



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.**

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ANSWER ALL THE QUESTIONS

Commented [BB1]: TOTAL = 43/50 (86%)

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

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

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: 9/10

QUESTION 2 (direct questions) [10 marks]

Commented [BB4]: Sub-total = 9 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 5 types of voidable transactions reversible by a liquidators on application to the court are:

- (a) *Unfair preferences;*
- (b) *Uncommercial transactions;*
- (c) *Unreasonable director-related transactions;*
- (d) *Unfair loans; and*
- (e) *Circulating security interests (in limited circumstances), i.e. floating charges*

As long as the party acted in good faith, was not aware nor would reasonably be made aware of the insolvency of the company and provided valuable consideration or changed its position in reliance on the transaction, then the Australia court cannot make an order allowing the liquidators to void the transactions. Australia courts also stated that it must look at the ultimate effect of the transaction to assess whether there is indeed an unfair preference and whether by voiding the transaction would materially prejudice a right or interest of a party to the transaction. Hence, if the defendant entered into the transactions, as long as the payment it received was made for new goods and services to the company, there will not be unfair preference.

However, for unreasonable director-related transactions and unfair loans, it is challengeable by the liquidator to void the transactions and it can be recovered without the requirement of the company being insolvent when the transactions were entered into or became insolvent by doing so. Hence, the defendant cannot defend the case even if it claimed that it is not aware that the company was insolvent at the time, they entered the transactions.

As for the circulating security interests, liquidators can only apply to void the transactions if the company is placed under compulsory liquidations on ground of insolvency. It can also be void if no new goods and services were provided for taking the security interest.]

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?

[This is not a question of discretion. Which type of stay should apply depends on the nature of the proceeding or case. If the case is clearly a business rescue procedure, a broader voluntary administration stay which affects secured creditors is required. If the case is liquidation-like, then a standard liquidation stay which affects only unsecured creditors is required. If the case is not clear, neither business rescue nor liquidation-like, then difficult questions will be raised to determine which type of stay to grant or not to grant at all.]

QUESTION 2.2: 2/3

Question 2.3 [maximum 4 marks]

What are the differences between liquidations and small company liquidations?

[Standard liquidations process is available for most companies and there are 3 modes of liquidation, i.e. members' voluntary liquidation, creditors' voluntary liquidation and court-ordered winding up. Both solvent and insolvent companies can apply for standard liquidation process either voluntary via passing of resolutions or by application to the court and the threshold for a court-ordered liquidation is a debt of at least AUD 2,000.]

Small company liquidation, also known as simplified liquidation, is only available in a creditors' voluntary liquidation where the company's total liabilities do not exceed AUD 1 million and no current director or former director within the last 12 months, has been a director of another company that has undergone restructuring or been the subject of a simplified liquidation process within seven years.

Most of the features of a standard liquidation applies to the small company liquidations except for the following:

- *the clawback of voidable transactions under a standard liquidation is on any amount paid within six months prior to the commencement of the liquidation. For the simplified liquidation process, the clawback period is reduced to three months and applicable to unfair preferences of over AUD 30,000;*
- *Liquidators for the small company liquidation process are only required to report to ASIC on potential misconduct where there are reasonable grounds to believe that misconduct has occurred;*
- *There is no requirement to hold creditors meetings and no requirement to form committees of inspection under the small business liquidation;*
- *The proof of debt process and the dividend process is simplified under the small business liquidation;*
- *Electronic communications and voting are allowed in the small business liquidation.]*

QUESTION 2.3: 4/4

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

Commented [BB5]: Sub-total = 13 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's insolvency law for both personal and corporate debtors is regarded as being creditor-friendly because the main focus is to protect creditors' rights, aiming to achieve maximum return for the creditors. Unsecured creditors can issue a specific notice for under the Bankruptcy Act and the Corporation Act. Secured creditors are well protected under Australian law. Based on World Bank's measures, Australia scores 11 out of 12 for protection of rights of secured creditors. Australia's insolvency regime is focused more on punitive measures than on the rehabilitation of debtor companies. Whereas, in other jurisdictions, their insolvency laws are more debtor friendly as it promotes restructuring, innovative reorganisations and value preservation.

