



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 202223-336.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 dealing 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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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 9 pages.***

**ANSWER ALL THE QUESTIONS**

Commented [BB1]: TOTAL = 48/50 (96%)

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

Commented [BB2]: Sub-total = 10 marks

**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.**

**Question 1.2**

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

- (a) Small company restructuring.**
- (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.**
- (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.**

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**

**(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.**

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.**

**(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.**

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.**

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

**(d) A safe harbour from insolvent trading liability.**

**MULTIPLE CHOICE: 10/10**

**QUESTION 2 (direct questions) [10 marks]**

**Commented [BB3]: Sub-total = 8 marks**

Question 2.1 [maximum 3 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.**

*Voidable transactions include:*

1. *Unfair preferences*
2. *Uncommercial transactions,*
3. *Unreasonable director-related transactions*
4. *Unfair loans*
5. *Circulating security interests*

*The unfair preference and uncommercial transactions provisions can be reversed if a transaction was entered into when the company was insolvent or resulted in the company's insolvency. If there are new consideration (eg. Services or goods) provided to the company by a creditor in exchange for payment, this is not constituted as an unfair preference. If a reasonable person would have entered into the transaction under the company's circumstances, then it is not an "uncommercial transaction" and may not be reversed. It does not matter whether the defendant was aware of the insolvency of the company.*

*The unreasonable director-related transactions and unfair loan provisions do not have the same insolvency limitation, but only apply to a limited range of transactions. If there is no payment, transfer of property in favour of director or their associate, and a reasonable person would have entered into the transaction under those circumstances, then the transaction would not be deemed "unreasonable director-related" transaction and may not be reversed. It does not matter whether the defendant was aware of the insolvency of the company.*

*For circulating security interests that are created within 6 months prior to the (a) winding up or (b) administration, it is deemed void, (a) unless it can be proven the company was solvent prior to the security, or (b) if the secured creditor did not provide new consideration for the security. It does not matter whether the defendant was aware of the insolvency of the company.*

*In a simplified liquidation, only unfair preferences of more than AUD30,000 that were made to related parties of the company three months prior winding up can be recovered as voidable transactions.*

QUESTION 2.1: 2/3

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 Australia Article 20 of Model Law, the specified the scope of stay is the same as what would be granted under the following statutes, where relevant:*

- (a) The Bankruptcy Act; or*
- (b) Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act.*

*Under Australian's implementation of Article 20 of the Model Law, the Australian courts decide if the case requires:*

- i. a stay in the form of moratorium that prevents secured creditors from enforcing their rights or*
- ii. a limited stay that is applied to unsecured creditors during a liquidation.*

*The determination of the scope of stay that should be granted is dependent on the type of proceeding rather than what is available in the foreign jurisdiction. If the foreign proceeding is a restructuring / work-out, then (i) should be granted; if the foreign proceeding is a winding up, then (ii) should be granted, as it would be in a local application.*

#### QUESTION 2.2: 2/3

Question 2.3 [maximum 4 marks]

**What are the differences between liquidations and small company liquidations?**

*There are 3 types of liquidations:*

- 1. Members' voluntary liquidation*
- 2. Creditors' voluntary liquidation*
- 3. Compulsory liquidation*

*To qualify for a small company liquidation, the company must have less than AUD1m of liabilities and this can only be done by way of a creditors' voluntary liquidation. The directors of the company cannot in the last 7 years also be director of another company that is in financial distress and subject to rescue or work-out proceedings or small company liquidation.*

*A small company liquidation has the following regulations that differ from the typical liquidation:*

- 1. Unfair preference transactions that may be voided and subject to clawback provisions are restricted to payments made to related parties within the period 3 months before commencement of the small company liquidation and only applies for amounts more than AUD30,000.*
- 2. ASIC report by liquidator on misfeasance is only necessary if there exist reasons to suspect such behaviour.*

3. *There is no requirement to form committees of inspection to oversee the process and hold creditors meeting.*
4. *In respect of communication and voting, there are additional provisions that allow for this to be done electronically and be simplified.*
5. *Similarly, the review of claims, adjudication and dividend distribution procedures are also streamlined.*

*If it comes to attention of the liquidator that there has been acts of deceit which has material impact on the outcome and the rights of the stakeholders, the IP should no longer continue the small company liquidation process.*

QUESTION 2.3: 4/4

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

Commented [BB4]: Sub-total = 15 marks

***“Australia’s insolvency and restructuring options have in the past been very creditor-friendly. However, recent reforms have made Australia more of a debtor-friendly jurisdiction.”***

***Critically discuss this statement and indicate whether you agree or disagree with it, providing reasons for your answer.***

