue of sections 301 and 302 of the Bankruptcy Act; and
 - (ii) in respect of companies, there is a moratorium imposed on *ipso facto* clauses against companies that are subject to a creditors' scheme of arrangement (section 415D Corporations Act), a voluntary administration (section 451E Corporations Act), a receivership where the receiver is appointed over the whole or substantially the whole of the company's property (section 434J Corporations Act) and a restructuring (section 454N Corporations Act).
- (f) The new "safe harbour" provisions provide immunity to directors from insolvent trading where the conditions in section 588GA of the Corporations Act are met. These safe harbour provisions encourage directors to pursue informal rescue attempts for viable companies that are in financial difficulties but have a reasonable prospect of being able to return to profitability in the longer run.

From the discussion above, it can be seen that though there have been recent reforms to make the insolvency regime in Australia more debtor-friendly, the creditor-friendly features still outweigh the debtor-friendly features. Based on the above, I disagree with the statement that "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.". This is because the primary focus of the Australian insolvency regime is still the protection of creditors' rights, making Australia still a predominantly creditor-friendly jurisdiction.

It is perfectly reasonable for a jurisdiction to be creditor-friendly. This is because in a bankruptcy or insolvency, it is the creditors who stand to lose due to, in all or the majority of cases, no fault of the creditors. It must be noted that creditors do not just comprise of lenders of the debtor, but also other creditors such as employees and tax authorities. Hence, the insolvency regime in a jurisdiction should, as far as possible within the confines of due process, assist creditors to reduce their losses and maximise their returns in the event of bankruptcy or insolvency of the debtor. However, there should, at the same time, be proper processes and safeguards in place to ensure that creditors do not abuse the system leading to the bankruptcy or insolvency of otherwise viable debtors.

15/15 marks – this is an exemplar response. You clearly communicate the factors of Australia's system which uphold the interests of creditors and those recent developments

which have attempted to bolster the interests of debtors. Your conclusion on the state of Australia's system which continues to protect the rights of creditors is well-supported and logical.

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?

There are a few issues that will need to be considered in advising the ATO and the issues are discussed in turn below.

1) Recognition of the Lyonessean liquidation in Australia

We will first have to consider if the Lyonessean liquidation of Aussiebee will be recognised as a foreign main proceeding in Australia. In this regard, reference will be made to the CBIA which enacts the Model Law in Australia. Pursuant to Article 17 of the Model Law, a foreign proceeding will be recognised as a "foreign main proceeding" if the following requirements are satisfied –

- (a) the foreign proceeding is a proceeding within the meaning of Article 2(a) of the Model Law.

Article 2(a) of the Model Law defines a "foreign proceeding" as a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

The facts of the case state that Aussiebee is insolvent and a liquidator has been appointed to Aussiebee in Lyonesse. The liquidation would be a collective judicial or administrative proceeding in a foreign State pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of liquidation. Hence, the liquidation of Aussiebee in Lyonesse would be a “foreign proceeding” within the meaning of Article 2(a) of the Model Law.

- (b) the foreign representative applying for recognition is a person or body within the meaning of Article 2(d) of the Model Law.

Article 2(d) of the Model Law defines “foreign representative” as a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.

The facts of the case state that it is the liquidator appointed to Aussiebee in Lyonesse that is making the application for recognition to the Federal Court of Australia. The liquidator would be a “foreign representative” within the meaning of Article 2(d) of the Model Law. Hence, this requirement would be satisfied.

- (c) The recognition application meets the requirements of Article 15(2) of the Model Law.

Pursuant to Article 15(2) of the Model Law, the liquidator’s recognition application must be accompanied by –

- (i) a certified copy of the decision commencing the Lyonesse liquidation proceedings over Aussiebee and appointing the liquidator; or
- (ii) a certificate from the Lyonesse court affirming the existence of the Lyonesse liquidation and of the appointment of the liquidator; or
- (iii) in the absence of evidence referred to in subparagraphs (i) and (ii) above, any other evidence acceptable to the court of the existence of the Lyonesse liquidation and of the appointment of the liquidator.

- (d) the recognition application must be submitted to the court under Article 4 of the Model Law.

Section 10 of the CBIA stipulates that for purposes of Article 4 of the Model Law, the competent court in respect of a proceeding involving a non-individual debtor is the Federal Court of Australia and the Supreme Court of a State or Territory.

