



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 = 35/50 (70%)

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

Commented [BB2]: Sub-total = 8 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

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

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

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

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: 8/10

QUESTION 2 (direct questions) [10 marks]

Commented [BB5]: Sub-total = 10 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 five types of voidable transactions are the below, these are under 5.7B of the Corporations Act:

1. Unfair Preferences

If this was paid to the creditor which:

- **Occurred at a time:**
 - o **6-month period ending on the relation back day**
 - o **In the 4-year period on the relation back day, where the creditor is a related entity of the company.**
 - o **In the 10-year period ending on the relation back day where the transaction was made to defeat, delay, or interfere with the rights of the creditors.**
 - o **After the relation back day but before the liquidator was appointed.**
- **Occurred when the company was insolvent or caused it to become insolvent.**
- **Enabled the creditor to recover more than would have as a proportionate distribution in liquidation as an unsecured creditor.**

Where a creditor repays the unfair preferences, they are entitled to prove in the liquidation for their debt.

Defences for the unfair preferences are contained in the Corporations Act.

Pursuant to the which the court cannot make an order permitting the recovery of property if it would materially prejudice a right or interest of a party to the transaction and that party:

- **Acted in good faith**
- **Was not aware of the facts and circumstances or have any reasonable grounds for suspecting insolvency.**
- **Provided valuable consideration or changed its position in reliance on the transaction.**

2. Uncommercial Transactions

If a company enters into a transaction with a person, the liquidator may apply to the court for an order challenging the transaction.

- **Occurred at a time:**
 - o **2-year period ending on the relation back day**
 - o **4-year period ending on the relation back day, where the creditor is a related entity of the company**
 - o **In the 10-year period ending on the relation back day where the transaction was made to defeat, delay, or interfere with the rights of the creditors.**
 - o **After the relation back day but before the liquidator was appointed.**

- *Occurred when the company was insolvent or caused it to become insolvent.*
- *Is uncommercial.*

Defences for the uncommercial transactions are contained in the Corporations Act.

Pursuant to the which the court cannot make an order permitting the recovery of property if it would materially prejudice a right or interest of a party to the transaction and that party:

- *Acted in good faith.*
- *Was not aware of the facts and circumstances or have any reasonable grounds for suspecting insolvency.*
- *Provided valuable consideration or changed its position in reliance on the transaction.*

3. Unreasonable Director related transactions

This can be applied to the court to challenge the transaction.

- *In the 4-year period on the relation back day*
- *After the relation back day but before the liquidator was appointed.*

This can be recovered even if the company was not insolvent when the transaction was entered into or did not become insolvent by doing so.

Requirements to be unreasonable:

- *There must be a payment, transfer of property or issue of shares on behalf of the benefit of a director.*
- *A reasonable person in the company's circumstances would not have entered into this transaction having regard to the effects arising from the transaction.*

Defences for the unfair preferences and uncommercial transactions are contained in the Corporations Act. But these do not assist with unreasonable director related transactions nor unfair loan claims.

4. Unfair loans

A liquidator can challenge the unfair loans provided to the company at any time before the appointment of the liquidator and regardless as to whether they were solvent or not.

Deemed to be unfair if:

- *Interest rates or charges have been extortionate.*

Defences for the unfair preferences and uncommercial transactions are contained in the Corporations Act. But these do not assist with unreasonable director related transactions nor unfair loan claims.

5. Circulating security interests

As per the Section 588FJ of the Corporations Act, circulating security interests created within 6 months before the commencement of the liquidation and securing past indebtedness are void against the liquidator.

The liquidator can also bring court proceedings to recover the proceeds of any realisation of the void circulating security interest when it is in a compulsory liquidation on grounds of insolvency.

When in a voluntary liquidation they can apply to the court to convert the liquidation into a compulsory liquidation on grounds of insolvency in order to make use of this provision.

No grounds for defences.

QUESTION 2.1: 3/3

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?

Under Article 20 of the Model Law as being the same as would apply if the stay or suspension arose under

- *The Bankruptcy Act*
- *Chapter 5 of the Corporations Act*

When the court is determining the recognition of the corporate debtor, it must consider what the case requires according to the nature of the proceedings- the broader voluntary administration stay (which affects secured creditors) or the standard liquidation stay (affects only the unsecured creditors).

If the foreign proceedings are in business rescue procedures, the broader is deemed more appropriate. For more analogous to liquidations, the standard liquidation is more appropriate. Questions that will be used to assess which stay is more appropriate.

