



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 = 32/50 (64%)

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

Commented [BB2]: Sub-total = 6 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

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

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.

Commented [BB4]: The correct answer is (a)

Commented [BB5]: The correct answer is (e)

(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.

Commented [BB6]: The correct answer is (d)

(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: 6/10

QUESTION 2 (direct questions) [10 marks]

Commented [BB7]: 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.

The types of voidable transactions referred to above are as follows;

- (a) Preference transactions: The underlying rationale in the rule against preference is that the assets of an insolvent company should be held for the benefit of its creditors and no one creditor ought to be allowed to obtain an advantage over and beyond that which he is entitled to in the ordinary course of the liquidation. This is established by showing that the debtor was insolvent at the time and the particular transaction was designed to give the creditor an unfair advantage. It is a complete defence to this that the creditor did know that the company was insolvent.*
- (b) Uncommercial contracts and transactions can be avoided by the liquidator if it can be shown that a reasonable person in the company's position would not have entered into the transaction. It is a complete defence if it can be shown that the transferee did not know that the company was insolvent at the time of the transaction.*
- (c) Unreasonable director-related transactions can be avoided if entered into within the relation back period. If a transaction is found to have been unreasonable, it is not a defence that the company was insolvent at the time.*
- (d) Unfair loans" unfair loans can be avoided if it is found that the interest charged or the terms of the loan were unfair. This is a question of fact. The solvency of the company is not a defence to this claim*
- (e) Circulating security interests or floating charges can be set aside if it is found that they were entered into at a time when the company was insolvent and it secured past indebtedness. It is a complete defence to this claim if the beneficiary can show that he was unaware of the company's insolvent status.*

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?

In determining the scope of the stay to be imposed in the context of a recognition application, the Australia court must consider what "the case requires". In other words, the court will impose stay that is appropriate having regard to the nature of the proceedings before it.

As has been made clear in the fairly recent case of Tai-Soo Suk v Hanjin Shipping Co Ltd at paragraph 24, the court in answering this question is not exercising a decision but rather engaging in a comparative exercise by comparing the proceedings before it with the nature of the foreign proceedings in respect of which the recognition is being sought.

This determines whether the court will grant to broader stay which restrains even some secured creditors or the more limited stay which restrains unsecured creditors.

The position as set out in Tai-Soo Suk appears there to be that where the foreign proceedings is more in the nature a business rescue then the standard stay which restrains unsecured creditors only while be imposed; conversely, where the foreign proceedings are more in the nature of liquidations then the broader stay will be imposed.

Invariably, in circumstances where there is no clear cut answers, the court will impose the stay which most closely fits into the analogous foreign proceedings although there may be some degree of overlap.

QUESTION 2.2: 2/3

Question 2.3 [maximum 4 marks]

What are the differences between liquidations and small company liquidations?

The key differences between regular liquidations and small company liquidations can be summarised as follows:

- (a) Small company liquidations are less onerous in that there are less statutory obligations imposed on a liquidator to pursue potentially unlawful actions committed by officers of the company unless there are reasonable grounds to conclude that there was misconduct of some sort*
- (b) There is no requirement in small company liquidations to call creditors meetings as is the case in ordinary liquidations in which the creditors' committee plays a key role in the liquidation process*
- (c) The process by which debts are proved and dividends paid in small company liquidations is simpler to reflect the need to reduce the costs of the liquidation on smaller companies with the view to having those costs paid to its creditors*
- (d) The small liquidation process is intended to be subject to a fixed fee unlike the ordinary liquidation process which can be quite expensive*
- (e) The policy objective behind the small business liquidations is designed to ensure that small businesses which can be rehabilitated should be given that*

opportunity and this new regime is arguably more debtor friendly than the creditor driven process found otherwise in which the main aim is to maximise assets for the benefit of the company's creditors

(f) Small businesses will benefit from a moratorium on claims from unsecured creditor and a limited number of secured creditors in order to restructure and implement rehabilitative measures.

QUESTION 2.3: 2/4

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

Commented [BB8]: Sub-total = 11 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.

Although there has been some reform in the recent past, Australia's restructuring and environment still remains a large creditor friendly system. This is said for several reasons.

The traditional terrain in Australia has been very creditor focused and there is particular emphasis on ensuring that secured creditors are still able to enforce their security rights even during a liquidation. This is compounded by the fact that substantial creditors who control large swathes of the company's assets are able to appoint a receiver whose role and purpose is likely to frustrate a voluntary administrator.

Unlike in other major insolvency systems, some secured creditors and select parties such as landlords and other individuals can continue to conduct enforcement action in circumstances where they were commenced prior to the appointment of a voluntary liquidator. This essentially forces a company to incur both the costs of the defence of the enforcement action while in voluntary liquidation.

This is in complete contrasts to other jurisdictions such as Jamaica in which the entry into the process akin to voluntary liquidation results in the imposition of stay which prevents the prosecution of these types of claims whether instituted prior to the entry into liquidation or not, with the stated aim of allowing the company to rehabilitate. The absence of such a stay in favour of the debtor confirms Australia's status as a creditor friendly regime.

