



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 = 36.5/50 (73%)

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

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

Commented [BB4]: 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

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 = 6.5 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.

There are at least four types of voidable transactions that can be reversed by a liquidator on application to the court are:

- a) Undervalued transactions**
- b) Transfers to defeat creditors**

- c) *Preferential payment to creditors*
- d) *Insolvent trading*

It is not enough for the defendant to prove that they were not aware that the company was insolvent at the time they entered into the transactions.

The transactions must be transacted in good faith, in the ordinary course of business, and in the absence of notice of the creditor's petition.

QUESTION 2.1: 1/3

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 will determine what "the case requires".

The stay will affect both secured and unsecured creditors if the foreign proceedings are analogous to a business/ corporate rescue type regime.

The stay will affect only unsecured creditors if the foreign proceedings are analogous to a liquidation type proceeding.

QUESTION 2.2: 1.5/3

Question 2.3 [maximum 4 marks]

What are the differences between liquidations and small company liquidations?

As of 1 January 2021, there are two different forms of creditors' voluntary liquidations.

However, the new simplified process is only available to business with liabilities less than AUD 1 million and where no director of the company (or former director in the last 12 months) has been a director of another company that has undergone restructuring or been the subject of a simplified process within 7 years.

The new process is meant to be simpler, cheaper and quicker (given the size of the company). The idea is that this will return more value to creditors (including employees of the small company).

The new process has the following characteristics (which differentiate it from the usual process):

- *Clawback provisions only apply to unfair preferences over AUD 30,000 that were paid to related parties in the 3 months prior to the commencement of the liquidation;*
- *Liquidators are only required to report to ASIC on potential misconduct where there are reasonable grounds to believe that there has been misconduct;*
- *There is no requirement to hold a creditor meeting, and no requirement for committees of inspection;*
- *There is a streamlined proof of debt and dividend process; and*
- *There are provisions for electronic communication and voting.*

QUESTION 2.3: 4/4

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

Commented [BB6]: 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.

I agree with this statement.

Australia's insolvency and restructuring regimes have historically been creditor-friendly, and to a large extent, remain so.

For example, the Australian system still emphasises the rights of creditors over debtors (i.e. is a creditor-friendly jurisdiction). For example:

- *Creditors are still active participants in all insolvency processes in Australia;*
- *Enforcement rights over secured assets are largely unfettered in Australia (i.e. the Australian liquidation moratorium applies only to unsecured creditors and not to secured creditors); and*
- *Members' VLs can only take place where the company is solvent.*

In summary, Australia is still largely geared towards lenders getting their money back.

That said, Australia has recently introduced a number of more debtor-friendly reforms.

A. 'Safe harbour' reforms

From September 2017, company directors can use the 'safe harbour' reforms in certain instances. The reforms protect directors from personal liability for insolvent trading if they take action that is reasonably likely to lead to a better outcome for the company and its creditors (when compared to the appointment of an administrator or a liquidator). This has made Australia more debtor friendly (i.e. more in the interests of

equity holders) in that directors are now not discouraged from taking risks to try to save their companies (if the risk is appropriate).

B. Ipso facto clause reforms

From 1 July 2018, there has been a moratorium on the enforcement of ipso facto rights under certain contracts in Australia, which applies in the VL context (and other contexts) in relation to certain contracts. This means that in certain circumstances a contractual counterparty will not be able to terminate a contract simply because they entity that is the counterpart has entered an insolvency process (and this is clearly a debtor friendly reform).

C. New simplified debtor-in-possession restructuring process reforms

From January 2021, further measures were introduced to help SMEs in Australia overcome the economic, financial and operational challenges caused by the pandemic. The reforms draw on debtor-in-possession aspects of Chapter 11 of the Bankruptcy Code in the USA, and introduce a new process for certain businesses to restructure the business whilst management remain in control under a restructuring plan approved by creditors (and this is clearly debtor friendly as it provides a new pathway for management to save a company).