*In the past, Australia is often considered a creditor-friendly jurisdiction due to its focus on protecting creditors’ rights in insolvency processes. Australia’s bankruptcy and insolvency cases predominantly requires an independent insolvency practitioner be appointed, rather than it being a debtor-in-possession restructuring. The few debtor-in-possession procedures include small business restructuring and schemes or arrangement that may be undertaken while directors continue operating the business. However, in such scenarios, a consultant who is a qualified insolvency practitioner must be engaged. These debtor-in-possession procedures are recent reforms that have just been introduced.*

*Generally, it is observed that secured creditors retain their rights to enforcement, to the extent they are allowed for in insolvency processes (where moratorium doesn’t apply to secured creditors). For example, in the case of personal bankruptcy and winding up of businesses, secured creditors remain entitled to exercise their rights and undertaken enforcement actions. If the company’s assets are charged to a creditor, even if a voluntary administrator has been appointed, the creditor may still exercise their rights to appoint a receiver.*

*Similarly, existing Australian laws are creditor-friendly in the sense that it is drafted with the intention of protecting the interests of creditors. For example, the claims against directors for insolvent trading and the ability of liquidators to void certain transactions, which are designed to allow clawback of funds that has been improperly disbursed.*

*The above being said, recent reforms are designed to make the laws more debtor-friendly and provide breathing room for businesses to restructure / turn around. Examples of recent reforms include:*

**1. Ipso Facto moratorium**

*Where a voluntary administrator is appointed to turnaround a business, it is often observed that creditors would invoke their ipso facto contractual rights and/or enforce their securities where the voluntary administration moratorium did not apply. This resulted in limited success of corporate rescues under Deed of Company Agreement (DOCA).*

*The new ipso facto moratorium is intended to improve the chances of a company being restructured or preserved as a going concern and improve returns to creditors. This grants the voluntary administrator space to conduct investigations into the company's affairs and after the review, propose to creditors whether a DOCA is feasible. This, however, does not prevent secured creditors from exercising their rights to appoint a receiver over the top of a voluntary administrator. The success of a restructuring is still dependent on the support of lenders, which are often secured creditors.*

**2. Safe harbour from insolvent trading**

*Prior to section 588GA of the Corporations Act, which allows for safe harbour from insolvent trading, being in force, directors would be personally liable for insolvent trading. Hence, it is commonly observed that if the business is insolvent or could be insolvent, directors would appoint a voluntary administrator to shield themselves from personal liability.*

*With Section 588GA in place, this allows directors to pursue restructuring options, together with insolvency practitioners as consultant, to improve business viability over time, where there is a reasonable chance of turning around the company. In the case of an informal restructuring, the ipso facto moratorium does not apply, creditors and suppliers may still choose to enforce their rights to terminate and/or amend key contracts. Hence, the success of the turnaround of the business is still dependent on the support of creditors. Similarly, this is not a shield or protection for directors from personal liability as they have to continue managing the operations and be actively involved in formulating and executing a restructuring plan with their best effort.*

*While the safe harbour and ipso facto moratorium reforms are important steps in the right direction in promoting corporate rescue, for Australia to become a more debtor-friendly regime, it is still dependent on the openness of creditors to hold off on exercising their rights at the first instance of financial distress. This is expected to likely develop and grow slowly over time as more success cases of restructuring completion occurs. Until then, Australia would continue to be seen as a more*

*creditor-friendly jurisdiction than a debtor-friendly jurisdiction where creditors interests are protected as priority, sometimes at the expense of businesses.*

12/15 marks - **this is a good essay. It identifies that, generally speaking, Australia's insolvency regime is creditor-friendly and lists some aspects of it which support that conclusion. To this list, the essay could have mentioned the number of procedural rights which creditors have to shape the insolvency process (eg the right to require IPs produce information, the right to vote out an IP easily). To the list of reforms, the small business restructuring process could have been added (although I note it was mentioned briefly in passing in the introduction). The acknowledgement of the ipso facto moratorium and the insolvent trading safe harbour were very good. The conclusion which the author reached, that the reforms did move the needle towards debtors but that overall it is better described as a creditor-friendly jurisdiction, is a sensible conclusion to reach.**

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

Commented [BB5]: Sub-total = 10 marks

Question 4.1 [maximum 8 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 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 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 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?**

*This is a similar case to that of **Ackers v Deputy Commissioner of Taxation** where a Cayman Islands liquidator applied for recognition in Australia to remit Australian assets sales proceeds to Cayman Islands for dividend distribution in the foreign main proceeding that is the liquidation proceeding in Cayman Islands.*

*In that case, the Deputy Commissioner of Taxation ("DCT"), applied to the Federal Court for amendment of recognition order and leave for DCT to exercise their rights in Australia for up to the *pari passu* amount that ATO would be entitled to as a creditor in the foreign main proceeding. The Full Court held on subsequent appeal that the amendment of recognition order ensured interests of DCT is sufficiently protected as required by Article 22 of the Model Law when court grants relief under Article 19 of the Model Law.*

