SUMMATIVE (FORMAL) ASSESSMENT (RESIT SEPTEMBER 2022): MODULE 8A

AUSTRALIA

This is the **summative (formal) resit assessment** for **Module 8A** of this course. Please read the instructions on the next page very carefully.

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.assessment8Aresit]**. An example would be as follows 202223-336.assessment8Aresit. **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. This assessment must be returned to David.Burdette@insol.org by e-mail no later than **23:00 (11 pm) BST (GMT +1) on Monday 26 September 2022**. When returning the assessment by e-mail, your e-mail must confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

Commented [DB1]: 41 out of 50 – 82%

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [DB2]: 9 out of 10

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. Yes

Question 1.2

Which of the following **is** a debtor-in-possession process?

(a) Small company restructuring. Yes

(b) Bankruptcy.

(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. Yes

(b) Deed of company arrangement.

(c) Creditors' voluntary liquidation.

(d) Voluntary administration.

(e) Small company restructuring.

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 100,000 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 debt agreement under Part IX.

(b) A voluntary administration followed by a deed of company arrangement.

(c) A small company restructuring.

(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. Yes

Question 1.6

Which of the following claims **are not provable** in a liquidation?

(a) Future debts

(b) Contingent claims

(c) Penalties or fines imposed by a court in respect of an offence against a law Yes

(d) Claims for damages for personal injury

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. Yes

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.Yes

(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. Yes

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. Yes

(c) Reducing the default bankruptcy period from three years to one year.

(d) A safe harbour from insolvent trading liability.

QUESTION 2 (direct questions) [10 marks]

Commented [DB3]: 9 out of 10

Question 2.1 [maximum 3 marks] 2 marks

Name the five types of voidable transactions that can be reversed by a liquidator on application to the court, and explain whether it is a complete defence to each of these types of voidable transactions if the defendant proves that they were not aware that the company was insolvent at the time they entered into the transactions.

ANSWER

The five types of transactions that can be reversed by the liquidator on an application to the court are explained herein below:

- **Unfair preferences:** The transaction that placed the creditor with the benefit of preference, priority or advantage can be set aside by the Liquidator as per Section 588FA of the Corporations Act. The liquidator is specifically required to demonstrate insolvency when transaction was entered into or became insolvent as a result of entering into the transaction as these forms the foundational aspect to the claim for reversal of the transaction. The Supreme Court in Queensland Quarry Group Pty Ltd (In Liquidation) & Anor v Cosgrove [2019] QCA 220 has provided the clarity to already comprehensive law wherein it has been suggested that the defences available to such transactions include the existence of reasonable grounds to suspect insolvency. Thus, the defendant can defend such applications against the Liquidator by raising a catena of reasons like good faith, reasonable man's mind application, reasonable grounds of suspicion of insolvency etc.
- **Uncommercial transactions:** The transactions that would have been deterring enough for a reasonable person in consideration of the company's circumstances, the benefits and the consequential effects etc for not entering into such commercial bargain forms the hinge point of such transactions. Section 588FA of the Corporations Act and the various precedents point out that the relevant defences to such transaction include bona-fide, delivery of valuable consideration, receiving of no-benefit out of the transaction etc. Also, if the defendant can prove that at the time of transaction, there were no reasonable grounds for suspecting company's insolvency or a reasonable person would have no reason for suspecting insolvency would also be relevant and useful.
- **Unreasonable director related transactions:** Section 588FDA (1) provides the mention of such transactions which includes the payment to a director or another person on behalf of, or for the benefit of, a director that would not have been entered into by a reasonable person in the company's position. The statutory defences to this transaction do not extend to the absence of knowledge/reasonable person's prudence as the transaction would be held valid and recoverable even if the defendant establishes that the company was insolvent when the transaction was entered into or did not become insolvent by doing so. Thus,
- **Unfair loans:** Section 588FD of the Corporations Act 2001 suggests that the determination of unfair loans can be made after considering the risk, value, term of security etc. and should have the element of extortionate interest, loan or other charges. The liquidator can claim the reversal of the transaction irrespective of the fact of insolvency at the time of entering into transaction or causing of insolvency as a result of the transaction. Thus, the defence of claiming the absence of grounds for suspicion of insolvency would not be considered for this transaction specifically.

