



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 = 41/50 (82%)

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

Commented [BB2]: Sub-total = 9 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

Commented [BB3]: The correct answer is (d)

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: 9/10

QUESTION 2 (direct questions) [10 marks]

Commented [BB4]: Sub-total = 6 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.

Pursuant to Part 5.7 B of the Corporations Act, a liquidator can avoid transactions that have taken place prior to the appointment of a Liquidator.

The five types of voidable transactions that can be reversed by a liquidator in Australia are:

- 1. Unfair preferences-** Pursuant to section 588FA of the Act, a transaction is an unfair preference given by a company to a creditor of the company if, the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company.
- 2. Uncommercial transactions-** Under section 588 FB a transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:(a) the benefits (if any) to the company of entering into the transaction; and (b) the detriment to the company of entering into the transaction; and (c) the respective benefits to other parties to the transaction of entering into it; and (d) any other relevant matter.
- 3. Unfair loans to a company-** Section 588 FD provides that a loan to a company is unfair if, and only if (a) the interest on the loan was extortionate when the loan was made, or has since become extortionate because of a variation; or (b) the charges in relation to the loan were extortionate when the loan was made, or have since become extortionate because of a variation; even if the interest is, or the charges are, no longer extortionate.
- 4. Unreasonable director-related transactions-** According to section 588FDA An unreasonable director-related transaction occurs if the transactions consist of a payment, conveyance, transfer, the issue of securities and an obligation to make such a payment, disposition or issue and the payment, disposition or issue is, or is to be, made to a director or close associate of the company and that a reasonable person in the company's circumstances would not have entered into the transaction.
- 5. Circulating security interests-** A circulating security interest is void, if created within six months before the start of liquidation unless the company was solvent immediately after granting the security. This security interest previously known as a floating charge is held by a secured creditor in circulating assets of a company. Under section 588 FJ subsection (2)- The circulating security interest is void, as against the company's liquidator, except so far as it secures: (a) an advance paid to the company, or at its direction, at or after that time and as consideration for the circulating security interest; or (b) interest on such an advance; or (c) the amount of a liability under a guarantee or other obligation undertaken at or after that time on behalf of, or for the benefit of, the company; or (d) an amount payable for property or services supplied to the company at or after that time; or (e) interest on an amount so payable.

Pursuant to section 588 FG (2) it is a defence if the defendant proves that they were not aware that the company was insolvent at the time they entered into an unfair preference or uncommercial transaction. However, if the transaction is an unfair loan to the company, or an unreasonable director-related transaction of the company the defence is not available.

In the Case of Hayden Leigh White in his capacity as joint and several liquidator of Port Village Accommodation PTY Ltd (IN LIQ) -v- ACN 153 152 731 PTY LTD (IN LIQ) [2018] WASCA

119, the court of appeal considered the proper approach that should be taken to the defence that the defendant was not aware of the company's insolvency and stated:

"... for the purposes of applying s 588FG(2), the matter is to be considered through the contemporary eyes of the parties in the commercial circumstances then prevailing, and without the benefit of hindsight."

Further the court held that the reference to suspicion of insolvency is suspicion of actual insolvency, and not a suspicion (or even belief) that the debtor might be insolvent. Also, the court would consider what facts and matters the defendant appreciated, and that regard would ordinarily be had to the training, skills and experience of 'the person' in question. The Court determined that the test is an objective test, and the standard of measurement is that of a hypothetical person who is assumed to have the knowledge and experience of the 'average businessperson'.

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?

The Cross-Border Insolvency Act 2008 (the Act) gives the force of law in Australia to the UNCITRAL Model Law on Cross-border Insolvency (Model Law).

Section 16 of the Cross Border Insolvency Act 2008 ("The Act") states:

"Effects of recognition of a foreign main proceeding-

For the purposes of paragraph 2 of Article 20 of the Model Law (as it has the force of law in Australia), the scope and the modification or termination of the stay or suspension referred to in paragraph 1 of that Article, are the same as would apply if the stay or suspension arose under:

- (a) the *Bankruptcy Act 1966*; or
- (b) Chapter 5 (other than Parts 5.2 and 5.4A) of the *Corporations Act 2001*; as the case requires."

Article 20 in the Model Law provides that:

"Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding:

- (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) Execution against the debtor's assets is stayed;

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended..."