15/15 marks - excellent essay. Identifies all the right substantive legal processes which weigh in favour of creditors vs debtors. Identifies the recent reforms which have shifted the scales towards debtors. Acknowledges the rights of creditors in insolvency processes in Australia generally and that the majority of processes continue to uphold the rights of creditors over debtors.

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 Lyonesian 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 Lyonesian 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 Lyonesian liquidation.

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

Australia has adopted the UNCITRAL Model Law by way of legislation in CBIA in relation to the recognition of foreign insolvency proceedings.

Under CBIA, the liquidators of Aussiebee will likely be able to be recognised as foreign main proceedings in Australia, and thereby gain control of NewYums and its assets.

However, not all of these assets will be subject to unfettered remittance to the Cayman Islands.

*In this instance, the Federal Court case of *Ackers* [2014] FCAFC 57 is instructive.*

In the case, the DCT claimed a revenue debt of AUD \$58 million against a foreign company and said that that debt could not be admitted as a proof of debt in the Cayman Islands proceedings (see [109]).

For background, the foreign company had acquired and sold shares on an Australian stock exchange and it is said to have made a sizeable capital gain from entering into commercial transactions in Australia (see [110]).

As such, the foreign company owed tax in Australia.

The DCT argued that the sacrifice of the rights (or the value in the rights) of local creditors upon an altar of universalism may be to take the general informing notion of universalism too far (see [118]).

The first instance judge and the Federal Court agreed on appeal.

The decision is significant as it can be applied to any Australian creditor who would otherwise be stripped of rights Australian sourced right, or even the value of rights, by reason of recognition of a cross-border insolvency in Australia.

As such, the ATO will have a claim of AUD 12 million against NewYums assets prior to the remaining value of those assets being remitted to the Aussiebee holdco.

However, the ATO should still bear in mind that secured creditors are paid prior to tax claims, and thus if Aussiebee holds security over NewYums assets that should be borne in mind.

Finally, as an aside, it also bears noting that the ATO has a litigation funding department wherein liquidators may receive funding if the ATO believes there may be a return to the tax office in New Yums bringing any claims (subject of course to the overriding point on security above).

3/8 marks - this answer does not adequately grapple with the facts or the law in this space. It confuses AussieBee with NewYums and fails to engage with the law in relation to determining COMI. It did not state why AussieBee's COMI was Australia dispute the presumption that it would be in Lyonesse. It did not advise that the ATO ought to receive a pari passu amount it would've received if it were an unsecured creditor. It devotes more words to summarising the case of *Ackers* than it does to the facts of the question.

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?

As HA has been insolvent since the judgment debt of AUD 4.6 million was handed down in October 2020, HA has been trading insolvently since.

As such, immediate action should be taken.

The first step would be to enter into the safe-harbour regime, and obtain the advice of a licenced liquidator, or to enter into a more creditor driven restructuring regime.

As a result of the *ipso facto* changes, the loan agreement for AUD \$30 million would not become automatically due and payable as a result of entering into certain restructuring regimes (but as a large shareholder of HGL that relationship would still need to be carefully managed by the boards of HA and HGL).

Further, as HA has an attractive offer for the Perth re-refining plant, and as HA does not earn enough from that plant to meet the judgment debt, and to start repaying CBA at the end of 2021, the best option for HA appears to maintain the plant going forward, and then sell it as quickly as possible to that buyer (shutting down the plant would have negative consequences for creditors; rather it should simply be sold as quickly as possible and for the highest price).

As the interest in the trucks was not registered on the Personal Property Securities Register, CBA will not be entitled to the repayment of its AUD 3 million loan from proceeds that are obtained from the sale of those vehicles. Rather, out of the sale of

*HA's assets (including the sale of the second plant and the trucks), the AUD \$3 million loan, AUD 30 million loan debt, AUD 4.6 million judgment debt, AUD 5 million loan debt from its parent company HGL, and trade creditor debts would then all rank *pari-passu* in the capital distributions from HA. HGL, as the sold shareholder, would then be entitled to any remaining value.*

QUESTION 4.2: 4/7

* End of Assessment *