QUESTION 2.2: 3/3

Question 2.3 [maximum 4 marks]

What are the differences between liquidations and small company liquidations?

Australian insolvency laws have a simplified liquidation and restructuring plan for small companies with less than AUD 1 million in liabilities and no current director of

the company has been a director of another company that has undergone restructuring or simplified liquidation within 7 years.

This is only available to creditors voluntary liquidation and not members voluntary liquidation or court ordered winding up. The liquidator will assess and if it is under reasonable grounds to meet the criteria, the liquidator may adopt the simplified approach, this cannot be done if at least 25% of the creditors have requests that the liquidator not follow the simplified approach. And also, that the liquidator is not aware of any fraud or dishonesty.

Following differences from a liquidation:

- *Clawback of voidable transaction will only apply to unfair preferences over AUD 30,000 that were paid in the 3 months prior to the commencement.*
- *Liquidations are only required to report to ASIC on potential misconduct where they believe there has been misconduct.*
- *Removal of the requirement to hold creditors meetings and removal of the committees of inspections.*
- *Simplification of the proof of debt process and the dividend process*
- *Provisions for electronic communications and voting.*

QUESTION 2.3: 4/4

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

Commented [BB6]: Sub-total = 10 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 was considered to be creditor friendly; the following examples show why they are creditor friendly:

- *All processes have the appointment of an external administrator, and not debtor in possession processes.*
- *Secured creditors are entitled to enforce their rights during bankruptcy/liquidation processes.*
- *Major creditors can appoint a receiver over the top of a voluntary administrator.*
- *Australia has broad insolvent trading liability for directors and a voidable transaction regime which allows for clawbacks benefiting the creditors.*

The new reforms and the corporate voluntary administration regime are deemed to be more debtor friendly due to it being designed to encourage a stronger corporate and business rescue culture and promote the move away from dominance of the creditor friendly focus. Which are:

- *The primary goal of the voluntary administration regime is to maximise the change of the insolvency company or the business to continue existence.*
- *Creditors are prevented from enforcing ipso facto contractual rights contingent only on a company's solvency or entry into an external administration.*
- *Bankruptcy Act for personal insolvency rendering ipso facto clauses are void outright when a person becomes bankrupt.*
- *Safe Harbour allows for companies to take advantage from insolvent trading liability, so that they can continue to allow a company to incur debts with the view of an informal restructuring of the supervision of restructuring expert. But the restructuring regime in Australia is secured creditor friendly.*

Australia is still considered to be creditor friendly due to its primary focus to protect the creditors rights. Even though they have new regimes and reforms that have elements of more debtor friendly aspects, they are still ultimately creditor friendly. The protection of the interests is much greater emphasis on the creditors than the debtor and its shareholders. They focus on achieving the best possible returns for the creditors.

But, I do agree that there has been some change to incorporate some debtor friendly aspects.

10/15 marks - this is a good essay but there are some incorrect statements of law. It states that there are no debtor-in-possession procedures in Australia. This is incorrect. It accurately identifies the insolvent trading safe harbour and ipso facto moratoriums as reforms which have moved towards a more debtor-friendly regime. The essay does not mention the small business restructuring process which is another reform that upholds the rights of debtors. The essay does not mention the number of procedural rights which creditors have (eg right to require IPs produce information, right to vote out IPs).

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

Commented [BB7]: Sub-total = 7 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 Lyonesse 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 Lyonesse liquidation.

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

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

ATO is the Australian Tax Office of which Aussiebee owes AUD12 million in taxes. Taxes are considered to be a secured creditor.

Secured creditors in insolvency are paid first (before tax claims and employee claims) when a debtor defaults outside an insolvency procedure. Secured creditors holding no circulating security interests are paid first before tax claims and employee claims when a company is liquidated or in a bankruptcy. Secured creditors holding circulating security interests over company assets are paid after employee claims but before tax and other claims.

Secured creditors that do not hold security over all or most of the debtors assets are subject to an automatic stay on enforcement when a corporate debtor enters voluntary administration. But secured creditors are not subject to any stays once company enters liquidation or if the person is made bankrupt.

Parties can agree that the secured creditor will have a right to appoint a receiver over the debtors property if the debtor defaults in repayment of the debt.

