



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. 0 marks**
- (d) is an agent of the company until the appointment of a liquidator to the company. **Correct answer**
- (e) is required to meet the priority claims of employees out of assets subject to a non-circulating security interest.

Question 1.9

Select the correct answer:

Australia has excluded from the definition of "laws relating to insolvency" for the purposes of Article 1 of the Model Law the following parts of the Corporations Act:

- (a) The part dealing with schemes of arrangement.
- (b) The part dealing with windings up of companies by the court on grounds of insolvency.
- (c) The part dealing with taxes and penalties payable to foreign revenue creditors. 0 marks**
- (d) The part dealing with the supervision of voluntary administrators.
- (e) The part dealing with receivers, and other controllers, of property of the corporation. **Correct answer**

Question 1.10

Select the correct answer:

Laws regarding the following came into effect on 1 January 2021:

- (a) an *ipso facto* moratorium in voluntary administrations and liquidations.
- (b) simplified restructuring and liquidation regimes for small companies. 1 mark
- (c) reducing the default bankruptcy period from three years to one year.
- (d) a safe harbour from insolvent trading liability.

8/10 marks

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Name the three types of voidable transactions that can be reversed by a bankruptcy trustee and describe the circumstances in which such a transaction will not be reversible.

The 3 types of voidable transactions under the Bankruptcy Act 1966 (**Bankruptcy Act**) that can be reversed by a bankruptcy trustee are:

1. undervalued transactions;
2. transfers to defeat creditors; and
3. preferential payments to creditors, 1 mark

which took place during the “relation back period” prior to the “commencement of bankruptcy”.

Pursuant to s. 123 of the Bankruptcy Act, where the relevant transaction took place in good faith and in the ordinary course of business in the absence of a creditor’s or debtor’s petition, it is not reversible by the bankruptcy trustee. 1 mark

Pursuant to ss. 120(6) and 121(8) of the Bankruptcy Act, where the transferee of the property the subject of the transaction has subsequently transferred the property to a third party who received the property in good faith and for market value, that transaction is also not reversible by the bankruptcy trustee. 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?

Pursuant to s. 16 of the Cross-Border Insolvency Act 2008 (Cth) (**CBIA**), the scope of the stay under Article 20 of the Model Law is the same as if the stay arose under Chapter 5 (except for Parts 5.2 and 5.4A) of the Corporations Act 2001 (Cth) (**Corporations Act**), as the case requires. 1 mark This means that the stay to be applied by the court depends on the nature of the foreign proceeding. The stay will either be:

1. a broader voluntary administration stay affecting secured creditors where the foreign proceeding is akin to a business rescue procedure; or **1 mark**
2. a liquidation stay that affects only unsecured creditors, where the foreign proceeding is analogous to a liquidation. **1 mark**

The issue of which type of Australian stay should apply under Article 20(2) of the Model Law was considered by Justice Rares in *Alari v Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2018] FCA 1067, pursuant to an application by Italian liquidators to the Federal Court of Australia for recognition of an Italian *fallimento* proceeding. Justice Rares recognised the *fallimento* proceeding as a main foreign liquidation analogous to a liquidation proceeding and determined that the liquidation moratorium should apply. In so doing, he rejected an argument that as the moratorium in the Italian *fallimento* proceeding affected secured creditors, the voluntary administration moratorium (which also affects secured creditors) should be applied in Australia.

3/3 marks

Question 2.3 [maximum 4 marks]

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

An *ipso facto* clause is a contractual provision that allows one counterparty to terminate or modify the contract upon the occurrence of specified insolvency or bankruptcy related events, such as the appointment of an administrator, receiver or liquidator, in respect of the other counterparty.

From 1 July 2018, a moratorium or stay on reliance on such *ipso facto* clauses came into effect in relation to all contracts, arrangements and agreements entered into on or after that date, save for certain exceptions. It does not apply to variations or novations to contracts where the original contract was entered into before 1 July 2018, as long as the variations or novations are made before 1 July 2023. The intention behind such a stay or moratorium is to enhance the prospects of a sale of the business as a going concern, without key creditors and suppliers terminating their contracts with the company and leaving the company without a viable business. The stay therefore regulates the application of *ipso facto* clauses and does not prohibit them.

On 1 January 2021, the moratorium was extended to reflect the new restructuring regime under Part 5.3B of the Corporations Act introduced by the Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth). This means that there will be a stay on certain *ipso facto* contractual rights on companies that are the subject of the following insolvency regimes:

- a creditors' scheme of arrangement (s. 415D of the Corporations Act);
- a voluntary administration (s. 451E of the Corporations Act);
- a receivership where the receiver is appointed over the whole or substantially the whole of the property of the company (s. 434J of the Corporations Act);
- a restructuring – a process for companies with liabilities (excluding employee entitlements) of less than \$1 million under Part 5.3B of the Corporations Act (s. 454N of the Corporations Act)
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The stay does not apply in the event of the company becoming subject to the following insolvency regimes:

- a receiver or other controller appointment that is not over the whole or substantially the whole of the company's property;
- a deed of company arrangement;

- a liquidation (at least in circumstances where the liquidation does not immediately follow an administration, creditors' scheme or restructuring); or
- a restructuring plan.