However, in September 2017, Australia introduced 2 fundamental amendments to its insolvency laws, i.e. (a) the "safe harbour" provision whereby directors seeking to restructure financially distressed companies, are safe from civil liability for insolvent trading without commencing a formal insolvency process and (b) a stay on the enforcement of ipso facto rights.

Before the introduction of safe harbour provision in Section 588GA of the Corporation Act, directors of a distressed company would usually appoint a voluntary administrator at the first sign of financial trouble so that the directors would not incur personal liability for insolvent trading. The problem with appointing a voluntary administrator and attempt to rescue the company via a formal corporate rescue mechanism caused creditors to invoke their ipso facto contractual rights and / or enforce their securities. This reduces the company's chance of a successful restructuring plan. It also leaves the voluntary administrator with limited scope to revive the company or achieve a going concern sale of the business.

Subject to certain exclusions, as at 1 July 2018, creditors are prevented from enforcing ipso facto contractual rights contingent only on a company's insolvency or entry into an external administration.

These amendments attempt to help Australia companies achieve more successful restructuring outside of formal insolvency and to promote entrepreneurship. Both the safe harbour provision and the ipso facto moratorium are important to promote both formal and informal corporate rescue to maximise the chances of the companies or its businesses, to remain in existence or for it to achieve a better return for its creditors and members than an immediate winding up of the company.

Other reform in Australia is a new small company restructuring process introduced in January 2021. This is a debtor-friendly, lower cost and faster liquidation model for small businesses with liabilities not exceeding AUD 1 million. It allows financially distressed small companies to restructure their existing debts by devising a restructuring plan for creditors' voting, in an attempt to repay its creditors while enable the companies to continue as a going concern.

Another reform is pertaining to assetless companies. ASIC administers a small Assetless Administration Fund which it is utilised to engage liquidators to report to

ASIC on preliminary investigations into the failure of companies and assist ASIC in deciding whether to commence enforcement action against directors of these companies with few or no assets. The focus of this Fund is to curb fraudulent phoenix activity.

*With all the above reforms introduced in Australia, I agree that it have made Australia moving towards a more debtor-friendly jurisdiction but generally, it is still a creditors-friendly jurisdiction compares to jurisdiction like the US. **Good***

However, there were other reforms that seemed to be pro-creditors, eg. the Anti-phoenixing laws, introduced in 2019 and 2020, which attempt to reduce the impact and incidence of “phoenix company activity” among small companies in Australia with less than AUD 1 million in liabilities. It aims to deter directors from trying to avoid paying employees and ATO when the company became insolvent.

To assess whether the reforms in Australia’s insolvency law is sufficient to encourage and enhance companies’ restructuring scheme for its businesses to stay afloat or return to the black, rather than being close down/liquidated, depends very much on the timing and efforts the directors put in to approach its major creditors and suppliers. The earlier the better. It also depends on the quality of the restructuring plan and the restructuring adviser and whether creditors buy into the plan and give the companies a “second chance” to trade out of its financial difficulties. Generally, due to the anti-collectivist creditors enforcement culture in Australia and the stigma associated with insolvency, it is expected that it will still take sometimes for Australia to really move towards debtor-friendly jurisdiction.

Australia has to study its law and reforms carefully to manage all stakeholders to ensure these reforms have sufficient time to be tested and take full effect especially among the small businesses.]

13/15 marks - this is a very strong essay. It correctly identifies the main reforms which have upheld debtors’ rights over creditors’ rights. It also correctly identifies that there is still a significant amount of law which prioritises the rights of recovery of creditors. However, the description of Australia’s insolvency regime as punitive is not correct. Bankrupt individuals and insolvent companies are not punished for their impecuniosity. Further, the essay could have been strengthened by acknowledging the procedural rights which creditors have (e.g., right to require IPs to provide information, easier to vote out IPs).

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

Commented [BB6]: Sub-total = 12 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 Lyonesian. 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?