In *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 the plaintiff sought a declaration that the "scope and the modification or termination of the stay or suspension" arising under article 20(1) of the Model Law as affected by s 16 of the CBIA, "are the same as would apply if the stay and suspension arose under Part 5.3A of the Corporations Act 2001. Chapter 5 of the Corporations Act, to the extent relevant, includes the following Parts: (1) Part 5.1 (scheme of arrangement) – no stay applies. (2) Part 5.3A (voluntary administration) – ss 440A-440JA provide for stays. (3) Part 5.4/Part 5.4B (Court-ordered liquidation) – ss 467, 471B and 471C provide for stays. (4) Part 5.5 (voluntary liquidation) –s 500 provides for a stay.

The court answered the question in the affirmative and held that the stay which "should apply" is the stay the "case requires" which is determined by the nature of the foreign proceedings compared to the nature of proceedings under the relevant Parts of the Corporations Act. Further the Court does not have a discretion regarding the imposition and scope of the automatic stay, which comes into effect pursuant to Article 20 of the Model.

In *Borrelli (Liquidator) v Orthogonal Trading Ltd (in liq)* (a company registered in the British Virgin Islands) [2023] FCA 393, the Court at paragraph 27 stated :

"The question for the Court in recognising foreign proceedings in respect of a corporation is whether "the case requires" the stay that would apply in a voluntary administration or the stay that would apply in a liquidation. In answering that question, the Australian Court looks to whether the foreign proceeding is more akin to a voluntary administration or a liquidation: *Tai-Soo Suk* at [37] and [51] (Jagot J). Where the foreign proceeding is clearly a business rescue procedure, the former will be more appropriate. The latter would be more appropriate for foreign proceedings that are, as in this case, more analogous to Australian liquidation."

In conclusion, the Court in determining the scope of the stay in relation to a corporate debtor under Australia's implementation of Article 20 of the Model Law will consider what the case requires as each case turns on its own facts.

QUESTION 2.2: 3/3

Question 2.3 [maximum 4 marks]

What are the differences between liquidations and small company liquidations?

There are several differences between a liquidation and a small company restructuring. To be eligible for small business restructuring a company must be insolvent or likely to become insolvent. Under a small company liquidation, the total liabilities of the company must not exceed AUD \$1 million. Additionally, the directors remain in control of the insolvent company and do not give control to the restructuring practitioner and can continue to trade. The company must also not have previously utilised small business restructuring, or any of its current, or (a former director in the last 12 months) should not have been a director of another company that has been under restructuring or the subject of a simplified liquidation process within the last 7 years. A restructuring practitioner may also be appointed once the board has

come to an opinion that the company is insolvent or is likely to be insolvent and that a restructuring practitioner should be appointed in the circumstances. The restructuring practitioner's role is an advisory one. The restructuring practitioner also has a right to inspect books held by other persons. If the books of a company under restructuring are held by a person other than the company, the directors of the company cannot enter into a contract or deal with company property unless the restructuring officer consents, court order or in the course of the company's ordinary business. A third party cannot exercise rights in property of the company unless the restructuring practitioner consents. Furthermore, ipso facto clauses in contracts entered before the restructuring of the company cannot be enforced until the restructuring is complete. The company may propose the restructuring plan to its creditors with an accompanying proposal statement.

A company which falls outside the eligibility of using the small company restructuring process can use the creditor voluntary liquidation process. In a creditor voluntary liquidation, a liquidator is appointed instead of a restructuring practitioner. Under a creditors' voluntary liquidation the appointment of the liquidator is made by the creditors if the directors are of the opinion that the company is insolvent. Once appointed the liquidator must call a meeting of creditors within 10 days. The liquidator takes control of the company upon appointment. The directors' powers are thereby suspended. The liquidator has a wide range of responsibilities to the company, creditors and employees but the overriding objective is for the liquidator to wind up the affairs of the company. Only a registered liquidator can act in a Company Voluntary Liquidation. Some of the powers of the liquidator include:

- (a) carry on the business of the company so far as is, in the opinion of the liquidator, required for the beneficial disposal or winding up of that business; and
- (b) subject to the provisions of section 556 of the Corporations Act, pay any class of creditors in full; and
- (c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging that they have any claim (present or future);
- (d) compromise any calls, liabilities to calls, debts, liabilities capable of resulting in debts and any claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company.

Further the Corporations Act empowers the liquidator to

- (a) bring or defend any legal proceeding in the name and on behalf of the company; and
- (b) appoint a solicitor to assist him or her in his or her duties; and
- (c) sell or otherwise dispose of, in any manner, all or any part of the property of the company; and
- (ca) exercise the Court's powers under subsection 483(3) (except paragraph 483(3)(b)) in relation to calls on contributories; and
- (d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary a seal of the company; and
- (h) take out letters of administration of the estate of a deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor, or his or her estate, that cannot be conveniently done in the name of the company.