The facts of the case state that the Lyonesse liquidator of Aussiebee applied to the Federal Court of Australia for the recognition of the Lyonesse liquidation. Hence, this requirement has also been satisfied.

- (e) the recognition of the foreign proceeding must not be manifestly contrary to the public policy of Australia.

The Lyonesse liquidation is against Aussiebee which is insolvent and there is nothing in the facts to indicate that the recognition of the Lyonesse

liquidation would be manifestly contrary to the public policy of Australia. Hence, it is highly likely that this requirement would also be satisfied.

- (f) the foreign proceeding must be taking place in the State where the debtor has the centre of its main interests.

Though the Model Law does not define “centre of main interests”, Article 16(3) of the Model Law provides a rebuttable presumption that the debtor’s registered office is presumed to be the centre of its main interests. The facts of the case state that Aussiebee is incorporated in Lyonesse and has offices and warehouses in Lyonesse. Since there is also nothing to prove that Aussiebee’s centre of main interests is a country other than Lyonesse, the presumption will apply and Aussiebee’s centre of main interests will be Lyonesse.

- The ATO could reasonably argue that the COMI of Aussiebee is Australia, not Lyonesse, and so the assets of Aussiebee should not be entrusted to the Lyonesse liquidator.
 - *Ackers v Saad Investments* is the leading Australian decision on COMI. It followed and expressly adopted the principles in *Re Eurofoods IFSC Ltd* that COMI is to be determined having regard to the objectively ascertainable factors of the debtor.
 - Need to displace presumption that place of incorporation is COMI, which could potentially be done using the following facts:
 - Six of the seven directors are Australians
 - The CEO is Australian (although resident in Lyonesse)
 - The CFO is Australian and resident in Australia
 - Sells Australian product, manufactured by its subsidiary in Australia.
 - Do not know whether Aussiebee holds itself out to be an Australian-based company, but its name and its product seem to indicate that it does.

This is a borderline case – it is possible, although far from certain, that an Australian court may find that Aussiebee’s COMI is in Australia, not Lyonesse.

If the COMI is in Australia, and the Lyonesse liquidation is only recognised a foreign non-main proceeding, article 21(3) of the Model Law will apply, such that the Lyonesse liquidator will need to convince the Australian Court that the shares “should be administered in the foreign non-main proceeding” before the Court will be able to entrust the shares to the Lyonesse liquidator under art 21.

Since the liquidation of Aussiebee is taking place in Aussiebee’s centre of main interests, that is, Lyonesse, this requirement will also be satisfied.

Based on the above, it is highly likely that the Federal Court of Australia will recognise the Lyonesse liquidation as a foreign main proceeding.

2) Winding-up proceedings by the ATO

Upon recognition of the Lyonesse liquidation as a foreign main proceeding, there will be an automatic stay on the commencement or continuation of individual actions or proceedings in respect of Aussiebee or its assets (Article 20(1) Model Law). However, this stay does not affect the right to request commencement of a proceeding under Chapter 5 (other than Parts 5.2 and 5.4A), section 601CL and Schedule 2 of the Corporations Act (Article 20(3) of the Model Law read together with section 8 of the CBIA).

Hence, the stay does not prevent the ATO from commencing insolvency proceedings against Aussiebee in Australia to recover the AUD 12 million in taxes owed by Aussiebee in Australia. We will now need to consider if the ATO may commence winding-up proceedings against Aussiebee in Australia.

Section 583(1) of the Corporations Act (read together with section 9 of the Corporations Act) empowers the Australian courts to wind-up in Australia, a registered foreign company or an unregistered foreign company that is, or was, carrying on business in Australia.

The facts of the case state that Aussiebee has offices and warehouses in Sydney and Aussiebee regularly sells its chocolates all over the world, from its Sydney offices and warehouses. This shows that Aussiebee was carrying on business in Australia.

Since Aussiebee owes the ATO outstanding taxes, provided ATO shows that any of the requirements for Aussiebee to be wound-up as set out in section 583(c) of the Corporations Act have been satisfied, Aussiebee may be wound-up under section 583(1) of the Corporations Act. It should also be noted that in the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under Part 5 of the Corporations Act, proof that the debtor is insolvent (Article 30 Model Law).

Turning back to the CBI, Article 28 of the Model Law stipulates that after recognition of a foreign main proceeding, a proceeding under Chapter 5 of the Corporations Act may be commenced only if Aussiebee has assets in Australia. Further, the effects of the Australian winding-up proceedings will be restricted to the assets of Aussiebee that are located in Australia.

