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 = 25/50 (50%)

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

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 [BB3]: 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

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

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

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

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 [BB6]: The correct answer is (e)

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.

[A Liquidator can lodge an application before Court to challenge the following voidable transactions;

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

Under unfair preferences and uncommercial transactions it is a defence under the Corporations Act if the party to the transactions was not aware or had no grounds to suspect that the company was at the time of the transactions insolvent or would become insolvent by executing or entering into the transactions. However, it is not a complete defence under the Corporation Act in relation to the unfair loans, unreasonable director related transactions and circulating security interests transactions for a defendant to prove that they were not aware or have reasonable grounds to believe that the company was insolvent at the time of the transactions. The difference between the Unfair preferences and uncommercial transactions on one hand and the unfair loans, unreasonable director related transactions and circulating security interests on the other hand is that the latter transactions can be recovered whether the company was not insolvent or did not become insolvent by virtue of the very transactions.]

QUESTION 2.1: 2/3

Question 2.2 [maximum 3 marks]

How does a court determine the scope of the stay in relation to a corporate debtor under Australia's implementation of Article 20 of the Model Law?

[The Court determines the scope of the stay in relation to a corporate debtor by considering what the case requires. Therefore, the determining factors are whether the case requires a wider or broader voluntary administration stay which is likely to affect the secured creditors or the standard liquidation stay that can only affect the unsecured creditors.]

QUESTION 2.2: 1/3

Question 2.3 [maximum 4 marks]

What are the differences between liquidations and small company liquidations?

[The common feature of liquidation is the taking possession of all the movable and immovable property of the company, to realise the property and apply proceeds

towards the payment of the company debts and distribute any surplus to the members. In light of the preceding the differences between liquidations and small company liquidations is that liquidations refers to the regular liquidations while small company liquidations refers to the simplified procedure of liquidations relating to small companies as provided for under the 1st January, 2021 Reforms which have made the liquidation process less complex, swifter and less costly in relation to the small companies. The existing liquidation framework applies to small company liquidation with adaptions which distinguishes it from the regular liquidation. Therefore, the differences are that; the clawback of voidable transactions to unfair preferences of over AUD 30,000.00 that were paid to the parties related to the company three months preceding the commencement of the liquidation whereas in regular liquidations that is not the case. In regular liquidations, there is a statutory requirement to hold creditors' meetings and establishing of the Committees of inspection whereas in small company liquidations that requirement has been removed. There is simplified process of proving the debt process in small company liquidations whereas that is not the position in regular liquidations. In small company liquidations, liquidators are only required to report to ASIC on potential misconduct where there are reasonable grounds to believe that misconduct has happened whereas that is not the case in liquidations]

QUESTION 2.3: 3/4

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

Commented [BB8]: Sub-total = 7 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.

[It is my position from the outset that I strongly disagree with the statement above on the ground that Australia's insolvency and restructuring options still remain creditor friendly despite recent reforms that the country has introduced. The recent reforms are designed to merely encourage a corporate and restructuring culture aimed at advancing a shift from the existing dominance of the creditors' rights however; the reforms have not altered the creditor's rights in insolvency proceedings or situations. For example secured creditors have enforcement rights during the bankruptcy or liquidation processes which entitle them to appoint a receiver besides the voluntary administrator having been appointed. Furthermore, creditors with security interest over the company's property either in whole or substantially in whole have enforcement rights over the security by appointing a receiver despite the Voluntary Administrator being in office. Additionally, the commencement of the insolvency or restructuring proceedings do not act as a stay of the creditor's enforcement actions that were instituted prior to the appointment of either the Liquidator or Restructuring

Practitioner. In light of the preceding it is the firm position of this author that the Australia's insolvency and restructuring options are still creditor friendly despite recent reforms.]

7/15 marks – ***this essay does not meet the basic requirements necessary to pass. The essay does not actually identify any of the features of Australia's insolvency regime (other than the rights of secured creditors). It fails to identify what the actual reforms were which are debtor-friendly (ie ipso facto moratorium, insolvent trading safe harbour and small business restructuring process). It does not acknowledge the procedural rights of creditors generally.***

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

Commented [BB9]: Sub-total = 6 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 Lyonessian. Aussiebee employed 40 staff: 20 in Sydney and 20 in Lyonesse. Aussiebee's CEO is an Australian, but resident in Lyonesse. Aussiebee's CFO is an Australian, resident in Australia.