*Under application of Article 22 of the model law, the court must be satisfied that the interests of the creditors are adequately protected when granting relief under article 19. A debt payable to a foreign revenue creditor is not admissible to proof in an Australian liquidation. In *care Ackers v Deputy Commissioner of Taxation* The deputy Commissioner of Taxation (DCT), the federal court modified the recognition orders, giving leave to the DCT to take steps to enforce its claim in Australia for the purpose of recovering an amount up to the *pari passu* amount that ATO would have received if they were entitled to prove for the tax debt as an unsecured creditor in the foreign main proceedings. Therefore, a modification of the recognition orders was deemed*

appropriate way to ensure that the interests of the DCT as a creditor were adequately protected.

4/8 marks - this answer is premised on the incorrect conclusion that the ATO is a secured creditor. Though tax liabilities do receive different treatment to regular unsecured creditors under Australian insolvency law, there is nothing to suggest that they are treated that way under Lyonesian law. On that basis, it was necessary to advise the ATO to proceed as though the debt were an unsecured debt which would have involved challenging the recognition proceeding on the basis that the COMI were Australia. Your answer does not consider the COMI of AussieBee at all. It does, however, correctly advise the ATO to enforce its claim to recover an amount up to the pari passu amount that ATO would have received if it were entitled to prove as an unsecured creditor in the Lyonesian 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 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?

We understand the boards concerns and take note of the fact that since the 2020 judgement the Perth plant is too small to be able to provide sufficient earnings to be able to repay the loan which was received from the major Shareholder of HGL. These repayments are due the end of 2021 monthly. We also note that if HA had to go into liquidation the loan would be fully repayable immediately.

Currently the liabilities are:

- 30 mil unsecured loan payable in full if insolvency or end of 2021
- 3 mil bank loan secured by the assets (3 trucks)
- 5 mil loan to HGL
- Debts to trade creditors

Currently there is only small profits being made from the Perth Plant. This is not expected to increase currently in the current financial status.

Currently there is a very attractive offer in which to purchase the Perth plant.

Currently we have the following options/considerations:

1. ***The creditor can appoint a receiver over the assets of the company. A receiver is usually appointed by a creditor who has a security interest over the whole or a substantial part of the company's property. This needs to be a secured creditor. Therefore, the funding from the major shareholder is unsecured and therefore this would not be applicable.***

2. *The entity applies to go into small companies' liquidation to be more cost effective and time effective, but they don't meet the threshold of under 1 million in liabilities.*
3. *Court appointed liquidation, due to being insolvent, which would be costly and timely and could result in unfavourable outcomes for the creditors due to court/ lawyer costs etc. There is currently a prospective offer and no other assets which could be realised to pay the creditors.*
4. *Creditors rescue:*
 - a. **voluntary administration followed by the implementation of a DOCA,**
 - b. *creditors scheme of arrangement or*
 - c. *a restructuring plan for companies with liabilities under 1 million. These are for companies registered under the Corporation's act. The high court recently emphasised the intended use of the voluntary administration to achieve corporate rescue and saving the company.*

When deciding the best course of action for the company we need to determine whether a course of action is reasonably likely to lead to a better outcome for the company. The court will consider the following items:

- *Whether the directors properly informed themselves of the company's position,*
- *Taken the appropriate steps to prevent misconduct.*
- *Taken the appropriate steps to ensure the company is keeping appropriate financial records.*
- *Obtained advise from an expert on a restructuring plan which will lead to a better outcome for the company and*
- *Proceed to develop and implement the restructuring plan in consultation with an expert advisor.*

*Based on the facts above. **We would suggest it would be beneficial to use a voluntary administration** of which the DOCA restructuring proposal does not have to be ready when the company enters into the voluntary administration. This allows the company the benefit of the voluntary administration moratorium while the DOCA proposal is prepared. The DOCA proposals are made by the directors or shareholders of the company to the voluntary administrator and then they take pro active roles in negotiation of the proposed terms so that this can be put to the creditors which the DOCA recommend they accept.*

I would recommend to the board that they consider this approach and the attractive offer for the Perth plant which would then result in the creditors being paid and split pari passu with the offer from the competitor received due to the plant making small profits and the trucks being secured by the bank loan.

The board has stated that there is no more funding and no more possibilities for refinancing debts. Therefore, there is no other options than to consider the offer on the table for the plant and receive as much from the sale of this major asset to repay

the creditors. Paying of priority creditors in the order specified by in section 556 of the corporation's act.

QUESTION 4.2: 3/7

* End of Assessment *