Therefore, there are some fundamental differences in the powers of the liquidator contrasted to that of the restructuring practitioner and the type of company which can use the small company restructuring process.

QUESTION 2.3: 1/4

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

Commented [BB5]: 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.

“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.

The statement that Australia’s insolvency and restructuring options have in the past been very creditor-friendly is generally accurate. Historically, the Australian insolvency system has placed a strong emphasis on the rights of creditors. For example, court proceedings can be brought by an unsecured creditor seeking to enforce debts. The creditor must file the claim based on the amount owed. A small claim is filed in the magistrates’ court; medium claims brought can be brought in the county or district court whilst larger claims from (AUD 1 million and over in most states) are brought in the Supreme Court of the relevant state or territory. A claim which also includes a statutory claim under federal legislation, or which relates to bankruptcy or corporate insolvency can be filed in the Federal Court or federal Circuit Court.

With respect to secured creditors in Australia, they are not subject to a stay once a company enters liquidation or if an individual is made bankrupt. Secured creditors are paid first and above employee and tax claims outside the insolvency process and when they hold non circulating security interests in a liquidation or bankruptcy. Where a secured creditor holds circulating security interests over a company’s assets payment is made after employer claims but before tax and other claims. Additionally, a secured creditor with rights under a security interest in the assets of a company may choose to appoint a receiver to realise its security.

Also, in most of the insolvency processes in Australia although the directors remain in office their powers of management and control of the company cannot be exercised. Depending on the process utilised a liquidator, voluntary administrator, or receiver will exercise the powers of the directors. Creditors also have oversight during personal and corporate insolvency and ensure that insolvency practitioners discharge their duties in an accountable and responsible manner. In schedule 2 of the insolvency practice rules of the Bankruptcy Act at 75-10 it states that the trustee may convene a meeting of the creditors of a regulated debtor’s estate at any time but the as mandated at 75-15 of the schedule a trustee must convene a meeting if the creditors direct the trustee to do so by resolution; or at least 25% in value of the creditors direct the trustee to do so in writing.

Another creditor friendly option available to creditors is where a creditor's petition can be made against an individual debtor, a partnership or joint debtors as provided for in ss 7, 45 and 46 of the Bankruptcy Act. The debt (s) owed must not be less than AUD 5,000. Additionally, if the directors of a company are of the view that the company is insolvent and the shareholders appoint a liquidator, the liquidator must convene a meeting with the creditors within 10 business days of the appointment. The creditors may, at the meeting convened appoint some other person to be liquidator for the purpose of winding up the affairs and distributing the property of the company instead of the liquidator appointed by the company. A creditor can also file an application to the Court for a winding up order of an insolvent company.

Furthermore, the creditors also have the right to request information from the trustee in a regulated debtor's estate. This can be by resolution to (a) give information; or (b) provide a report; or (c) produce a document to the creditors. The trustee must comply with the request unless:

(a) the information, report or document is not relevant to the administration of the regulated debtor's estate; or

(b) the trustee would breach his or her duties in relation to the administration of the regulated debtor's estate if the trustee complied with the request; or

(c) it is otherwise not reasonable for the trustee to comply with the request.

The trustee of a regulated debtor's estate must have regard to directions given to the trustee by the creditors of the estate but is not obliged to comply with those directions. If the trustee does not comply with a direction, the trustee must make a written record of that fact, along with the trustee's reasons for not complying with the direction. If there is a conflict between directions given by the creditors to a committee of inspection the directions given by the creditors override any directions given by the committee. The majority in value of the creditors who reply to the Official Receiver must agree for the acceptance of the debt agreement of an individual debtor before it is accepted.

All of the aforementioned points out that Australian insolvency options provided by law empower and enable creditors with the ability to assert their rights and makes it creditor friendly.

However, there have been a number of recent reforms that have made Australia more of a debtor-friendly jurisdiction. These reforms include:

- The introduction of a new small business restructuring process, which provides small businesses with a simpler and more flexible way to restructure their debts.
- The introduction of a new safe harbour provision, which protects companies from insolvent trading claims if they take steps to restructure their debts in good faith.
- The amendment of the Corporations Act to make it easier for companies to enter into deeds of company arrangement (DOCAs).
- Creditors are prevented from enforcing Ipso facto contractual rights contingent only on the insolvency of a company or from being placed in an external administration.