- **Circulating security interests:** Section 588FD of the Corporations Act 2001 talks about circulating security interests and holds the transactions as void against the liquidator if created in six-month period before external administration and new value is not provided as consideration. The transactions are held to be void against the liquidator unless the company was solvent immediately after granting of security.

Answer is too long. What you should have answered:

- unfair preferences;
- uncommercial transactions;
- unreasonable director-related transactions;
- unfair loans; or
- circulating security interests (in limited circumstances).

For unfair preferences and uncommercial transactions, it is not enough that the defendant was not aware the company was insolvent, also need:

- acted in good faith;
- was not in fact aware, *and nor would any reasonable person in the party's circumstances be aware, of any reasonable grounds for suspecting* the company was insolvent at the time of the transaction or would become insolvent by entering into the transaction; and
- provided valuable consideration or changed its position in reliance on the transaction.

For unreasonable director-related transactions; unfair loans; and circulating security interests lack of awareness of insolvency is not a relevant defence.

Question 2.2 [maximum 3 marks] 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?

ANSWER

Article 20 of Model Law on Cross border Insolvency talks about the effect of recognition of the foreign main proceeding which leads to stay against debtor's property, assets etc. by stay on actions, executions, transfer, sale or otherwise disposal of debtors' assets. Now, Australia has specifically stated the scope of the stay in Article 20 of Model Law by stating that the stay or suspension shall be as per the rules/procedures of Bankruptcy Act or Chapter 5 of Corporations Act, as the case requires. Now the subjectivity of case-to-case basis is to be decided by the Australian court after considering the facts of the case. The court is to decide if the broader stay as per voluntary administration which affects secured creditors is required or the limited stay affecting only the unsecured creditors is mandated.
In Tai-Soo Suk vs Hanjin Shipping co. Ltd (2016) FCA 1404, it was held that the court has to decide on the stay under Article 20 not on the basis of its discretion or arbitrary judgment but on the basis of the nature of the proceedings. If foreign proceedings are purely business rescue proceedings, then definitely broader stay would serve the purpose so as to realign the domestic proceedings in context with the foreign proceedings. Whereas, if such proceedings

are more likely to be tilted towards the liquidations, then limited stay as granted under liquidations shall suffice. This is to ensure uniformity of Australian law with international model law and is appreciable to the extent.
The only issue generally faced here is in relation to the decision of nature of proceedings which is non-ascertainable due to varying jurisdictional assumptions and procedures as has been observed in The Rizzo-Bottiglieri-de- Carlini Armatori decisions. The decision of nature of proceedings has to be understood out of the impact of the proceedings to categorise the analogy of the insolvency proceedings.

Good answer

Question 2.3 [maximum 4 marks] 4 marks

What are the differences between liquidations and small company liquidations?

ANSWER

The liquidation consists of three major types including members' voluntary liquidation, creditors' voluntary liquidation, compulsory liquidation. On 1 January 2021, a simplified and another version of creditors' voluntary liquidation was introduced in the form of Simplified liquidation for small companies which have total liabilities of less than AUD 1 million. Thus, the small company liquidation has certain eligibility criteria in terms of outstanding liability and in terms of directorships (no current director ought to be a director of another company that has undergone restructuring or been a subject of simplified liquidation within seven years) unlike other types of liquidations. The simplified liquidation can be adopted only if at least minimum % in prescribed value of creditors do not disapprove the adoption of the simplified version and this is absent in liquidation generally.
Generally, the liquidator is entitled to enforce the provisions for voidable transactions for any amount in liquidations but in small company liquidations, this provision of clawback shall apply only in unfair related party transactions of over AUD 30,000 in the immediately preceding three months. Further, to hasten and simplify the process under small company liquidations, the role/duty of liquidators to report to ASIC has been restricted only to transactions having potential misconduct but on the other hand, is also entrusted with the fiduciary duty to case the simplified process if there exist reasonable grounds to believe the involvement of fraud or dishonesty or any other misconduct having material adverse effect on the interests of creditors.
Also there exists procedural flexibilities to small company liquidators are they are not required to hold creditors meetings or form the committee of inspection. The procedure for proof of debt and voting and electronic communications has also been simplified.

