



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 = 46/50 (92%)

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

Commented [BB2]: Sub-total = 9 marks

**Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

**Question 1.1**

Select the correct answer:

**If a creditor is dissatisfied with the bankruptcy trustee or liquidator's decision in respect of its proof of debt, the creditor may:**

- (a) apply to AFSA or ASIC for the decision to be reversed or varied.**
- (b) apply to the bankruptcy trustee or liquidator for the decision to be reversed or varied.**
- (c) bring court proceedings for a money judgment in respect of the debt.**
- (d) apply to the court for the decision to be reversed or varied.**

**Question 1.2**

**Which of the following is a debtor-in-possession process?**

- (a) Small company restructuring.**
- (b) Bankruptcy.**
- (c) Deed of company arrangement.**
- (d) Voluntary administration.**

**Question 1.3**

Select the correct answer:

**Which of the following insolvency procedures requires court involvement?**

**(a) Creditors' scheme of arrangement.**

**(b) Deed of company arrangement.**

**(c) Creditors' voluntary liquidation.**

**(d) Voluntary administration.**

**(e) Small company restructuring.**

Question 1.4

Select the correct answer:

**Newco Pty Ltd has three (3) employees and an annual turnover of AUD 950,000. It currently owes AUD 100,000 to its trade creditors and it has a AUD 800,000 secured loan from its bank. Which of these restructuring processes is Newco ineligible for?**

**(a) A debt agreement under Part IX.**

**(b) A voluntary administration followed by a deed of company arrangement.**

**(c) A small company restructuring.**

**(d) A deed of company arrangement.**

Question 1.5

Select the correct answer:

**Which of the following is not "divisible property" in a bankruptcy?**

**(a) Wages earned by the bankrupt.**

**(b) Fine art.**

**(c) Choses in action relating to the debtors' assets.**

**(d) The bankrupt's family home.**

**(e) Superannuation funds.**

Question 1.6

**Which of the following claims are not provable in a liquidation?**

*(a) Future debts*

*(b) Contingent claims*

***(c) Penalties or fines imposed by a court in respect of an offence against a law***

*(d) Claims for damages for personal injury*

Question 1.7

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

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: 9/10**

**QUESTION 2 (direct questions) [10 marks]**

**Commented [BB4]:** 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 that can be reversed by a liquidator under part 5.7B of the Corporations Act 2001 (Cth) (the **Act**) on application to the court are:<sup>1</sup>

1. Unfair preferences;

<sup>1</sup> Emma L Beechey, *Module 8A Guidance Text – Australia*, September 2022, p 35.

2. Uncommercial transactions;
3. Unreasonable director-related transactions;
4. Unfair loans; and
5. In limited circumstances, circulating security interests.

With respect to unfair preferences and uncommercial transactions, the Act contains a limited defence, which if made out, means that the court cannot make an order permitting recovery of the property in question.<sup>2</sup>

The defence will be available if:<sup>3</sup>

- Recovery of the property in question would materially prejudice a right or interest of a party to the transaction;
- That party acted in good faith;
- That party was not aware nor could have reasonably been aware nor suspected that the company was insolvent at the time of the transaction, or would become insolvent as a result of entering into the transaction; and
- That party provided valuable consideration or changed its position in reliance on the transaction.

However, the Act does not provide such defence with respect to unreasonable director-related transactions or unfair loans.<sup>4</sup>

The defence of not being aware of a company's insolvency also does not apply to the voidability of circulating security interests. This is because under the Act, a circulating security interest created within 6 months before the commencement of the liquidation and securing past indebtedness will be void, unless the company was solvent immediately after the granting of the security.<sup>5</sup> As such, the only available defence is not the lack of knowledge of solvency, but the fact that the company was solvent immediately after the granting of the security.