*As the situation here is similar, ATO may rely on the previous judgment in **Ackers v Deputy Commissioner of Taxation** to request that the recognition order be amended and leave for ATO to take steps to enforce its claim in Australia to recover the amount up to the *pari passu* amount the ATO would have received if entitled to prove for the tax debt as an unsecured creditor in the foreign main proceeding.*

*In addition to the above, as Aussiebee employs 20 staff in Australia, there could be tax filings that Aussiebee may not have complied with in relation to employee tax obligations. If applicable, the ATO may issue penalty notice to directors regarding Aussiebee's failure to remit withholding amounts for employee personal income tax and superannuation.*

*To the extent there are tax refund owing Aussiebee, ATO would be allowed to retain these funds on the basis that Aussiebee has failed to make payment of AUD12m due to ATO.*

*Furthermore, as the assets in Australia (NewYums) are likely to be sold and proceeds to be transferred to Lyonesse, outside of Australia, such transfer of funds will be subject to withholding tax. ATO may seek an order that requests for ATO to be notified for any sale of NewYums and other assets in Australia and for any relevant tax filings be completed and withholding tax be made in full prior to any transfer of funds be made to Lyonesse for the purposes of distribution to Aussiebee's estate. Any transfer of funds to Lyonesse should be made net of withholding tax amounts and *pari passu* amount due to ATO as unsecured creditor if so entitled to prove for tax debt in Aussiebee's liquidation.*

**5/8 marks - this answer only addresses half of the relevant issues which the ATO could be advised on. It is correct that the ATO could seek to enforce its claim in Australia to receive the *pari passu* amount it would have received as an unsecured creditor in the Lyonesian proceeding. The answer failed to advise the ATO to**

**challenge AussieBee's COMI as being Australia despite the presumption that it would be in AussieBee's place of incorporation (Lyonesse).**

Question 4.2 [maximum 7 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?**

*The general approach will be to consider the facts of the situation and decide if it is still viable to turn around the business, this may be reliant on the view of an insolvency practitioner. As there is still a profit generating business unit in Perth, it will make sense to continue operating the plant while seeking to restructure / turn around the business. Where the assets are loss making, the Company should seek to realize the market value for these. A voluntary administrator may be appointed to achieve the above and potentially seek to sell the plant as a going concern to maximize returns. If instead, the view is that it is no longer viable to turn the business around, a liquidator should be appointed to realize the assets of HA. However, it is noted that the competitor and any interested party may view that it is a fire sale and apply a significant discount to the Perth asset and this may diminish the returns to stakeholders of the estate.*

*The other issues that should be noted are set out in the following paragraphs below.*

- 1. The board may be personally liable for insolvent trading as they have confirmed that HA has been insolvent since the judgment was handed down in October 2020. The court may also impose civil penalties, disqualification orders and if directors have behaved dishonestly, a criminal penalty. The directors may be held liable for the debts incurred since Oct 2020, due to trade debtors, as well as the AUD5m of shareholder's loan provided by HGL to HA. This is especially so since the directors did not attempt to appoint a restructuring expert to guide them through an informal restructuring attempt, despite being aware of the financial difficulties facing HA.*
- 2. Given that HA is insolvent, the directors should make a decision which insolvency procedure would be best, whether it would be better to appoint a voluntary administrator or place the company into liquidation. In this case, as there is still an operating asset, i.e. the Perth re-refining plant (the "Perth Plant"), it may be viable to appoint a voluntary administrator to continue operating the Perth Plant, with a view to sell it as a going concern to maximize recoveries to creditors than if a liquidation is pursued.*
- 3. As the 3 trucks are secured to CBA on the AUD3m loan, CBA may choose to enforce on the trucks upon the appointment of the voluntary administrator. However, as the mortgage was not registered on the Personal Property Securities Register, the security has not been perfected and CBA may face issues enforcing their rights. Upon the appointment of voluntary administrator, CBA will be deemed to have lost the security and the 3*

*trucks will vest in HA's estate unless the court allows for any extension of time for registration of the security.*

- 4. By placing HA into a voluntary administration, BOR will not be able to enforce their unsecured claims against HA. However, it is noted that the shareholders loan provided by HDL to HA will similarly become immediately due and payable and HGL will become an unsecured creditor of HA.*
- 5. Another option to consider is to sell Perth Plant to competitor to generate cash now to pay down other debts that are due. However, this may not be sufficient and can only be a short term stop gap measure to allow breathing room for other restructuring options be pursued. If it is the case that the offer is not even sufficient to pay down existing debts due and there is no viability to restructure the company, then the directors should consider placing the company into liquidation directly.*

QUESTION 4.2: 5/7

\* End of Assessment \*