Ipsa facto rights arising from certain types of contracts or arrangements are excluded from the statutory moratorium (Corporations Regulations 2001 (Cth), reg. 5.3A.50(2)).

A counterparty can apply to the court to lift the stay, which the court can do if it is in the "interests of justice".

S. 301 of the Bankruptcy Act renders *ipso facto* clauses void when a person becomes bankrupt, and prevents the counterparty from terminating, modifying or repossessing property upon the debtor's bankruptcy.

The question was about the relevance of *ipso facto* clauses in liquidations. I can see that you have copied and pasted quite liberally from the internet, and so you happened to pick up most of the correct answer (highlighted in yellow above) from the Baker McKenzie paper at <https://www.bakermckenzie.com/-/media/files/insight/publications/2021/03/ipso-facto-29-march-2021.pdf> but I cannot tell if you actually understood the question or its answer. The answer is this:

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

2/4 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.

Australia remains a creditor-friendly jurisdiction despite recent reforms under the Corporations Amendment (Corporate Insolvency Reforms) Act 2020 aimed at making Australia more debtor-friendly, namely the simplified liquidation process for small companies with liabilities of less than \$1 million, intended to make liquidations faster, less complex and less costly.

The Australian insolvency regime is mainly focussed on protecting the rights and interests of creditors over those of debtors. Almost all of the bankruptcy and insolvency processes involve the appointment of an external administrator instead of debtor-in possession processes, except for schemes of arrangement and small business restructurings, although a qualified insolvency practitioner must be appointed as an advisor in the latter case.

Australia's voluntary administration regime is controlled by creditors to the exclusion of directors and shareholders and is intended to maximise returns to creditors. Directors remain in place but are unable to exercise their powers.

Unlike the UK, receivership remains in place for the benefit of secured creditors, who can appoint receivers over the top of liquidators or voluntary administrators to realise assets of the company that are subject to the security interest and distribute the proceeds to the secured creditor.

Creditors play an active part in all insolvency processes and secured creditors can enforce their rights in an unfettered manner, save for certain time limitations in a voluntary administration scenario. Exceptions to the statutory moratorium include:

- where a creditor with a secured interest over the whole or substantially the whole of a company's property enforces its security interest, usually by appointing a receiver, within 13 business days from the commencement of the voluntary administration or the secured creditor receiving notice of the appointment of the voluntary administrator (ss 9 and 441A, Corporations Act); and
- subject to a contrary order of the court (ss 441D and 441H, Corporations Act), where a secured creditor seeks to continue with an enforcement action commenced prior to the appointment of the voluntary administrator (ss 441B and 441F, Corporations Act) or recover perishable property (ss 441C and 441G, Corporations Act).

Secured creditors and employees enjoy a statutory priority in the distribution of assets. Unsecured creditors have no legal right to priority but if they have a particular relationship with the debtor (e.g. a supplier of essential materials), they may be able to leverage that relationship to obtain payment and ensure future payments as a practical necessity to keep the business running and maximise value.

In addition, Australia has broad insolvent trading liability for directors where they have allowed a company to incur debts whilst insolvent, and a voidable transaction regime, which allow substantial sums to be clawed back for the benefit of creditors over a substantial number of years and without having to prove improper conduct such as an intention to defeat creditors. Although directors can benefit from safe harbour from insolvent trading liability under s. 588GA of the Corporations Act, should they wish to pursue an informal restructuring attempt, upon the advice of a restructuring expert, to trade out of existing financial difficulties, this is subject to gaining the support of key financiers and suppliers, given that the *ipso facto* moratorium does not apply during informal restructuring.

11/15 marks – this is a good response. You identified the components of Australia's insolvency and restructuring system which are creditor-friendly and weighed up those components with more recent developments which have sought to uphold the interests of debtors. Your response could have been strengthened by elaborating on the factors of the system which are debtor-friendly. In particular, the prohibition of *ipso facto* clauses and the small business insolvency regimes which are designed to be more debtor-friendly. Nonetheless, your conclusion is supported by logic and evidence.

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

Question 4.1 [maximum 9 marks]

Aussiebee Pty Ltd (Aussiebee), a company incorporated in the fictional country of Lyonesse, sells chocolates flavoured with Australian native plants. The chocolates are manufactured in Australia by NewYums Pty Ltd (NewYums), an Australian-incorporated wholly-owned subsidiary of Aussiebee.