### 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?**

Australia's Cross-Border Insolvency Act 2008 (Cth) (**CBIA**) adopts the UNCITRAL Model Law on Cross-Border Insolvency (**Model Law**) as a Schedule.<sup>6</sup>

In particular, article 20 of the Model Law, which deals with the effects of recognition of a foreign main proceeding,<sup>7</sup> is dealt with in section 16 of CBIA.<sup>8</sup>

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<sup>2</sup> *Idem*, p 37.

<sup>3</sup> *Ibid*, citing s 588FG(2) of the Corporations Act 2001 (Cth) (**Corporations Act**).

<sup>4</sup> *Ibid*.

<sup>5</sup> *Idem*, p 38, citing s 588J of the Corporations Act.

<sup>6</sup> *Idem*, p 68.

<sup>7</sup> <<<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/insolvency-e.pdf>>>, accessed 25 April 2023.

<sup>8</sup> Beechey, *supra* note 1, p 71.



In particular, section 16 of CBIA specifies the scope of the stay under article 20 as the same that applies as if the stay or suspension arose under either:<sup>9</sup>

- The Bankruptcy Act 1966 (Cth); or
- Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act 2001 (Cth),

as the case requires.

'As the case requires' in this scenario effectively means that when considering a recognition application relating to a corporate debtor, the court must consider whether the case requires the type of stay that would apply in a voluntary administration (which is relatively broad as it affects secured creditors), or the type of stay that would apply in a standard liquidation (which is less broad as it only affects unsecured creditors).<sup>10</sup>

Previous case law has found that this consideration is not a matter of the court's discretion, but rather a consideration of which stay ought to apply in light of the nature of the proceeding.<sup>11</sup> The matter was also considered in the *Rizzo-Bottiglieri-de Carlini Armatori* decisions, in which the court held that the Italian *fallimento* proceeding was analogous to a liquidation, and therefore the liquidation moratorium ought to apply.<sup>12</sup>

In general, the broader voluntary administration stay will be more suitable where the foreign proceeding is a business rescue procedure, while the liquidation stay will be more appropriate for foreign proceedings that are similar to liquidations.<sup>13</sup>

### QUESTION 2.2: 3/3

Question 2.3 [maximum 4 marks]

#### **What are the differences between liquidations and small company liquidations?**

The different types of corporate liquidation procedures available in Australia (members' voluntary liquidation, creditors' voluntary liquidation and compulsory liquidation) are long-established features under the Corporations Act 2001 (Cth) (the **Act**).

In late 2020, Australia introduced an alternative to the 'normal' creditors' voluntary liquidation for smaller companies, with the intention of making the process less complex, less costly and quicker in order to allow for a greater return for both creditors and employees.<sup>14</sup> The simplified version is applicable from 1 January 2021, and is available only where:

- The business's total liabilities do not exceed AUD 1 million;<sup>15</sup> and

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid*, *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 at [24].

<sup>12</sup> *Idem*, p 73, citing *Alari v Rizzo-Bottiglieri-de Carlini Armatori SpA* [2018] FCA 1067 at [16]-[18].

<sup>13</sup> *Idem*, p 71.

<sup>14</sup> *Idem*, p 41, citing the Explanatory Memorandum to the Corporations Amendment (Corporate Insolvency Reforms) Act 2020 at [3.3] and [3.14].

<sup>15</sup> *Ibid*, Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020, reg 5.5.03(1).

- No current director of the company (as well as no former director in the last 12 months) has been a director of a company which has undergone restructuring or been subject to a simplified liquidation process within the last seven years.<sup>16</sup>

In addition, a liquidator must not adopt the simplified liquidation process:

- Unless he or she believes on reasonable grounds that the company meets the above eligibility criteria;<sup>17</sup> or
- If at least 25% of the value of the creditors have requested that the liquidator do not adopt the simplified liquidation process.<sup>18</sup>

By contrast, a normal creditors' voluntary liquidation process can be used so long as:<sup>19</sup>

- A liquidator is appointed by special resolution of shareholders if the directors believe the company is insolvent; or
- If the creditors resolve to appoint a liquidator at the second meeting of creditors held during voluntary administration.