QUESTION 3 (essay-type questions) [15 marks in total] 13 marks

Commented [DB4]: 13 out of 15

"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.

ANSWER

Australia's insolvency laws have been creditor friendly as the main focus has always been the protection of interests of creditors and the procedures prescribed in various forms including receiverships, voluntary administration regime etc. are indicative of the stance as the major controlling stake lies in the hands of creditors to the exclusion of management. But however,

the recent reforms do imply a shift in the business/ corporate rescue approach with particulars hereunder:

Voluntary administration

- Voluntary administration's main aim is to maximise the chance of the company's revival over the secondary objective of better return to creditors. The case of Sydney Land Corp Pty Ltd vs. Kalon Pty Ltd (1997)26 ACSR 427, 430 specifically stated that the legislative intent is to maintain the corporate entity to maximise the interests of all stakeholders.
- In Mighty River International Ltd. Vs Hughes (2018) 265 CLR 480, yet another landmark case of High Court of Australia established the fact that the approval of "holding DOCA", interim moratorium on enforcement of creditors' claims during the proceedings of voluntary administration etc. are enablers of debtor's chances of revival. Such precedents indicate that the legislative intent has been shifted from being creditor friendly to debtor friendly.
- Even payment obligations arising out of independent contracts during voluntary administration have been sufficiently insulated by giving authority to the voluntary administrator to take valid and just grounds for preventing adverse enforcements against the distressed debtor.
- The voluntary administrator is entrusted with the power to repudiate/maintain pre-appointment contracts and even protected from being personally liable. This indicate that the legislative intent is to encourage the administrators to explore every single opportunity to ensure the corporate/business rescue.
- Even the creditors (superannuation) rights have been pressed to provide additional support to the debtor, particularly in relation to the proportional voting rights of secured creditors during the second meeting of voluntary administration proceedings where they are given right to vote for the full amount of their due, unlike liquidation. This incentive encouragement is to ensure that more and more creditors participate in such proceedings which are objectivised to achieve the resolution of debtor entity.

ipso facto moratorium

- The ipso facto moratorium for contracts entered after 1 July 2018 prohibits the creditors to avail ipso facto clauses for contract termination as the corporate debtor is to be equipped for facing the financial stress and thus creditors are prevented from interfering with the objective of the corporate/business rescue. However, it is sufficiently ensured that the creditor has the option to seek enforcement in the interest of justice.
- The ipso factor moratoriums are not just limited to voluntary administrations but also extended to the creditors scheme of arrangements, receiverships, small company restructurings which signifies the wider jurisdictional legislative change in approach from being creditor friendly to debtor friendly.

personal bankruptcy

- The personal bankruptcy provides the direct and clear mandate that the ipso facto clauses shall be void and in no case are enforceable. Therefore, any contract that provides the other party a right to terminate or modify or repossess any property, such right is taken away by statutory ipso facto prohibition which is based on the premise of keeping the company as a going concern and thus favours the debtor by preventing the clutches of insolvency.
- The bankruptcy trustee is entitled to disclaim a contract so that all the unprofitable or onerous transactions can be reversed and thus the opposite party can only claim for damages and submit a proof of debt

safe harbour

- Until September, 2017, it has been observed that the directors tend to appoint voluntary administrator as and when the early signs of distress appear in the debtor company and this was done to evade the personal liability for insolvent trading as mentioned 588H(6) of the Corporations Act. The appointment of voluntary administrator would cause the creditors to invoke ipso facto clauses or enforcement of security interest which ultimately leads to shattering of hopes of any business or corporate rescue plan.
- After the introduction of Safe harbour in Section 588GA of the Corporations Act which is meant for preventing the liability of company's directors from insolvent trading as the legislative intent is to now encourage the directors to enter into informal restructurings mechanisms as earlier experiences reflect the failed resolutions.
- The "better outcome" approach has now been devised to help directors in defending their liability if they can show some course of action resorted to for achieving better outcomes in the shades of insolvency.

small company restructuring

- The newly introduced small company restructuring process though have been drawn as an alternative to costly and lengthy processes but the main aim of this process is to help the companies retain control of their businesses, property and affairs while simultaneously working upon the plan to repay the company's debts and thus ensure that the debtor remains in possession while the entire restructurings are proceeded with so that debtor may be revived.