*[This case is similar to the case of *Ackers v Deputy Commissioner of Taxation*, whereby a debt payable to a foreign revenue creditor is not admissible to proof in a Cayman Islands liquidation nor is such a debt admissible to proof in an Australia liquidation.]*

Under the UNCITRAL Model Law on Cross-Border Insolvency, the insolvency proceedings commence in the foreign jurisdiction where the insolvent entity has its centre of main interest ("COMI"). The adoption of this Model Law and the recognition of foreign insolvency proceeding by various jurisdiction eg. Australia and Lyonesse, is to ensure that the distribution of an insolvent entity's assets takes place within a single system.

Firstly, for the Lyonesian liquidator to apply for Australia Court to recognise Aussiebee's Lyonesian liquidation as foreign main proceeding as well as recognise the Lyonesian Liquidator as its foreign representative, the liquidator must prove that Aussiebee's COMI is in Lyonesse. Otherwise, the application will fail.

Hence, ATO can challenge Aussiebee's COMI because it is questionable where Aussiebee's COMI is because, even though Aussiebee was incorporated in Lyonesse, has an office there with 20 staff, most of its operations seemed to indicate that its COMI is in Australia due to the following facts:

- *Aussiebee is selling Australia product (chocolates flavoured with Australia native plants) which are manufactured in Australia;*
- *Its warehouse is in Australia although orders are received in Lyonesse;*
- *Aussiebee's directors are mostly Australiana (6 out of 7 are Australiana);*
- *Both its CEO and CFO are Australian although the CEO reside in Lyonesse.*

Secondly, for the Australia Court to grant the application of the liquidator to entrust Aussiebee's assets (including Aussiebee's shares in NewYums which are worth AUD 20 million) to the liquidator, the Australia Court must be satisfied that the interest of creditors in Australia (eg. ATO and the AUS 12 million taxes owed in Australia by Aussiebee) must be adequately protected. This principle is also stated in the speech by Nye Perram, a Justice of the Federal Court of Australia, given to the Judicial Insolvency Network Conference in Singapore in October 2016.

Based on Article 22 of the Model Law, the Australia Court in exercising its discretionary power to decide whether or not to grant any relief under Article 19, to the Lyonesse liquidator, it must also be satisfied that the interest of the debtor's creditors and other interested parties are adequately protected. Again, the Australia Court is granted the power to subject relief to conditions it considers appropriate and it may modify or terminate the relief.

*The Model Law provides that the enacting State (in this case, Australia) can take action to protect its interest if there is a risk that tax debts owed to Australia is not entitled to prove its debt in Lyonesse liquidation. In this situation, ATO can apply to an Australian court to make orders requiring the Australian assets of Aussiebee be paid to ATO to the extent to settle its taxes. This will prevent the assets being remitted to the foreign jurisdiction to be distributed in the liquidation. ATO can also rely on the judgment in *Ackers v Deputy Commissioner of Taxation*, appealing for the Australia Court to modify the recognition order to ensure that the interest of ATO as a creditor is adequately protected, eg. recovering an amount up to the *pari passu* amount the ATO would have received if they were entitled to prove for the tax debt as an unsecured creditor in the foreign main proceeding.*

*ATO can rely on Article 13 of the Model Law, the Anti-discrimination principle, which state that foreign creditor (in this case ATO is the foreign creditor to the Lyonesse liquidation) have the same rights as creditors domiciled in Lyonesse. ATO shall not be given a lower priority than that of general unsecured claims solely because ATO is a foreign creditor. The Lyonesse cannot refuse or deny ATO to prove its debt. ATO can rely on the judgment in *Ackers v Deputy Commissioner of Taxation*, appealing for the Australia Court to modify the recognition order to ensure that the interest of ATO as a creditor is adequately protected, eg. recovering an amount up to the *pari passu* amount the ATO would have received if they were entitled to prove for the tax debt as an unsecured creditor in the foreign main proceeding.*

ATO may also check whether there is any treaty or international agreement between Australia and Lyonesse for both jurisdictions to be fair and protect the equal rights of

creditors in both jurisdictions. Pursuant to Article 3 of the Model Law, the treaty and agreement take priority over the Model Law should there be any conflict.