With respect to the differences in process, the simplified liquidation process applies most of the features of a regular liquidation.<sup>20</sup> However, the following key differences exist:<sup>21</sup>

- The ability to clawback voidable transactions will only apply to unfair preferences over AUD 30,000 which were paid to related parties of the company in the three months prior to the commencement of liquidation;
- Reporting to ASIC on potential misconduct is only required of liquidators where there are reasonable grounds to believe that misconduct has occurred. This eliminates the significant time and costs otherwise incurred in having to investigate all conduct prior to reporting to ASIC;
- There is no requirement to hold creditor meetings;
- Committees of inspection are removed;
- The proof of debt and dividend processes are simplified; and
- There are provisions for electronic communications and voting.

In addition, a liquidator must stop the simplified liquidation process if the liquidator on reasonable grounds believes that the company or a director has engaged in fraudulent or dishonest conduct, which has or is likely to have, a material adverse effect on the interests of creditors as a whole, or a class of creditors as a whole.<sup>22</sup>

#### QUESTION 2.3: 4/4

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

Commented [BB5]: Sub-total = 15 marks

<sup>16</sup> *Ibid*, Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020, reg 5.5.03(2).

<sup>17</sup> *Ibid*, Corporations Amendment (Corporate Insolvency Reforms) Act 2020, cl 500A(1).

<sup>18</sup> *Ibid*, Corporations Amendment (Corporate Insolvency Reforms) Act 2020, cl 500A(2), 500AB, 500AD.

<sup>19</sup> *Idem*, p 27, citing ss 497 and 439C(c) of the Corporations Act.

<sup>20</sup> *Idem*, p 42.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid*, Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020, reg 5.5.07(1).

***“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.***

Generally speaking, I agree with the above statement.

Australia has in the past, and continues to be, considered as creditor-friendly in its insolvency processes.<sup>23</sup> The primary focus is on the protection of creditors' rights to the exclusion of management and shareholders.<sup>24</sup> This is so notwithstanding the consequent adverse impact on corporate and business rescue, which may ultimately be in the interests of employees, small suppliers and other corporate stakeholders.<sup>25</sup> The following below examples demonstrate Australia's strong anti-collectivist creditor culture.

Almost all of Australia's bankruptcy and insolvency processes involve the appointment of an external administrator. The only debtor in possession processes are schemes of arrangements and small business restructurings (although even for this, a qualified insolvency practitioner must be appointed as an advisor).<sup>26</sup>

In particular, secured creditors are entitled to enforce their rights during the bankruptcy process for an insolvent individual notwithstanding the intention that a moratorium on claims be in place during processes like this. Generally speaking, creditors are prevented from enforcing any remedy or commence any new legal proceeding or take a fresh step in an existing proceeding against the property of the debtor if the debtor is bankrupt.<sup>27</sup> However, this moratorium does not apply to secured creditors, meaning they are entitled to enforce their rights.<sup>28</sup>

A similar moratorium on enforcement action against the assets of a company as well as proceedings against a company is in place for companies in liquidation.<sup>29</sup> However, the moratorium does not apply to secured creditors, leaving secured creditors to enforce any rights under a valid security interest.<sup>30</sup>

Whilst one of the aims of voluntary administration as Australia's primary formal corporate rescue process is to maximise the chance of an insolvent company to continue in existence per the terms of a deed of company arrangement, an alternative aim is to enable a maximum return to be achieved for distribution to creditors.<sup>31</sup>

Although neither secured nor unsecured creditors are able to enforce their rights during a voluntary administration unless the voluntary administrator consents or the court grants leave,<sup>32</sup> there are again exceptions to this statutory moratorium. In particular, where a

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<sup>23</sup> *Idem*, p 6.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Idem*, p 14.

<sup>27</sup> *Idem*, p 18, citing s 58(3) of the Bankruptcy Act 1966 (Cth) (**Bankruptcy Act**).