The small company restructuring regime, introduced in 2021 pursuant to part 5.4 B of the Corporations Act is debtor-in-possession restructuring process. The object of this amendment to the Corporations Act is to provide for a restructuring process for eligible companies that allows the companies:(a) to retain control of the business, property and affairs while

developing a plan to restructure with the assistance of a small business restructuring practitioner; and (b) to enter into a restructuring plan with creditors.

Section 453B provides:

(1) A company may, by writing, appoint a small business restructuring practitioner for the company if:

(a) the eligibility criteria for restructuring are met in relation to the company on the day the appointment is made; and (b) the board has resolved to the effect that:

- (i) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and
- (ii) a restructuring practitioner for the company should be appointed.

This allows the company to keep trading under the control of its owners or directors. In order to qualify for this scheme a company must have

- Less than \$1 million in total liabilities
- The company is either insolvent or likely to become insolvent in the near future
- The directors (current or in the previous 12 months) have not engaged with the small business restructuring process or simplified liquidation within the past seven years
- The company must not be under other restructuring or administration including a deed of company arrangement or liquidation.

Whilst the restructuring practitioner advises on matters related to the restructuring and the creation of the restructuring plan the directors remain in control of the company. The restructuring practitioner must be allowed access to the company's books and other pertinent information in order that balanced advice can be given. The company must also ensure that all employee entitlements are current and tax commitments are lodged.

Additionally, in order to grant the debtor a reprieve third party rights cannot be enforced against the company during the restructuring process without the leave of the Court or the restructuring practitioner.

In a voluntary administration, the company's affairs are controlled by an Administrator, who assesses its viability, reports to creditors, and provides recommendations for the company's future. The duties of the directors are suspended during this process, but must cooperate with the Administrator. The Administrator develops a proposal for the company's future, called a Deed of Company Arrangement (DOCA), which may include a compromise, sale, or restructuring plan. The proposal is then put to creditors for a vote, and a majority of creditors must approve it. If accepted, the company exits voluntary administration, and control is returned to the directors. If not, the company may be placed into liquidation. During this period there is a moratorium thus no creditor whether secured or un-secured can enforce their rights against the company except with the leave of the court or voluntary administrator. There are some exceptions to this rule however such as where a creditor has security over the whole or substantially whole of the assets of the company where that creditor can instead decide to appoint a receiver instead of a voluntary administrator.

A new section, s588GA, was added to the Corporations Act of 2001 as a result of amendments made to the Act to shield directors from personal liability for debts incurred by an insolvent company if they take a course of action that is reasonably likely to result in a better outcome for the company and its creditors than the appointment of an administrator or liquidator. This is known as the safe harbour provision which allows the debtor to take steps on the future of the company and not as advised by the creditors.

These reforms have given debtors more options to restructure their debts and avoid immediate liquidation once there is a likelihood of insolvency. Thus, Australia has become a more debtor-friendly jurisdiction than it was in the past. However, the Australian insolvency system still favors creditors.

15/15 marks – this is a very good essay. It goes into depth about creditors' procedural rights and the majority of processes which may be described as creditor-friendly. It then correctly identifies the reforms and new processes which are more debtor-friendly. It comes to a sensible conclusion that the weight of Australia's insolvency regime may still be described as creditor-friendly despite the recent reforms.

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

Commented [BB6]: Sub-total = 11 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 Lyonessian liquidation.

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

The Cross-Border Insolvency Act 2008 incorporates the Model Law on Cross-Border Insolvency in Schedule 1 to the Act. The Model Law is intended to ensure co-operation between foreign courts. Chapter IV of the Model Law, comprising Articles 25 – 27, provides for cooperation with foreign courts and foreign representatives in the cross-border insolvency matters that are referred to in Article 1 of the Model Law.