Good comprehensive answer

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

Commented [DB5]: 10 out of 15

Question 4.1 [maximum 8 marks] 6 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 in both Sydney and in Lyonesse. Its warehouses are only in Sydney. Aussiebee regularly sells its chocolates all over the world, with orders received in Lyonesse and shipped from the Sydney warehouses. Aussiebee and NewYums share a board of directors, made up of six Australians and one Lyonessian. 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 Lyonessian liquidation as a foreign main proceeding under the *Cross-Border Insolvency Act 2008*, 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 Lyonessian liquidation.

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

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

ANSWER

FACTUAL MATRIX AND LEGAL POSITION:

Aussiebee Pty Ltd (Aussiebee) being a holding company of NewYums Pty Ltd (New Yums) controls the affairs of New Yums. The liquidator of Aussibie has applied to the Federal Court of Australia for recognition of Lyonessian liquidation as foreign main proceedings under the cross-border Insolvency Act 2008. The proceeding would be easily recognised as foreign main proceeding in Australia as the Foreign Judgments Act allows the registration of money judgments from the superior courts including UK and the Centre of Main Interests also lie in Aussiebee considering the objectively ascertainable factors as presented in the statement.

The liquidator has also applied for entrusting the assets of Aussibee which includes the Aussiebee's shares in NewYums worth 20 million AUD for utilisation of proceeds for the benefit of creditors. Now Article 13 of UNCITRAL Model Law on Cross Border Insolvency states that foreign creditors shall have the same right regarding commencement of participation of proceedings in Australia and thus Aussieebee might not face any resistance while applying the application and availing the statutory relief for consolidation/ realisation / distribution of claims for foreign insolvency proceedings. However, at the same time, it is stated under Article 13 that exclusions relating to foreign tax and social security claims from Australian Insolvency proceedings are efficiently preserved. The foreign creditors thus are ranked at par with domestic creditors under Australian Model Law but exclusions to give priority to tax and social security obligations have been specifically carved out.

Considering the facts in hand, Aussiebee owes AUD 12 million to Australian Taxation Officer (ATO). It is also provided that though ATO has not submitted its claim in foreign main proceeding i.e. Lyonessian liquidation, foreign creditors i.e. (ATO) are exempted from proving their debt in Lyonessian liquidation and thus the debt is admissible and valid as a claim.

CASE ANALYSIS

The case in hand may derive its jurisprudence from Ackers Vs Deputy commissioner of taxation (2014) 223 FCR 8 where the full court of Federal Court of Australia has held while granting reliefs under Article 19 for recognition effects, the position of the creditors is to be effectively ensured by virtue of Article 22 of Model Law. The Cayman Islands liquidation was recognised as foreign main proceeding in Australia and the assets in Australia were applied to for remittance of AUD 7 million to Cayman Islands for distribution/consolidation/realisation purposes. But however, AUD 83 million was owed for taxation and penalties and since the foreign revenue creditor was not entitled to proof its debt in foreign jurisdiction, the Deputy Commissioner of Taxation was granted leave to take steps to enforce its claim in Australia specifically on *pari-passu* basis.

Now considering the Article 13 exclusions, claims are covered under the taxation exclusion and thus ATO is well entitled to take steps to enforce its claim in Australia. Provided that the ATO shall be entitled to recover *pari-passu* amount that it would have recovered/received as an unsecured creditor in the foreign main proceeding. This modification of Model law has even been upheld in the above case and now to resonate the adequate protection to creditors, the

ATO can effectively take steps to recover via liquidation /administration/ sale and realise its dues in Australia before any order of entrusting assets with liquidator.