<sup>28</sup> *Idem*, p 19, citing s 58(5) of the Bankruptcy Act.

<sup>29</sup> *Idem*, p 30, citing ss 471B and 500(2) of the Corporations Act.

<sup>30</sup> *Idem*, p 30.

<sup>31</sup> *Idem*, p 46, citing s 435A of the Corporations Act.

<sup>32</sup> *Idem*, p 50, citing ss 440B and 440F of the Corporations Act.

creditor has security over the whole or substantially the whole of a company's property, that creditor is entitled to appoint a receiver notwithstanding a voluntary administrator is already in place (subject to compliance with certain time restrictions).<sup>33</sup> Secured creditors as well as owners and lessors with enforcement rights are able to continue enforcement action during a voluntary administration if:<sup>34</sup>

- The enforcement action was commenced prior to the appointment of a voluntary administrator, or
- the enforcement action relates to perishable property; or
- the court gives its consent.

In addition, a liquidator has broad rights to recover substantial sums from directors where a director has allowed a company to incur debts while insolvent.<sup>35</sup>

Transactions are also able to be clawed back for the benefit of creditors over a substantial period of time as a result of Australia's voidable transaction regime. There is no requirement to prove improper conduct such as an intention to defeat creditors.<sup>36</sup>

Furthermore, on World Bank measures, which measures the protection of rights of secured creditors on a scale of 0-12, Australia was scored an 11.<sup>37</sup>

Furthermore, it is not just secured creditors who are more than adequately protected in Australia. Unsecured creditors also have adequate rights under Australian laws. For example, unsecured creditors are able to bring court proceedings to enforce debts.<sup>38</sup> They can also issue a specific notice as set out in the Bankruptcy Act 1966 (Cth) (**Bankruptcy Act**) and the Corporations Act 2001 (Cth) (**Corporations Act**), which requires an individual or company to pay the alleged debt. If the debt is consequently not paid within 21 days of the notice having been issued, the unsecured creditor is able to either:<sup>39</sup>

- apply to bankrupt the individual as failure to pay is an act of bankruptcy; or
- in the case of company, apply to have the company wound up for insolvency as failure to pay creates the presumption of insolvency.

That is not to say that there are not aspects of the regime that attempt to encourage a stronger corporate and business rescue culture.

As noted above, the primary goal of the voluntary administration regime is to maximise the chance of an insolvent company to continue in existence under the terms of a deed of company arrangement.<sup>40</sup>

In addition, as noted in the statement, some fairly recent reforms and amendments have been introduced with the aim of promoting a move away from the existing dominance of creditor rights.

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<sup>33</sup> *Idem*, p 51, citing ss 9 and 441A of the Corporations Act.

<sup>34</sup> *Ibid*, citing ss 441D, 441H, 441B, 441F, 441C and 441G of the Corporations Act.

<sup>35</sup> *Idem*, p 7.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Idem*, p 6.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Idem*, p 7, citing s 435A(a) of Corporations Act.

In particular, as of 1 July 2018, creditors are prevented from enforcing ipso facto contractual rights that are contingent on a company's insolvency or entry into an external administration.<sup>41</sup>

Furthermore, under the Bankruptcy Act, a bankruptcy trustee has the benefit of a statutory ipso facto prohibition, under which any provision in a contract that purports to provide a right to terminate or repossess property upon a debtor's bankruptcy is deemed void.<sup>42</sup>

As of September 2017, company directors are also able to take advantage of a 'safe harbour' from insolvent trading liability, which allows director to continue to allow a company to incur debts so long as an informal restructuring attempt under the supervision of an appointed restructuring expert will be implemented.<sup>43</sup> By providing directors with immunity from insolvent trading liability where the relevant conditions of the Corporations Act are met, the safe harbour provides a key incentive for directors to attempt informal rescue instead of voluntary administration in an effort to invoke a defence to the insolvent trading provisions.<sup>44</sup>

Whilst the ipso facto moratorium will likely enhance the prospect of a company being resuscitated, or the business being preserved, a creditor with a security interest over the whole or substantially the whole of the company's property is not by virtue of the moratorium prevented from appointing a receiver notwithstanding a voluntary administrator is already in place.<sup>45</sup>

As such, the practical achievement of company rescue remains heavily dependent on the support of such major creditors, irrespective of the ipso facto moratorium.