For the purposes of the Model Law, “foreign proceeding” is defined broadly (Art. 2(a), and includes any: ... collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. If a foreign proceeding complies with the requirements for recognition, an Australian court must recognise it “unless recognition would be manifestly contrary to the public policy of Australia”.¹

Further article 2 (b) and (c) defines foreign main proceeding and foreign non-main proceeding as follows:

(b) “Foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) “Foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of the present article;

Upon considering the application for recognition of the Lyonessian liquidation as a foreign main proceeding under the Cross-Border Insolvency Act 2008, the Federal Court of Australia will consider where Aussibee has its centre of main interests (COMI): See Art. 17(2)(a). The Court will consider the following facts when coming to a determination of the COMI:

- a) Aussibee (The Company) is incorporated in Lyonesse.
- b) The Company sells chocolates flavoured with Australian native plants.
- c) The chocolates are manufactured in Australia by NewYums Pty Ltd (NewYums), an Australian-incorporated wholly-owned subsidiary of Aussiebee.
- d) Aussibee has offices in both Sydney and in Lyonesse however its warehouses are only in Sydney.
- e) Aussiebee regularly sells its chocolates all over the world, with orders received in Lyonesse and shipped from the Sydney warehouses.
- f) Aussiebee and NewYums its subsidiary share a board of directors, made up of six Australians and one Lyonessian.
- g) Aussiebee employed 40 staff: 20 in Sydney and 20 in Lyonesse.
- h) Aussiebee’s CEO is an Australian, but resident in Lyonesse.
- i) Aussiebee’s CFO is an Australian, resident in Australia.

Article 16(3) provides that:

¹ As provided in Article 6 of the Model Law.

"In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests."

In this scenario Aussibee conducts business in both Australia and Lyonesse and has offices in both countries and its CEO an Australian resident in Lyonesse whilst the CFO is an Australian, resident in Australia. Thus, the court would decide based on the facts highlighted above whether Lyonesse is the COMI before deciding on the recognition application.

In the case of *Ackers (as joint foreign representative) v Saad Investments Company Limited (in official liquidation)* (a company registered in the Cayman Islands)² the Federal Court of Australia considered the application of the plaintiffs were appointed by the Grand Court of the Cayman Islands, as official liquidators of Saad Investments Company Limited (Saad Investments). They applied to have the liquidation in the Cayman Islands proceedings recognised as a foreign main proceeding for the purposes of the Model Law on Cross-Border Insolvency. One critical issue for determination by the Court was whether the COMI of Saad Investments should be deemed to be where its registered office is, as provided in Art 16(3) of the Model Law.

Saad Investments was incorporated in the Cayman Islands. Saad Investment's registered office was in Grand Cayman in the Cayman Islands. Saad Investments was part of a large global group of companies comprising, among others, of about 40 companies based in the Cayman Islands. The company's immediate parent is also incorporated in the Cayman Islands and held by a trust, nominally also located there. There were indications that Saad Investments had commercial activities in and connections to places outside the Cayman Islands. The company's books and records were held and maintained by Saad Financial Services SA, a company registered in Switzerland and based in Geneva. There were indications that Saad Investments had commercial activities in and connections to places outside the Cayman Islands.

Rares J held that the COMI was where Saad Investment's registered office was located which was the Cayman Islands. In reaching that conclusion, the Judge at paragraph 29 of the judgment stated that:

" 29. Importantly, Art 16 creates a number of presumptions, the critical one here being in Art 16(3), namely that in the absence of proof to the contrary, Saad Investments' registered office in the Cayman Islands is presumed to be its centre of main interests."

The Court further noted that at paragraph 30 that " the expression, "the centre of the debtor's main interests", is not defined either in the *Model Law* or in the Act. "Rares J considered the case of the European Court of Justice in *Eurofood*³ which considered the formulation of the test for ascertaining the COMI, where the it was stated that:

"33 That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with article 4(1) of the Regulation,

² 2010 190 FCR 285.

³ [2006] Ch 541-542 [29]-[37].

determination of the court with jurisdiction entails determination of the law which is to apply.”

Rares J in Ackers further noted that for the presumption to be displaced, the Court had to be satisfied that the COMI is not in the State in which its registered office is located and given the importance to international commerce and, to third parties, of having an objective ascertainable basis upon which to commence and decide proceedings that will govern winding up an insolvency of a debtor under the Model Law, the approach adopted in Eurofood should be followed here.

Consequently, in the present scenario looking at all the facts in the round and noting that a liquidator has already been appointed in Lyonesse and that the Aussiebee was incorporated there and maintains an office there, it is likely that the Federal Court will recognise the Lyonesian liquidation as a foreign main proceeding under the *Cross-Border Insolvency Act 2008* and make the order 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 Lyonesian liquidation.

