



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 = 36/50 (72%)

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

Commented [BB2]: Sub-total = 10 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

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: 10/10

QUESTION 2 (direct questions) [10 marks]

Commented [BB3]: Sub-total = 7 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 on application to the Court are as follows:

- (i) *Unfair preferences;*
- (ii) *Uncommercial transactions;*
- (iii) *Unreasonable director-related transactions;*
- (iv) *Unfair loans; or*
- (v) *Circulating security interests (in limited circumstances).*

In cases involving unfair preferences and uncommercial transactions, it is a defence if it can be shown that the other party to the transaction was not in fact aware, and nor would any reasonable person in the party's circumstances be aware, of any reasonable grounds for suspecting the company was insolvent at the time of the transaction or would become insolvent by entering into the transaction. This defence does not apply to unreasonable loans or unfair loans.

QUESTION 2.1: 2/3

Question 2.2 [maximum 3 marks]

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

Australia has specified that the scope of the stay under Article 20 of the Model Law as being the same as would apply had the stay or suspension arose under the (i) Bankruptcy Act, or (ii) Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act.

As such, Australian court must consider what "the case requires", i.e., whether the case requires the broader voluntary administration stay which affects secured creditors or the standard liquidation stay that affects only unsecured creditors. This is not a question of discretion but is instead which stay should apply given the nature of the proceeding. The latter will be more appropriate in foreign proceedings which are analogous to liquidations while the former would be more appropriate for foreign proceedings which are business rescue procedures.

QUESTION 2.2: 3/3

Question 2.3 [maximum 4 marks]

What are the differences between liquidations and small company liquidations?

Firstly, unlike regular liquidations, small company liquidations are only available to businesses with total liabilities of less than AUD1 million. Secondly, small company

liquidations only apply where no current director of the company (or a 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 liquidation process within seven years. Unlike a regular liquidations, there is no requirement to hold creditor meetings and neither is there a need for committee of inspection. Unlike regular liquidation process, clawback of voidable transactions in small company liquidations only apply to unfair preferences of over AUD 30,000 that were paid to related parties of the company in the three months prior to the commencement of the liquidation. Small company liquidations also provide for electronic communications and voting.

QUESTION 2.3: 2/4

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

Commented [BB4]: Sub-total = 9 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 disagree with the above statement. Based on the current available law on insolvency and restructuring in Australia, Australia's regime (for both personal and corporate debts) is considered to be creditor-friendly. This is based on the following reasons:

Firstly, save for schemes of arrangement and small business restructurings (which are debtor-in possession process where the directors of the company can continue to exercise their powers), almost all of Australia's bankruptcy and insolvency processes involve the appointment of an external administrator. Even though in the case of small business restructurings, the company must engage a qualified insolvency practitioner as an advisor, the control of the company is still with the director(s).

Secondly, secured creditors are still entitled to enforce their rights during the bankruptcy and liquidation process.

Thirdly, major creditors with security over the whole or substantially the whole of a company's property remain entitled, subject to compliance with certain time restrictions, to appoint a receiver over the top of a voluntary administrator.

Fourthly, non-major unsecured creditors, as well as owners and lessors with enforcement rights, can continue with enforcement action which has been commenced prior to the appointment of a voluntary administrator or which relates to perishable property, or otherwise with the consent of the court.

Fifthly, Australia has broad insolvent trading liability which essentially allows a liquidator to recover substantial sums from directors in cases where the directors have

allowed a company to incur debts while insolvent. Sums clawed back are for the benefit of creditors.

Sixthly, the voidable transaction regime, particularly in corporate liquidation, allows transactions to be clawed back for the benefit of creditors over a substantial period of years and without having to prove improper conduct such as an intention to defeat creditors. Sums clawed back are for the benefit of creditors.

Seventhly, in terms of unsecured creditors, they can bring court proceedings to enforce debts. Smaller claims are brought in the Local or Magistrates Courts, where they are generally dealt with relatively swiftly and cheaply. As for medium sized claims, they will be brought in the Country or District Court. Large claims that are AUD 1 million and above shall be brought in the Supreme Court of the State or Territory. Claims that include statutory claims under Federal Legislation, or claims that related to bankruptcy or corporate insolvency can be brought in the Federal Circuit Court or the Federal Court.