In addition, while the safe harbour provisions are likely to encourage directors to pursue informal restructuring attempts in order to trade out of the company's financial difficulties, such attempts will largely be reliant to the support of key creditors given the ipso facto moratorium does not apply to such informal restructuring attempts.

Ultimately, while the recent reforms have indeed made Australia a more debtor-friendly jurisdiction, a true shift away from Australia's creditor friendly regime has not fully been achieved. A further and more significant change in the underlying anti-collectivist creditor enforcement culture remains necessary.

**15/15 marks - this is a very strong essay. Although it is heavily focused on the creditor-friendly aspects of Australia's insolvency regime, it correctly addresses all of the aspects which uphold debtor rights, and particularly the more recent reforms such as ipso facto prevention, the insolvent trading safe harbour and the new small business restructuring process. The footnotes were confusing but as they were not necessary for the purpose of this essay, I didn't deduct marks for that.**

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

Commented [BB6]: Sub-total = 12 marks

##### Question 4.1 [maximum 8 marks]

<sup>41</sup> *Idem*, p 52, citing s 451E of Corporations Act.

<sup>42</sup> *Idem*, p 20, citing s 301 of Bankruptcy Act.

<sup>43</sup> *Idem*, p 40.

<sup>44</sup> *Idem*, p 67.

<sup>45</sup> *Ibid*.

***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?***

The ATO should firstly oppose the recognition of the Lyonessean liquidation in Australia under the Cross-Border Insolvency Act 2008 (**CBIA**) in order to prevent orders being granted in relation to Aussiebee's assets.

Australia's CBIA has adopted the UNCITRAL Model Law on Cross-Border Insolvency (**Model Law**) by way of Schedule to CBIA.<sup>46</sup> As such, the Model Law is applicable in Australia.

Recognition is dealt with in article 17(2) of the Model Law, which states that the foreign proceeding shall be recognised as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interest (**COMI**).<sup>47</sup>

As such, recognition in Australia will depend on whether or not the liquidator can establish that Aussiebee's COMI is in Lyonesse.

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<sup>46</sup> *Idem*, p 68.

<sup>47</sup> <<<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/insolvency-e.pdf>>>, accessed 26 April 2023.

The case of *Ackers v Saad Investments*<sup>48</sup> is useful as it expressly adopted the principles in *Re Eurofoods IFSC Ltd* which held that COMI is to be determined having regard to the objectively ascertainable factors of the debtor.<sup>49</sup>

Here, the ATO could oppose recognition of the Lyonesse liquidation as a foreign main proceeding on the basis that Lyonesse is not Aussiebee's COMI. Although Aussiebee is incorporated in Lyonesse, and has an office and staff in Lyonesse, objectively, the factors support a finding that Lyonesse is not Aussiebee's COMI. In support of this argument, the ATO could refer to the fact that six of Aussiebee's seven directors are based in Australia, it has an office and half of its staff in Sydney, the manufacturing of its goods as well as the shipping is done in and from Australia and its CEO and CFO are both based in Australia.

Even if the Lyonesse liquidation was granted recognition as a foreign main proceeding under the Model Law, the ATO could nonetheless oppose enforcement of the judgment.

The first avenue for enforcement that the ATO should consider is article 25 of the Model Law.

Article 25 of the Model Law deals with the cooperation and direct communication between a court and foreign courts or foreign representatives.<sup>50</sup>

Whilst the Australian courts are yet to make a definite finding on whether Article 25 can be relied on in supporting the recognition, and consequently, the enforcement of foreign judgments, the general consensus appears to be that article 25 is unlikely to support the recognition and enforcement of foreign judgments.<sup>51</sup> In particular, the UK Supreme Court in *Rubin v Eurofinance SA* has previously found that article 25 does not extend to the enforcement of foreign judgments.<sup>52</sup> The ATO could refer to the *Rubin* decision in support of its opposition to article 25 of the Model Law being used for enforcement of the liquidation judgment.