Aussiebee has offices and warehouses in both Sydney and in Lyonesse. Aussiebee regularly sells its chocolates all over the world, from both its Lyonesse and its Sydney offices and warehouses. Aussiebee and NewYums share a board of directors, made up of six Australians and one Lyonesse. Aussiebee employed 40 staff: 20 in Sydney and 20 in Lyonesse. Aussiebee's CEO is an Australian, but resident in Lyonesse. Aussiebee's CFO is an Australian, resident in Australia.

Aussiebee is insolvent. NewYums, however, remains solvent.

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

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

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

The liquidator in the Lyonesse liquidation's application for recognition of the liquidation as a foreign main proceeding is grounded in Article 19 of the Model Law. **Actually article 21 (final relief), rather than article 19 (interim relief).** The ATO can rely on Article 20 of the Model Law which requires the court to be satisfied that the interests of creditors are "adequately protected" when granting relief under Article 19. **Not quite – the ATO can rely on article 21(2) which required that the interests of creditors in this State (ie in Australia) are adequately protected.**

Relying on the decision of the full Court of the Federal Court of Australia in *Ackers v Deputy Commissioner of Taxation* (2014) 223 FCR 8; [2014] FCAFC 57, the ATO can apply to the Federal Court of Australia for modification of any recognition order of the Lyonesse liquidation as a foreign main proceeding, if granted, to give leave to the ATO to take steps to enforce its claim for unpaid taxes in Australia, exclusively for the purpose of recovering an amount up to the *pari passu* amount the ATO would be entitled to receive (i.e. up to \$12 million) if the ATO were entitled to prove for the tax debt as if it were an unsecured creditor in the foreign main proceeding. **Good**

If the ATO is successful and the Federal Court of Australia does permit such modification of the recognition order, the ATO could take steps to enforce its claim against Aussiebee's assets in Australia in the same way as an unsecured creditor. For instance, the ATO could issue a statutory notice for payment of unpaid taxes and should the debt remain unpaid after 21 days from issuance of the notice, the ATO can apply for a liquidator to be appointed by the Federal Court of Australia, **Good idea and well done on identifying this as a possibility. Just for your information (and this does not affect your mark, as this goes beyond knowledge required by this course), you are slightly off on the details: the winding up would actually be under s 583 of the Corporations Act, and if Model Law recognition is granted to the Lyonesse liquidation as a foreign main proceeding, art 28 provides that any subsequent Australia winding up will only be of assets in Australia.** under s. 601CL(14) of the Corporations Act. The Australian liquidator would then take steps to wind up Aussiebee and realise its assets worldwide for the benefit of Aussiebee's unsecured creditors, including the ATO.

You missed the other major issue raised on the facts, being the COMI of Aussiebee. The ATO should intervene on the recognition application, arguing 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**
- **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.

6/9 marks

Question 4.2 [maximum 6 marks]

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

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

HA's major remaining asset is a second re-refining plant that it operates near Perth, Western Australia. This plant has only been in operation for one year. The funding for the Perth plant has been provided by a major shareholder of HGL as an unsecured loan for AUD 30 million. The loan agreement provides that the loan is repayable by monthly instalments over a term of 5 years with the first payment due at the end of 2021. The loan agreement also provides that the loan becomes automatically due and payable in full if HA enters into any formal insolvency or restructuring process in Australia.

HA also owns three large trucks that transport waste oil to the Perth re-refining plant and transport re-refined oil to HA's customers. Those trucks were purchased with a AUD 3 million loan from the Commonwealth Bank of Australia (CBA). That loan is secured by mortgages over the three trucks. The mortgages are not registered on the Personal Property Securities Register.

In July 2020, BOR commenced proceedings against HA in the Supreme Court of New South Wales for damages in respect of the failed joint venture. On 1 October 2020, the Supreme Court found in favour of BOR, ordering that HA pay AUD 4.6 million in damages to BOR.

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

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

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

1. The directors owe certain duties towards HA, its shareholders and creditors, including:
 - duties of good faith, due care and diligence;
 - duty to take into account interests of creditors including CBA, BOR, HGL; and

- duty to prevent insolvent trading.