As a result, the Australian Taxation Office (ATO) should apply to the Court for modification of the recognition order. In Ackers as a joint foreign representative of Saad Investments Company

Limited (in Official Liquidation) v Deputy Commissioner of Taxation⁴ the Court of Appeal heard and determined an appeal by the joint foreign representatives of Saad Investments Company Limited against orders made by a judge of the Court on 29 August 2013 (“the Modification Orders”) that modified orders previously made by him on 22 October 2010 (“the Recognition Orders”) concerning the company’s liquidation in the Cayman Islands. The appeal raised important questions about the proper construction and interpretation of the Model Law on Cross-Border Insolvency (the “Model Law”). The Court stated that the

“particular question at the centre of the appeal is the treatment of a claim by the Deputy Commissioner of Taxation (“DCT”) that Saad is liable to Australian tax and penalties. Saad was not a registered foreign company, does not carry on business in Australia, and, as was common ground before the primary judge and on appeal, cannot be wound up by an Australian court under the *Corporations Act 2001 (Cth)*.”

The Court stated at paragraph 3 that

“The question at issue is whether the *CBI Act* and the *Model Law* permitted the primary judge to vary orders made by him in the recognition of the foreign representatives and the foreign main proceedings, in effect, by refusing to remit the remaining funds in Australia (in the order of \$7 million) to the Cayman Islands, and by permitting the DCT to proceed against the funds within Australia for the claimed tax and penalties. The difficulty for the DCT in the liquidation of the company in the Cayman Islands is that under Cayman Islands law his or her proof would not be accepted, on the basis that to do so would be to enforce foreign revenue laws.”

The ATO faces a similar issue here since Aussiebee owes AUD 12 million in taxes in Australia, payable to the (ATO), however the ATO are not entitled to prove in the Lyonesian liquidation.

In Ackers the Deputy Commissioner of Taxation (DCT) filed interlocutory process seeking, amongst other things, modification of the Recognition Orders and leave to issue statutory notices and take other enforcement steps. Under the terms of the application the DCT sought an order under Article 22.3 of the Model Law modifying the orders made by Rares J on 22

⁴ [2014] FCAFC 57

October 2010. The Court of appeal upheld the decision of the first instance judge and found that:

“...formal submission of a proof of debt to the insolvency administration will generally be adequate to support a conclusion that the court supervising the administration thereafter has jurisdiction to make orders in matters connected with the administration against the creditor who has proved. Such a conclusion does not, however, answer the question whether, as a matter of law and discretion, a court should not make orders under Art 20.3 and 22.3 to protect local creditors ..”⁵

Consequently the Court was of the view that the interests of the Commissioner, as an unsecured creditor of Saad Investments, was not adequately protected under the 2010 orders, because the 2010 orders would allow the whole amount of Saad Investments remaining Australian assets, of about USD 7 million, to be remitted to the Cayman Islands, as its centre of main interests, where the Commissioner could not prove for any distribution from its estate. Thus, the Court granted the modification order. This decision is thus significant in that it means where there is recognition in Australia of a foreign main winding up proceeding under the Cross Border Insolvency Regulations 2008 local debts such as tax debts owed to the ATO which are unenforceable in the foreign main proceedings may still be enforceable against the local assets of the company.

Therefore, the ATO should likewise file for a modification order to protect its position and claim an interest in AussieBee's assets (including AussieBee's shares in NewYums which are worth AUD 20 million) for the debt of AUD 12 million.

5/8 marks - the background of the substantive law regarding COMI and the decision of *Ackers* is very strong. However, the application of that case should have come to the conclusion that AussieBee's COMI was Australia and not Lyonesse. On that basis, the ATO should have been advised to intervene in the recognition proceedings. Failing that, the ATO should have been advised to enforce its claim to receive a *pari passu* amount equivalent to that which it would have received if it were an unsecured creditor in the Lyonesse proceeding.

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

⁵ See paragraph 165 of *Ackers v Deputy Commissioner of Taxation* 2014 FCAFC 57

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?

Based on the facts outlined above HA is insolvent and therefore the Board should inform the shareholders of this and make urgent suggestions on how to pay creditors, rescue the business or cause it to be wound up.

Since a competitor has recently approached HA with an attractive offer to purchase the Perth re-refining plant the Board can seek to place the company under voluntary administration. By using the voluntary administration procedure as a mechanism of business rescue the Board sell the Perth refining plant as a going concern sale to the competitor. The voluntary administrator can be appointed by a resolution of the company's directors, who are of the view that the company is insolvent or is likely to become insolvent at a future date. Upon assuming the role, the voluntary administrator will take control of the business, property and affairs and is entitled exercise or perform the powers of behalf of HA which may include disposing of the assets or carrying on the business pursuant to s. 437 A of the Corporations Act. The voluntary

administrator may also issue recommendations to creditors of HA as to how they should vote with reference to HA's future.