The second avenue for enforcement that the ATO should consider opposing under is articles 21 and 22 of the Model Law.

Article 21 of the Model Law deals with the relief that may be granted upon recognition of a foreign proceeding. In particular, Art 21(2) deals with entrusting the distribution of the debtor's assets so long as the court is satisfied that the interests of creditors are adequately protected.<sup>53</sup>

Article 22 of the Model Law deals with the protection of creditors and other interested persons. In particular, article 22(1) states that in granting or denying relief under article 19 or 21, the court must be satisfied that the interests of the creditors and other interested

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<sup>48</sup> Beechey, *supra* note 1, p 72, citing *Ackers v Saad Investments Co Limited (in official liq)* (2010) 190 FCR 285; [2010] FCA 112.

<sup>49</sup> *Ibid*, citing *Re Eurofoods IFSC Ltd* [2006] Ch 508.

<sup>50</sup> <<<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/insolvency-e.pdf>>>, accessed 26 April 2023.

<sup>51</sup> Beechey, *supra* note 1, p 80.

<sup>52</sup> *Rubin v Eurofinance SA* [2012] 1 AC 236, as cited by Nye Perram in "Issues in recognition and enforcement of foreign insolvency judgments – An Australian perspective", <<<http://classic.austlii.edu.au/au/journals/FedJSchol/2016/13.html>>>, accessed 26 April 2023.

<sup>53</sup> <<<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/insolvency-e.pdf>>>, accessed 26 April 2023.

persons, including the debtor, are adequately protected.<sup>54</sup> Furthermore, per article 22(2), the court may grant any relief under article 19 and 21 that it considers appropriate.<sup>55</sup>

Once again, the Australian position with respect to enforcement under articles 21 and 22 is unclear. However, the UK Supreme Court in *Rubin* previously also held that article 21 does not allow recognition and subsequent enforcement.<sup>56</sup> On the other hand, US courts have interpreted the equivalent provisions of the US Bankruptcy Code as permitting the enforcement of foreign restructuring plans.<sup>57</sup> The ATO can attempt to rely on the application of *Rubin* in support of its opposition to enforcement (and the sought order entrusting Aussiebee's assets to the liquidator).

Lastly, in the event recognition and enforcement orders are granted, the ATO should consider filing an application to the Federal Court for the modification of any granted recognition orders in reliance on *Ackers v Deputy Commissioner of Taxation*,<sup>58</sup> in which the court considered whether the interests of creditors were adequately protected when granting relief under article 19 of the Model Law. In this case, the foreign representative wished to remit a significant sum of money from Australia to the Cayman Islands for distribution there.<sup>59</sup> Given the foreign company owed over AUD 83 million in tax and penalties in Australia, the Deputy Commissioner of Taxation (DCT) applied for modification of the recognition orders. The Federal Court accordingly gave leave to DCT to take steps to enforce its claim in Australia for the purpose of recovering an amount up to the pari passu amount the ATO would have received if it was entitled to prove for the tax debt in the foreign main proceeding. Given Aussiebee owed AUD 12 million in taxes in Australia, the ATO as a last resort could apply to have the recognition orders modified to allow it to recover an amount up to the pari passu amount as in *Ackers*.

**7/8 marks** – this answer was very strong. It focused unnecessarily on enforcement options rather than devoting more time to establishing that the ATO could successfully intervene on the recognition application by establishing that AussieBee's COMI is Australia. It did, however, identify all of the objectively ascertainable facts from the question which supports the COMI being 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.***

<sup>54</sup> <<<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/insolvency-e.pdf>>>, accessed 26 April 2023.