This is also confirmed when one looks at the relation back period over which certain transactions can be clawed back in Australia versus that in other countries. These periods range from 2 years to five years and emphasises the underlying policy goal of ensuring that the assets of a company in liquidation are maximised for the benefit of the creditors.

A further point on this is the fact that Australia remains one of the few countries which substantial wrongful trading liability pursuant to which a liquidator can recover substantial damages from directors who allowed a company to trade while insolvent. Again, the aim behind this is to ensure that as much of the company's assets as possible are available for realisation and distribution to its creditors.

Admittedly, there has been some reform in recent years mainly designed to assist small businesses in accessing rehabilitative mechanisms rather than being liquidated. These measures have included:

- (a) The evolution and development of the voluntary administration regime which has improved the business rescue options. This regime has the stated purpose of maximising the chances of an insolvent company returning to solvency as can be seen in the use of the deed of creditors' arrangement which is a welcomed addition.*
- (b) The threshold for the issuance of statutory demands have been doubled which means that a higher level of debt is required to justify a possible winding up order*
- (c) The fairly stringent provisions dealing with directors' liability have been relaxed in favour of "safe harbour" provisions in the Treasury Laws Amendment Act 2017. This allows directors to trade for a limited period of time with a view to implementing an out of court restructuring plan in order to return the company to solvency.*

However, these reforms have been counteracted by the continuing focus on anti-phoenixing regime which created new offences and set sights on impugning even more transactions which can be seen as calculated to defraud creditors. This is also coupled with the lack of a broad based moratorium regime which would prevent both secured and unsecured creditors from continuing enforcement of certain categories of proceedings in circumstances where there is an ongoing liquidation. Further, it can be arguably said that the raft of improvements for voluntary liquidation was more line with the desire to protect Australia's airline industry rather than move away from a largely creditor-centric insolvency system.

11/15 marks - this is a good essay. It identifies a number of features of Australia's insolvency regime which are creditor-friendly. To this list, it could have been added that creditors have a significant number of procedural rights in the insolvency process (eg right to require IPs to produce information, rights to vote out IPs easily). The author identified some new reforms which are debtor-friendly. To this list, the

ipso facto moratorium could have been added. Additionally, the small business restructuring process could have been mentioned as a process which upholds the rights of debtors.

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

Commented [BB9]: Sub-total = 9 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?

ATO would be advised to take the following course of action:

(a) object to the application for recognition on the following bases that the Lyonesse proceedings are recognised as main foreign proceedings. this can be established when the following facts are considered:

- i. most of the staff are Australian including the most senior staff members***
- ii. significant assets in the form of the warehouses are located in Australia***
- iii. NewYums is an Australia corporation***

iv. *NewYums remains solvent*

(b) ATO should also object to the recognition order on the basis that its interests as a creditor would not be adequately protected as Article 19 requires since it would not be able to prove the outstanding tax liability in the Lyonesian liquidation.

(c) This inability to prove may also constitute a public policy reason to refuse recognition

*(d) In the event that the court granted recognition despite the objective, then ATO should make an application seeking leave of the court to enforce its claim against NewYums in order to ensure that it is able to collect on the tax liability in Australia as if it were entitled to do so in the Lyonesian proceedings. This is a condition that was applied by the Court in *Ackers v Deputy Commissioners of Taxation* and ought to be used to ensure that the interests of creditors are adequately protected in the recognition process.*

7/8 marks - this is a very strong answer. It addresses the two main pieces of advice which would be given to the ATO: to challenge the recognition proceeding on the basis that the COMI of AussieBee is Australia and not Lyonesse, and to enforce the claim to receive a pari passu amount equivalent to that which AussieBee would receive as an unsecured creditor in the Lyonesian proceedings. It could have been strengthened by a more specific and detailed analysis of the factors which support the proposition that the COMI is in Australia.

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?

There are several options open to the Board and several matters of which it should be aware. These are as follows:

- (a) The question arises as to whether the directors are engaged in insolvent trading such that would attract a liability claim against them by liquidator in the event that HA enters liquidation. The date of the judgment is clearly within the clawback date and the question arises as to whether a reasonable director would continue to have the company trade in those circumstances.**
- (b) In light of that, the Board can either immediately consider making an out of court effort to restructure in order to reduce the likelihood of an insolvent trading charge so that it can be restructured with a view to returning to solvency.**

*(c) The Board should also consider **voluntary liquidation which would provide ample protection to HA while negotiating a possible sale to its competitor.***

(d) Continuing to trade in those circumstances as described above also makes the transactions entered into subject to the new anti-phenixing regime which seeks to prevent and invalidate transactions which are designed to defeat the interests of creditors.

(e) The Board should also note that the mortgages over the trucks and the loan agreement secured by the plant can be separately enforced by the lender in accordance with the terms of the loan. It is likely that a receiver will be appointed in the event that HA defaults as expected. At this point, the issues pointed out above will become even more pressing.

QUESTION 4.2: 2/7

* End of Assessment *