A voluntary administration may resolve the issues surrounding HA's future quicker. An independent registered liquidator (the voluntary administrator) is appointed by the director(s) to take full control of the company. This gives the director or third-party, usually in consultation with the voluntary administrator, time to find a way to save the company or the company's business, if possible. The director(s) will need to obtain the written consent of a registered liquidator to act as voluntary administrator before they can make the appointment. Further no creditor, whether secured or unsecured, can enforce their rights during the voluntary administration except with the leave of the Court or consent of the voluntary administrator. Thus, Best Oil Refining Pty Ltd (BOR) cannot enforce the judgment (of damages in the sum of AUD 4.6 million) which was obtained against HA in the Supreme Court of New South Wales whilst HA is in voluntary administration except if enforcement proceedings/action is began before the commencement of the voluntary administration.

The voluntary administrator will convene a first meeting with the creditors of the company within 8 business days of appointment where the creditors may remove and replace the selected administrator or appoint a committee of inspection which will represent the creditors interests in dealing with the administrator. There will be a second meeting with the creditors which is usually held within 25 days but may be adjourned to 45 days if so, resolved by the creditors. This period can also be extended by the Court if necessary. The voluntary administrator when convening the second meeting will provide the creditors with a report on the company's affairs, financial and property; whether it would be in the creditors interest that HA should be returned to the directors, whether a Deed of Company Arrangement (DOCA) should be executed or whether the company should be placed into immediate liquidation and whether there any voidable dispositions have been made which can be recovered.

If resolved/ voted by the creditors that the route of DOCA be explored this can cover a broad range of issues which can include:

- a) The property available to meet the creditors claim.
- b) The extent to which the company will be released from the debts
- c) The terms of the moratorium on the enforcement of creditors claims. Etc..

The Australia securities commission states that “

A deed of company arrangement (DOCA) is a binding arrangement between a company and its creditors governing how the company's affairs will be dealt with — and is agreed to after the company enters voluntary administration. The DOCA is generally proposed by the director (or any third party) and is administered by a deed administrator (usually the registered liquidator who was the voluntary administrator). The DOCA aims to:

- maximise the chances of the company, or as much as possible of its business, continuing, and/or
- provide a better return for creditors than an immediate winding up of the company.”⁶

⁶ [https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-creditors/deed-of-company-arrangement-for-creditors/#:~:text=A%20deed%20of%20company%20arrangement%20\(DOCA\)%20is%20a%20binding%20arrangement,the%20company%20enters%20voluntary%20administration.](https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-creditors/deed-of-company-arrangement-for-creditors/#:~:text=A%20deed%20of%20company%20arrangement%20(DOCA)%20is%20a%20binding%20arrangement,the%20company%20enters%20voluntary%20administration.)

The DOCA binds all unsecured creditors, even if they voted against the proposal. It also binds owners of property, those who lease property to the company and secured creditors (if they voted in favour of the deed). The Court can also make an order restricting the secured creditor from enforcing its interest only if this would prevent a genuinely viable rescue attempt of the Company. Thus, the court would consider factors such as the total debts of the company outweighed its profits and assets.

Alternatively, the creditors at the second meeting of creditors resolve to place HA in liquidation. The company can also be placed into liquidation if the directors believe the company is insolvent and the shareholders resolve to appoint a liquidator. Due to the amount of the debts listed herein (more than AUD 1 million) the liquidation will follow the normal creditors voluntary liquidation route.

Section 497 of the Corporations Act provides that:

"497 Information about the company's affairs

(1) The liquidator of the company must, within 10 business days after the day of the meeting of the company at which the resolution for voluntary winding up is passed:

(a) send to each creditor:

- (i) a summary of the affairs of the company in the prescribed form; and
- (ii) a list setting out the names of all creditors, the addresses of those creditors and the estimated amounts of their claims, as shown in the records of the company; and

(b) lodge a copy of the documents sent in accordance with paragraph (a)."

When the appointment of the liquidator takes effect, the directors remain in office however, their management powers are suspended. The liquidator acts as an agent, officer of the company and officer of the Court.⁷ The liquidator powers include but are not limited to:

- i. obtain and examine the books and records of the company to determine the state of the company's affairs and property;
- ii. investigate and prepare reports as to the affairs of the company;
- iii. take possession of the company's property; and
- iv. realise and distribute the company's property to creditors etc.