<sup>55</sup> <<<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/insolvency-e.pdf>>>, accessed 26 April 2023.

<sup>56</sup> Beechey, *supra* note 1, p 81.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Idem*, p 72, citing *Ackers v Deputy Commissioner of Taxation* (2014) 223 FCR 8; [2014] FCAFC 57.

<sup>59</sup> *Ibid.*



**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?**

In light of HA's situation, the board ought to consider the implications if HA was put into compulsory liquidation on the application of any of its unpaid creditors.

For instance, either the creditor of the AUD 30 million loan to finance the Perth plant, or CBA as lender of the AUD 3 million loan for the purchase of the trucks, or BOR as creditor with respect to the judgment debt may apply for liquidation if a statutory demand issued by either

of these creditors remains unpaid within 21 days of issuance, as this would demonstrate a presumption of insolvency.

An associated risk with this is that the **directors of HA may be held liable for insolvent trading**. Generally speaking, a director will be liable for insolvent trading where:<sup>60</sup>

1. that director was a director at the time the 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 that the company was or would become insolvent as a result of the debt;
4. the director failed to prevent the company from incurring the debt; and
5. the director was aware that there were reasonable grounds for suspecting that the company was insolvent when it incurred the debt.

Given HA continued to trade and incurred debts following the judgment debt being awarded on 1 October 2020, and the board knew that HA has been insolvent since then, the above elements are likely made out.

As a result, there is a risk that the appointed liquidator may apply for a compensation order to be made against the directors.<sup>61</sup> Additionally, the court may also impose a civil fine on the directors,<sup>62</sup> a disqualification order, or in the event of dishonest behaviour, a criminal penalty.<sup>63</sup>

This also poses a risk for the board of HGL as HA's holding company given the Corporations Act also imposes liability for insolvent trading on a holding company for the debt of the insolvent subsidiary in similar circumstances as those applying to directors as set out above. It is unlikely that any of the defences to insolvent trading as set out in section 588H of the Corporations Act, nor the 'safe harbour' provisions would here be applicable.

As such, it would be preferable for the board to consider a corporate rescue mechanism instead.

For instance, a voluntary administration may be suitable here. This could be done by a majority of directors appointing an administrator on the basis that HA is insolvent.<sup>64</sup>

Upon assuming office, the voluntary administrator would then take full control of HA's business, property and affairs, following which a recommendation to creditors can be issued as to how they should vote on the company's future.<sup>65</sup>

This has several advantages. For example, **the administrator may be able to dispose of the trucks that are subject to CBA's security interest** under section 442C of the Corporations Act so long as CBA's consent is obtained.

Furthermore, neither secured nor unsecured creditors can enforce their rights during voluntary administration.<sup>66</sup> This means neither the creditor of the unsecured AUD 30 million

<sup>60</sup> *Idem*, p 39, citing s 588G of Corporations Act.

<sup>61</sup> *Ibid*, citing s 588M of Corporations Act.

<sup>62</sup> *Ibid*, citing s 588V of Corporations Act.

<sup>63</sup> *Ibid*, citing ss 1317G, 206C and 588G(3) of Corporations Act.

<sup>64</sup> *Idem*, p 48, citing s 436A of Corporations Act.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Idem*, p 50, citing ss 440B and 440F of Corporations Act.

loan for the Perth plant, nor BOR would be able to enforce their rights, nor CBA would be able to enforce their rights.

This will allow the administrator to consider whether it would be in the creditors' interests for a DOCA to be executed.<sup>67</sup> That DOCA, if approved by the creditors, would then stipulate, amongst other matters, the extent to which HA will be released from any of its debts, and the order in which proceeds will be realised.

Lastly, HA could consider informal restructuring. The benefit of this option is that it is not a formal process and therefore ought not to trigger the repayment obligations of the full AUD 30 million loan to the creditor of the Perth plant loan.

QUESTION 4.2: 5/7

\* End of Assessment \*

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<sup>67</sup> *Idem*, p 49.