Since Aussiebee has assets in Australia, ATO may commence winding-up proceedings against Aussiebee in Australia and the winding-up proceedings will be restricted to Aussiebee's assets in Australia.

Very good point, most students would not have thought of this possibility at all. An excellent analysis.

3) Relief sought by Lyonession liquidator

The next issue that needs to be considered is whether the Federal Court of Australia will grant the relief sought by the liquidator, that is, for orders entrusting Aussiebee's assets (including Aussiebee's shares in NewYums which are worth AUD 20 million) to the liquidator, so that she can realise them for the benefit of creditors in the Lyonession liquidation.

The facts of the case state that the Lyonession liquidator has already filed an application for recognition of the Lyonession liquidation. Hence, in the event ATO files the winding-up proceedings against Aussiebee in Australia, the Australian proceedings would have been commenced after recognition, or filing of the application for recognition, of the Lyonession liquidation. Pursuant to Article 29(b) of the Model Law –

- (a) any relief in effect under Article 19 or 21 of the Model Law granted to the Lyonession liquidator will be reviewed by the court and will be modified or terminated if inconsistent with the proceeding in Australia; and
- (b) the stay and suspension in Article 20(1) of the Model Law granted upon recognition of the Lyonession liquidation will be modified or terminated pursuant to Article 20(2) of the Model Law if inconsistent with the proceeding in Australia.

Article 21 of the Model Law sets out the relief that may be granted by the court upon recognition of a foreign proceeding. In particular, Article 21(2) of the Model Law provides that the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

The Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency ("GEI") at paragraph 192 highlights that in respect of Article 21(2) of the Model Law –

"The "turnover" of assets to the foreign representative (or another person), as envisaged by paragraph 2, is discretionary. It should be noted that the Model Law contains several safeguards designed to ensure the protection of local interests before assets are turned over to the foreign representative. Those safeguards include the following: the general statement of the principle of protection of local interests in article 22, paragraph 1; the provision in article 21, paragraph 2, that the court should not authorise the turnover of assets until it is assured that the local creditors' interests are protected; and article 22, paragraph 2, according to which the court may subject the relief that it grants to conditions it considers appropriate."

Pursuant to Article 21(2) of the Model law, the Federal Court of Australia has the discretion to grant the relief sought by the Lyonession liquidator. However, the court must first be satisfied that the interests of creditors in Australia are adequately protected.

The facts of the case state that Aussiebee owes AUD 12 million in taxes in Australia payable to the ATO, and revenue creditors such as the ATO are not entitled to prove in the Lyonessian liquidation. This means that in the event the Federal Court of Australia grants the order sought by the Lyonession liquidator, the ATO will not receive any part of the proceeds in satisfaction of the taxes owed by Aussiebee.

The present facts are similar to the facts in the case of *De Akers as a joint foreign representative of Saad Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation*.¹¹ In that case, taking into consideration the notion of adequate protection in the Model Law, the Full Court of the Federal Court of Australia upheld the modified recognition order made by the Federal Court which had the effect of giving the Deputy Commissioner of Taxation ("DTC") leave to take steps to enforce its claims in Australia expressly for the purpose of recovering an amount up to the *pari passu* amount that the DTC would have received if it were entitled to prove for the tax debt as an unsecured creditor in the foreign main proceeding. However, it should be noted that in this case, the DTC was not entitled to commence winding-up proceedings against the debtor in Australia.

¹¹ [2014] FCAFC 57

Coming back to the facts of the present case, pursuant to Articles 21 and 29 of the Model Law, the Federal Court of Australia will need to ensure –

- (a) that the relief granted to the Lyonession liquidator is not inconsistent with the Australian winding-up proceedings against Aussiebee; and
- (b) that in granting the relief sought by the Lyonession liquidator, interests of creditors in Australia are adequately protected.

Hence, the most likely outcome in the present case is for the Federal Court of Australia to order that, subject to section 12 CBIA and Articles 13 and 31 of the Model Law, the assets of Aussiebee in Australia are to be used to settle the debts of creditors in accordance with the priority of ranking in Australia which will include the taxes owed by Aussiebee to the ATO and for the remaining assets to be entrusted to the Lyonession liquidator for the benefit of creditors in the Lyonessian liquidation.

8/9 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?