Secured creditors can continue exercise their security while the firm is in liquidation, but unsecured creditors cannot because a moratorium will be in place during the liquidation. The Court can however grant leave where proceedings were already well advanced before the liquidation began. Thus, since BOR commenced proceedings against HA in July 2020 and has since October 2020 received an order from the Court ordering that HA pay AUD 4.6 million in damages to BOR there is the possibility that the Court may deem that the enforcement (if pursued) proceedings can still continue although HA is in liquidation.

Also, some of the other issues that the board of HGL and HA should be aware of in light of the facts set out in this scenario are:

Since Hyrofine Group Ltd. (HGL), the parent company of HA, owns all of the company's shares, HGL may be held liable under Section 588V of the Corporations Act if, at the time HA incurred any debt, the company was insolvent at the time, or became insolvent as a result of incurring that debt, or as a result of incurring debts including that debt, and there were

⁷ See 1996 65 FCR 234...

reasonable grounds to believe that the company was insolvent. Additionally, section 588W requires that where:

“(a) a corporation has contravened section 588V in relation to the incurring of a debt by a company; and

(b) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company’s insolvency; and

(c) the debt was wholly or partly unsecured when the loss or damage was suffered; and

(d) the company is being wound up;
the company’s liquidator may recover from the corporation, as a debt due to the company, an amount equal to the amount of the loss or damage.”

Therefore, it is noted that 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. Further, the fact that HA has been insolvent since the judgment was handed down in October 2020 makes the board of directors liable under the corporation act. Additionally directors are to act in good faith, seeking to ensure the best interests of the company and trading whilst insolvent does not demonstrate this. Section 588 G mandates that it is the director’s duty to prevent insolvent trading by the Company. Section 588 G (3) states:

“ A person commits an offence if:

(a) a company incurs a debt at a particular time; and

(aa) at that time, a person is a director of the company; and

(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and

(c) the person suspected at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts (as in paragraph (1)(b)); and

(d) the person’s failure to prevent the company incurring the debt was dishonest.

Therefore the board of directors having indicated that HA has been insolvent since October 2020 can face liability and have a compensation order made against them if so ordered by the Court on an application by the liquidator or any individual creditor.

Further, the loan agreement between HA and the major shareholder of HGL who provided the unsecured loan for AUD 30 million which provides that the loan becomes automatically due and payable in full if HA enters any formal insolvency or restructuring process in Australia, will become payable if HA is placed in voluntary administration or liquidation. 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. Since HA insolvent it is unable to satisfy the monthly repayment thus it appears almost inevitable that the shareholder will demand repayment which HA will be unable to satisfy. Consequently, there is the possibility of court proceedings being instituted by the lender either in the form of a compulsory liquidation or breach of contract. This may however be stayed if a moratorium is in place if HA is placed under voluntary administration or creditor’s voluntary administration since the loan was unsecured.

Also, the Commonwealth Bank of Australia (CBA) may seek to enforce its security for the purchase of the trucks under the AUD 3 million loan. It is noted however that whilst the loan is secured with mortgages over the three trucks this is not registered on the Personal Property Securities Register. Accordingly, this failure to register can result in other security interests taking priority over the unregistered of CBA and may result in a loss of that security interest in any administration or liquidation of HA. This is a likely possibility since BOR has already

secured a judgment against HA and will likely seek to enforce that judgment and any assets (including the three trucks) may be sold by a liquidator/administrator to satisfy that debt. COR may seek to file a claim in court for repayment of the loan if not satisfied.

Therefore, it is imperative that the Board is proactive and take immediate steps to arrest the financial situation that the HA and HGL are facing. The Board should take obtain expert advice from individuals such as accountants to give a full picture of the company's finances and lawyers to start preparing a plan that is likely to lead to a better outcome for the company and creditors⁸, than an insolvency or administration. Further, the Board can try to protect themselves from liability for insolvent trading by making use of the safe harbour provisions under section 588G of the Corporations Act. Australia's Corporation Act allows for directors to face personal liability when their company is in severe financial difficulties when the directors allow the company to engage in insolvent trading. The safe harbour regime is designed to give company directors breathing space (and protection from insolvent trading personal liability) in circumstances where a turnaround plan is being pursued. The safe harbour protections, however, can only be used when there is a genuine and ongoing attempt to restructure the company to prevent insolvency/administration.

QUESTION 4.2: 6/7

*** End of Assessment ***

⁸ In *BTI 2014 LLC v. Sequana SA and Others* [2022] UKSC 25, The UK Supreme Court confirmed the existence of a duty owed by company directors to consider the interests of its creditors when nearing insolvency.