ATO may also pursue after the director to recover the taxes owed because directors are personally liable for the debts incurred if it has been established that the directors allow the company to continue trading when the company is insolvent and that there was no attempt by the directors to develop courses of actions for a better outcome than liquidation. Safe harbour policy is not meant to protect the director from personally liability but allow directors to trade during insolvency if the directors show that it has embarked on activities to try to restructure the company and try to avoid liquidation for better outcome for the creditors. Safe Harbour policy only applies if the company continues to pay all employee entitlements and if the company comply with all tax reporting obligations.

8/8 marks - **this is a very strong answer. It addresses all of the relevant legislative provisions and case law authority. It appropriately recommends that the ATO intervene in the recognition provisions and to establish that AussieBee's COMI is in fact in Australia (despite the presumption that it is in the place of incorporation - Lyonesse). The answer identified all of the facts in the question which point to the COMI being in Australia. The additional recommendations in the answer regarding international agreements and director liability was not necessary to this 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 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?

[Based on the facts set out above, HA has become insolvent since Judgment order on 1 October 2020 when the court ordered HA to pay damages of AUD 4.6 million. In view that the directors allowed HA to continue trading and incur further borrowing of AUD 5 million from its parent company HGL, the directors of HA are liable for insolvent trading. Pursuant to the Corporation Act, HGL being the holding company, is also liable for the debts incurred after HA became insolvent.]

The Board of directors who control both HA and HGL should be made aware of the civil penalty and disqualification order. The Board of directors should also be informed of the options available for them rather than waiting for BOR or any other creditors to petition for the winding-up of HA.

It is also good to inform the directors of the benefit of a formal or informal non-bankruptcy alternative, which include the adverse consequences of formal bankruptcy proceedings, eg. travel restrictions, requirement to disclose debtor's bankruptcy status to new lenders, prohibition from directorship, etc... All these negative effects of formal bankruptcy can be avoided if HA enters formal or informal non-bankruptcy alternative.

Options available to HA are:

- (1) Voluntary administration, followed by the implementation of a DODA (Deed of company arrangement);*
- (2) Creditors' scheme of arrangement;*
- (3) Creditors voluntary liquidation; and*
- (4) Any informal restructuring plan.*

All transactions took place after HA became insolvent need to be carefully analyse. Any action or attempt taken by the directors to rescue HA or trying to put HA into a better outcome than immediately appointing an administrator or liquidator should be listed down. With these properly documented, the directors can then take advantage of safe harbour provision from insolvent trading liability, which protect them from personal responsibility for HA's debts incurred after HA became insolvent, while they develop and implement an informal restructuring plan.

Safe Harbour provision allows director to incur debt with a view to implementing an informal restructuring attempt under the supervision of an appointed expert restructuring expert.

With that said, HA should quickly develop a restructuring scheme which include disposing its Perth's re-refining plant or continue to operate the plant for whatever small profit and seek creditors' approval via voting to allow it a chance to trade out of its financial distress with the promise to repay its debts over a period of time in future. HA has to convince the creditors that the return from the restructuring plan if successful would be better than the return from liquidation scenario.

The directors should also be informed if a security interest was granted less than 6 months before the external administration began and it was not registered within 20 days of its having been created, the security interest vest in the debtor company immediately before the debtor company entered voluntary administration.

In this case, since Commonwealth Bank of Australia (CBA) did not register the security interest in the 3 trucks on the Personal Property Securities Register within 20 days of its having been created, if HA began voluntary administration, CBA may loss the security interest, resulting in other security interest taking priority over the unregistered interest. The unregistered and unperfected security interest will automatically vest in HA immediately prior to the commencement of a voluntary administration or liquidation of HA.

Hence, HA should quickly appoint an external administrator to commence a voluntary administration and the 3 trucks would be part of the assets in its restructuring scheme.

The loan of AUD 30 million provided by the major shareholder of HGL is an unsecured loan. Even though it is stated in the loan agreement that the lender is entitled for repayment if HA enters any formal or informal restructuring process. It is seen as unfair preference if HA were to repay this unsecured loan in priority to other debts. All unsecured debt should follow the payment ranking and be paid pari passu. Any

payment made to repay this loan is voidable and the liquidators can claw it back, if any repayment is made within the six-month period immediately before the presentation of a creditor's petition.]

QUESTION 4.2: 4/7

* End of Assessment *