Aussiebee is insolvent. NewYums, however, remains solvent.

A liquidator has been appointed to Aussiebee in Lyonesse. She applies to the Federal Court of Australia for recognition of the Lyonessian liquidation as a foreign main proceeding under the Cross-Border Insolvency Act 2008, and for orders entrusting Aussiebee's assets (including Aussiebee's shares in NewYums which are worth AUD 20 million) to her, so that she can realise them for the benefit of creditors in the Lyonessian liquidation.

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

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

[It is very clear from the facts of the question that Aussiebee Pty Limited is a company incorporated outside Australia but has offices in Australia. Furthermore, it is also clear

that Aussiebee owes the ATO AUD 12 Million therefore, the ATO has interest in the application filed by the Liquidator. Therefore, in order to protect or improve its position the ATO must invoke the provisions of Article 22 of the Model Law and apply to the Federal Court of Australia. Article 22 of the Model Law is centred on the protection of the creditors such as the ATO, therefore, this is the perfect case in which the ATO must invoke the provisions of Article 22 of the Model Law. Additionally, the facts of the question are similar to the facts in the case of Ackers V Deputy Commissioner of Taxation (2014) 223 FCR 8 in which the Federal Court modified the recognition orders granting leave to the Deputy Commissioner of Taxation to take steps to enforce its claim in Australia for the purpose of recovering an amount up to the pari passu amounts the ATO would have received if they were entitled to prove for tax debt as unsecured creditor in the foreign main proceedings. On the basis of the preceding decision of the Court, the ATO has no option but to seek judicial intervention under the provisions of Article 22 of the Model Law if it is to protect or improve its position in so far as recovery of the AUD 12 Million is concerned.]

4/8 marks – ***this answer does not actively engage with the facts of the question or the substance of the law of cross-border insolvency in Australia. There is no mention of AussieBee's COMI or whether the ATO could establish that, despite the presumption, there is sufficient indicia to establish its COMI as Australia. The answer does not advise the ATO what to seek other than "judicial intervention". The answer does reference art 22 but it ought to have recommended the ATO enforce its claim so as to receive a pari passu amount it would have received as an unsecured creditor in the Lyonessian 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?

[The facts of the question at hand clearly shows that the Supreme Court of New South Wales passed Judgment in favour of BOR in the sum of AUD 4.6 Million as Damages at 1st October, 2020. Prior to the aforesaid Judgment HA had loans from a major shareholder of HGL in the tune AUD 30 Million, AUD 3 Million from the Commonwealth Bank of Australia and also post judgment debts of AUD 5 Million from HGL. The preceding narrative and the statement by the Board that HA had been insolvent since the judgment was handed down in October, 2020 because the company does not earn enough from its second refining plant to meet the judgment debt and start repaying CBA at the end of 2021 boarders on insolvency trading. According to the Author of Module 8A Guidance text, Australia on page 39 a Director is guilty of insolvency trading in the following circumstances;

1. *He or she was a director at the time a debt was incurred.*
2. *The company was insolvent when the debt was incurred, or became insolvent as a result*
3. *There were reasonable grounds for suspecting the company was insolvent or would become insolvent by incurring the debt*
4. *The Director failed to prevent the company from incurring the debts and*

5. *The Director was aware that there were reasonable grounds for suspecting the company was insolvent when it incurred the debt or a reasonable person in a like position in the company's circumstances would be aware.*

The ramifications for the Directors who engage in insolvency trading is mainly a compensation order against the directors in their individual capacities. The Court can also impose a civil sanction against the Directors which is usually the Director's disqualification Order. The highlighted ramifications are not only limited to the Directors but also apply to the holding company for the debts incurred by a subsidiary company. In light of the foregoing, the Board of HGL and HA and also HGL as a parent are not immuned from the above ramifications as they clearly engaged in insolvent trading. Since a major shareholder of HGL is unsecured creditor in the tune of AUD 30 million and there are no chances of HA undergoing a successful restructuring process, the only option available is for HA to be put under the creditors liquidation.]

QUESTION 4.2: 2/7

*** End of Assessment ***