Based on the facts of the case, it is clear that HA is insolvent. In this regard, pursuant to section 95A of the Corporations Act, a company is insolvent if it is unable to pay all of its debts, as and when they become due and payable. Taking into account the extent of HA's indebtedness, that there is no more funding available for HA's operations and all possibilities for refinancing HA's debts have been exhausted, the best option would be a liquidation of HA. The Board of HA can apply to the court for HA to be wound-up in insolvency (section 459P Corporations Act).

The following are the main issues that the Board of HA and HGL should be aware of –

- 1) The AUD 30 million loan for HA's second re-refining plant near Perth, Western Australia.

The facts state that loan agreement with the HGL shareholder has an *ipso facto* clause which provides that the loan becomes automatically due and payable in full if HA enters into any formal insolvency or restructuring process in Australia.

Pursuant to provisions in the Corporations Act, there will be a moratorium on *ipso facto* clauses against companies that are subject to a creditors' scheme of arrangement (section 415D Corporations Act), a voluntary administration (section 451E Corporations Act), a receivership where the receiver is appointed over the whole or substantially the whole of the company's property (section 434J Corporations Act) and a restructuring (section 454N Corporations Act). However, save for one exception,¹² there will be no moratorium on *ipso facto* clauses if a company goes into liquidation.

In the event HA goes into liquidation, there will be no moratorium on the *ipso facto* clause and the HGL shareholder will be entitled to invoke the *ipso facto* clause to make the AUD 30 million loan become automatically due and payable in full. **Good**

- 2) The mortgages in favour of CBA over HA's three (3) trucks

Pursuant to the Personal Property Securities Act 2009 ("PPSA"), a security interest over personal property must be registered on the Personal Property Securities Register ("PPSR"). Since the mortgages over the three (3) trucks are not registered on the PPSR, any other security interests registered over the trucks in the PPSR will take priority over CBA's unregistered interest on the trucks.

Further, pursuant to section 267 PPSA, in the event of HA going into liquidation, voluntary administration or restructuring, the security interest held by CBA on the trucks will vest in HA immediately prior to commencement of the liquidation, voluntary administration or restructuring. In such a scenario, CBA will lose its security interest in the trucks. **Good**

¹² The only exception is where a creditors' voluntary liquidation immediately follows a prior voluntary administration or attempt to negotiate a creditors' scheme of arrangement - Emma L Beechey, *Foundation Certificate in International Insolvency Law, Module 8A Guidance Text, Australia, 2021/2022* (INSOL International 2021), page 32.

3) HA continuing to trade between October 2020 and October 2021, incurring debts to trade creditors as well as borrowing AUD 5 million from HGL

(a) Impact on HA's directors

The directors of HA have a duty to prevent insolvent trading of HA. Pursuant to section 588G of the Corporations Act, HA's directors will be liable for insolvent trading if all of the following conditions are met –

(i) HA incurs a debt at a particular time.

The debts concerned would be the debts to trade creditors as well as the AUD 5 million borrowing from HGL incurred between October 2020 and October 2021

(ii) the person was a director of HA at the time when HA incurs a debt.

This would cover persons who were directors of HA from October 2020 to October 2021 when HA incurred debts to trade creditors and borrowed AUD 5 million from HGL.

(iii) HA was insolvent at the time of incurring the debt, or becomes insolvent by incurring that debt or by incurring at that time debts including that debt.

At the time of incurring debts to trade creditors and borrowing AUD 5 million from HGL, HA was insolvent. This is due to the fact that at that point in time, HA owed a debt of AUD 4.6 million to BOR which it was unable to pay.

(iv) at the time of incurring the debt, there were reasonable grounds for suspecting that the company was insolvent, or would so become insolvent as a result of incurring that debt or other debts.

At the time of incurring debts to trade creditors and borrowing AUD 5 million from HGL, HA already owed a debt of AUD 4.6 million to BOR which it was unable to pay. Hence, there were reasonable grounds for suspecting that HA is insolvent.

(v) the director failed to prevent the company from incurring the debt.

The facts of the case do not indicate that the directors of HA took any steps to prevent HA from incurring the debt.

(vi) the director was aware that there were reasonable grounds for suspecting that 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.

The facts indicate that the directors knew that HA has been insolvent since the BOR 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.