Good answer.

Question 4.2 [maximum 7 marks] 4 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.

A competitor has recently approached HA with an attractive offer to purchase the 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?

ANSWER

Statement of facts provide that Hyrofine Australia Pty Ltd(HA) is wholy owned subsidiary of Hyrofine Group Limited(HGA). It has two re refining plants- one with a joint venture with Best

Oil Refining Pty Ltd (BOR) and other in Perth is financed for AUD 30 million by one of the shareholder of HGL without any security. The trucks worth UAD 3 million forms the assets corpus of the HA which have been though mortgaged with Commonwealth Bank of Australia(CBA) but not registered under Personal Property Securities Register. The judgment debt of AUD 4.6 million against HA has been issued in October 2020 by Supreme Court on a petition filed for damages by BOR as the plant 1 has ceased to operate. HA has been approached for purchase of plant 2 in Perth which is operative but not making good profits.
Now the board of Directors of HA are having lucrative opportunity but the same has to be strategically dealt with after due consideration of all the impediments and predicaments of the financial affairs of the debtor HA. The best formal corporate rescue options available would be resorting to a formal resolutions for initiation of Voluntary Administration provided the ungiven or unknown situations/ circumstances weigh in favor of the same. The various factors which have to be considered while making any decision are:

- The judgment was issued in October 2020 for payment of AUD 4.6 million in damages to BOR for failure of joint venture in Plant 1 and Between October 2020 and October 2021, HA incurred further borrowings for AUD 5 million from HGL while trying to manage and operate Plant 2. If just in case the Voluntary administrator advices the creditors on the stance of recoveries from insolvent trading provisions, then the directors might face resistance in the form of insolvent trading provisions since the debtor may then be proceeded with creditors voluntary liquidation. But the challenge to uncommercial transactions or unfair loans may then be countenanced with safe harbour provisions which are specifically meant for business rescue attempts. The directors can suggest that their commercial decision to continue trading during 2020-2021 was in prospect of better outcomes than what they would be yielded in case of liquidation. The loans were further infused in the debtor company to make is a viable or keep it as a going concern and it is only because of the efforts envisaged in 2020-2021 that this new offer by the competitor has been made. The grounds and defences are good enough to rescue the debtor company from the clutches of liquidation as the best judgment of administrator and creditors is likely to favour the directors' version.

- The loans were infused in the debtor company by the director's decision to keep HA as a going concern and it is only because of the efforts envisaged in 2020-2021 that this new offer by the competitor has been made. Now despite the fact that the knowledge may be imputed upon the directors in relation to the suspicion of insolvency at the time of entering into contracts as the judgment rendered the HA insolvent but then good faith, reasonable person's prudence etc. would form the best defences which can easily help directors face this issue.

- Since securities interests are to be registered with Personal Property Securities Register (PPSR) and the mortgage against trucks has not been registered as of now but the perfection of the security interest may be created by possession, control and registration. If the Voluntary administration commences within 6 months from now then the security interest would vest in the debtor company HR provided it is not perfected by any other mode as mentioned above. Failure of registration/perfection will therefore prioritise other creditors and thus the debtor HA will have no secured creditors but only unsecured creditors.

- The loan agreement for AUD 30 million provides for the repayment with the instalment being in the end of 2021. Since the agreement provides that the loan becomes automatically due and payable in full if HA enters in formal insolvency proceedings or

restructuring proceedings then the ipso facto moratorium prohibition may be claimed by HA as the contract has been entered after 1 July 2018. The creditor is though prohibited to terminate the contract because of distressed financial position solely but if the creditor proves that nature of this contract is such that it deserves an exception to the moratorium or is in the interest if justice then such right may be adversely enforced against the HA and thus the entire proceedings may be hampered.

Considering the set of factors and presuming that all the factors fall to the court of Directors then after obtaining the consent of creditors then the company may be placed back into the hands of the Directors or otherwise DOCA or liquidation will find their place.

Reasonable answer.

*** End of Assessment ***