As HA has been insolvent since the October 2020 judgment, and yet continued to trade and incur debts, the directors should place HA into external administration as soon as possible to try and avoid incurring insolvent trading liability. **Not only the directors, but also HGL as holding company, will have insolvent trading liability.** The delay in a formal insolvency appointment might be explained by the directors trying to trade out of financial difficulties through the re-refining business carried out by its Perth re-refining plant. However, this turnaround plan was not successful (and possibly unrealistic given HA's significant debts and the fact that the fledgling Perth re-refining plant, its main remaining asset, has only been in operation for one year and only made a small profit), so the safe harbour protection might have to be used as a defence against a potential claim for insolvent trading by the liquidator, rather than an exception to liability. **Good point, but unlikely to qualify for safe harbour on the facts.**

2. The directors may opt for a creditors' voluntary liquidation, given that they believe HA is insolvent, there is no more funding available for HA's operations and all possibilities for refinancing HA's debts have been exhausted. The shareholders of HA would need to pass a special resolution to appoint a liquidator. The liquidator could be an insolvency practitioner who is familiar with the company, although he or she would be required to convene a creditors' meeting within 10 business days and the creditors have the power to appoint a new liquidator at a subsequent meeting, request more information and appoint a committee of inspection (s. 497 Corporations Act). The liquidator can conduct the winding up process without recourse to the court, which will save time and costs. However, creditors and shareholders can apply to the courts for relief if they consider a particular action or decision taken or proposed to be taken by the liquidator to be contrary to their rights. The directors would remain in place following the appointment of a liquidator but they would have no power to manage the company.
3. The liquidator is subject to the same statutory duties as a director, including the duty to act in the best interests of the company. This might include considering whether to take advice on the chances of a successful appeal against the October 2020 decision of the Supreme Court ordering HA to pay \$4.6 million in damages to BOR. However, given that there are no funds available for HA's operations and all possibilities of refinancing have been exhausted, this does not appear to be a realistic option.
4. The liquidator could seek funding from a litigation funder to finance the claim for insolvent trading against the directors, which may have greater prospects of success if the directors are insured. Alternatively, it could assign the insolvent trading claim to a third party and quickly realise an asset for unsecured creditors, although the amount for which the claim could be sold would be much less than the potential realisations if the claim is successful.
Interesting points
5. In the event the liquidator wishes to maintain an important contract in order to continue the re-refining oil business out of the Perth plant pending a possible sale, the liquidator would not be able to benefit from an *ipso facto* enforcement prohibition (assuming an *ipso facto* clause is included in such a contract) and the supplier or other contractor would be able to terminate its contract as soon as HA enters liquidation. The only exception to this would be if the creditors' voluntary liquidation immediately follows an attempt by the directors to negotiate a creditors' scheme of arrangement, in which case the *ipso facto* moratorium would apply. **The ipso facto clause could have tipped you off to voluntary administration being the better option.**
6. With regards to HA's specified creditors, they appear to be unsecured creditors who will be obliged to submit proofs of debt to the liquidator, in order for distributions to be made

to them once HA's assets are realised (in particular the re-refining plant in Perth and the trucks, if they are still in good condition) and after the liquidator is remunerated. The nature of the creditors' interests is outlined as follows:

- a. The loan agreement between the major shareholder of HGL - who provided the \$30 million loan to HA by way of an unsecured loan - and HA includes a provision that the loan becomes automatically due and payable in full if HA enters into any formal insolvency or restructuring process. As an unsecured creditor, the shareholder will not be able to commence an enforcement action against HA once the company enters into the liquidation process due to the statutory liquidation moratorium against enforcement actions against HA under s. 471B of the Corporations Act. Even if the shareholder did commence an enforcement action before HA entered into the liquidation process, the liquidation moratorium would stay that proceeding.
- b. The \$3 million loan from CBA was secured by mortgages over HA's three trucks but as these mortgages were not registered in the Personal Property Securities Register, any other secured interests would take priority over those mortgages and CBA would lose its secured interests upon the commencement of an external administration.
Good
- c. BOR is also an unsecured creditor following the October 2020 judgment in its favour for HA to pay \$4.6 million in damages as HA has not been able to pay the judgment debt. It may have commenced an enforcement action against HA but that proceeding would be stayed by the liquidation moratorium as mentioned above. BOR could apply to the court for leave to continue the enforcement proceeding but such leave is not normally granted.
- d. HGL and HA's trade creditors are also unsecured creditors, unless the \$5 million loan from HGL was secured against any assets. Any sums owed by the trade creditors to HA would be set off against mutual trade debts under the mandatory statutory set-off under s. 553C of the Corporations Act.

You identified the issues, but did not spot that voluntary administration followed by a DOCA would be a much better alternative than voluntary liquidation:

- The *ipso facto* clause in the loan agreement will not be triggered by entry into VA (but it will trigger once the company then goes into liquidation or a DOCA after the VA period).
- As you noted re 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 create a fund to provide a return to unsecured creditors.
- The VAs, or HGP, could propose a DOCA if HGP is willing to tip in some cash to create a fund to pay creditors (which would incentivise creditors to vote for the DOCA), or if they can find a purchaser for the Perth plant.
- All creditors will get to vote on the DOCA, HGP appears to only be owed \$5m so it will not be able to out-vote the other creditors. But HGP's major shareholder is the major 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: 36.5/50