Based on the above, the requirements for a claim for insolvent trading would be satisfied and HA's directors would be liable for insolvent trading unless they have a defence. **Good** Section 588H of the Corporations Act sets out the following defences to insolvent trading –

- (i) at the relevant time, the director had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent despite all its debts incurred;
- (ii) based on information provided by a competent and reliable person who was responsible for providing the information, there were reasonable grounds to believe and the director did believe that the company was solvent and would remain solvent despite all of the debts incurred;
- (iii) because of illness or other good reason, the director did not take part in the management of the company at the time the debt was incurred; or
- (iv) the director took all reasonable steps to prevent the company from incurring the debt, including appointing an administrator or a restructuring practitioner for the company.

Another relief for directors from insolvent trading liability would be the safe harbour provisions introduced in section 588GA of the Corporations Act.

The safe harbour provisions will absolve a director from liability for insolvent trading where after the time the director starts to suspect that HA may become or be insolvent, the director starts developing one or more courses of action that are reasonably likely to lead to a better outcome for HA. Section 588GA(7) Corporations Act defines "better outcome" as an outcome that is better for the company than the immediate appointment of an administrator, or liquidator, of the company. **Good**

For the purposes of determining whether a course of action is reasonably likely to lead to a better outcome for the company, regard may be had to whether the director (section 588GA(2) Corporations Act) –

- (i) is properly informing himself or herself of the company's financial position; or
- (ii) is taking appropriate steps to prevent any misconduct by officers or employees of the company that could adversely affect the company's ability to pay all its debts; or
- (iii) is taking appropriate steps to ensure that the company is keeping appropriate financial records consistent with the size and nature of the company; or
- (iv) is obtaining advice from an appropriately qualified entity who was given sufficient information to give appropriate advice; or
- (v) is developing or implementing a plan for restructuring the company to improve its financial position.

In this regard, it should be noted that the facts of the case state that HA's directors have exhausted all possibilities for refinancing HA's debts. However, it is unclear if there were any steps for restructuring taken to improve HA's financial position.

The safe harbour provisions will only apply –

- (i) if the debt is incurred directly or indirectly in connection with any such course of action that are reasonably likely to lead to a better outcome for HA (section 588GA(1)(b) Corporations Act);
- (ii) if HA pays the entitlements of its employees by the time they fall due (section 588GA(4) Corporations Act); and
- (iii) if HA gives returns, notices, statements, applications or other documents as required by taxation laws (within the meaning of the Income Tax Assessment Act 1997) (section 588GA(4) Corporations Act).

If the defences to insolvent trading and the safe harbour provisions do not apply, then the directors of HA will be liable for insolvent trading. If HA goes into liquidation, the liquidators of HA may recover from the directors, as a debt due to HA, an amount equal to the amount of loss or damage in relation to the debts incurred by HA (section 588M Corporations Act). The directors may also be subject to a civil penalty (section 1317G Corporations Act) or a disqualification order (section 206C Corporations Act). If the director has also behaved dishonestly, he or she may also be subject to a criminal penalty (section 588G(3) Corporations Act). **All correct.**

(b) Impact on HGL

The facts of the case state that all of the shares in HA are owned by HA's parent company, HGL and the same Board of directors control both HGL and HA. **Well spotted.**

Pursuant to section 588V of the Corporations Act, a holding company may also be liable for insolvent trading in respect of the debts of an insolvent subsidiary in similar circumstances as those applying to directors of the company.

Since the same Board of directors control both HGL and HA, HGL would also be aware of HA trading while insolvent during the period from October 2020 to October 2021. If the defences in section 588X of the Corporations Act or the safe harbour provisions in section 588WA do not apply, HGL would be liable for the insolvent trading of HA. In such a situation, the liquidators of HA may recover from HGL, as a debt due to HA, an amount equal to the amount of the loss or damage in relation to the debts incurred by HA (section 588W Corporations Act).

4/6 marks

You gave an excellent analysis of the claims that will arise if HA goes into liquidation. But what would you advise the directors to do? The Board should resolve to place HA into voluntary administration, resolving that it is insolvent or likely to become insolvent. Benefits:

- This will trigger the *ipso facto* moratorium during the VA period, but the moratorium will end if the company then goes into a DOCA or liquidation.
- As you noted above, 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 administrators can then sell the trucks, possibly as part of a sale of the Perth plant. CBA will be left with only its rights as an unsecured creditor.
- 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.
- If they can get the company into a DOCA, the directors and HA will avoid insolvent trading liability, as insolvent trading claims can only be pursued in a liquidation.

*** End of Assessment ***

TOTAL MARKS: 47/50