Finally, in terms of unsecured creditors, they can issue a specific notice under the Bankruptcy Act and the Corporations Act requiring the individual or the company to pay the debt. In the event that the debt is not paid within 21 days after the issuance of the said notice, the unsecured creditor may then proceed to apply for the individual or corporation to be made bankrupt or wound up.

9/15 marks - this essay lists some good examples of aspects of the insolvency regime which uphold the rights of creditors over debtors. However, the essay fails to address any of the factors weighing in favour of Australia's insolvency regime being described as debtor-friendly. For example, the essay does not address the ipso facto moratorium. In the fifth reason, there is no acknowledgement of the insolvent trading safe harbour which supports the debtor. In the list of reasons supporting a creditor-friendly characterisation, the essay does not mention the increase in creditors' procedural rights.

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

Commented [BB5]: Sub-total = 10 marks

Question 4.1 [maximum 8 marks]

Aussiebee Pty Ltd (Aussiebee), a company incorporated in the fictional country of Lyonesse, sells chocolates flavoured with Australian native plants. The chocolates are manufactured in Australia by NewYums Pty Ltd (NewYums), an Australian-incorporated wholly-owned subsidiary of Aussiebee.

Aussiebee has offices in both Sydney and in Lyonesse. Its warehouses are only in Sydney. Aussiebee regularly sells its chocolates all over the world, with orders received in Lyonesse and shipped from the Sydney warehouses. Aussiebee and NewYums share a board of directors, made up of six Australians and one Lyonessean. Aussiebee employed 40 staff: 20 in Sydney and 20 in Lyonesse. Aussiebee's CEO is an

Australian, but resident in Lyonesse. Aussiebee's CFO is an Australian, resident in Australia.

Aussiebee is insolvent. NewYums, however, remains solvent.

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

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

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

ATO must first determine where the COMI is vis-à-vis Aussiebee. The two (2) key factors for determining COMI under Model Law are:

- (i) The location where the central administration of the debtor takes place; and**
- (ii) Which is readily ascertainable as such by creditors of the debtor.**

In this case, it is arguable that Aussiebee's COMI is in Australia based on the following reasons:

- (i) The chocolates are manufactured in Australia by NewYums Pty Ltd (NewYums), an Australian-incorporated wholly-owned subsidiary of Aussiebee.**
- (ii) Aussiebee has offices in Sydney, and its warehouse is only in Sydney.**
- (iii) Majority of Aussiebee's board of directors is made up of six Australians and only one Lyonesse.**
- (iv) Aussiebee's CFO is an Australian, resident in Australia.**

As Aussiebee's COMI is arguably in Australia, ATO should challenge the liquidator's action by arguing that the foreign insolvency proceedings commenced/opened in Lyonesse is not to be considered as foreign main proceedings. This would mean that the foreign insolvency proceedings commenced/opened in Lyonesse is to be considered as a non-main proceeding. As a non-main foreign proceedings, the liquidator would not be entitled to orders entrusting Aussiebee's assets (including Aussiebee's shares in NewYums which are worth AUD 20 million) to her, so that she can realise them for the benefit of creditors in the Lyonesse liquidation.

7/8 marks - this is a very good answer. It identifies the correct factors to displace the presumption that AussieBee's COMI is in its place of incorporation (ie Lyonesse). It appropriately recommends that the ATO should intervene on the recognition application. It could only be strengthened by citing authority for its conclusions (ie Ackers).

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?

*I would advise the Board to proceed with a **creditors' voluntary winding** up pursuant to section 497 of the Corporations Act. Under section 497 of the Corporations Act, a liquidator can be appointed by a special resolution of HA's shareholders once the directors of HA forms the opinion that HA is insolvent. In this case, since the Board has taken the position 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, a liquidator can be appointed under section 497 of the Corporations Act.*

The liquidator must then convene a meeting of creditors within 10 business days, with creditors given the power to replace the liquidator, request information and reports and/or appoint a committee of inspection.

I will then warn the Board that upon the appointment of the liquidator, the directors remain in office but their management powers are then suspended. Following the appointment, the liquidator will proceed to, obtain and examine the books and records of the company for the purpose of ascertaining, among others, the circumstances which led to the company's liquidation and any transactions which may have contravened the voidable transaction provisions of the Corporations Act.

*I will also inform them that in Australia, **a director will be liable for insolvent trading** where:*

- *He or she was a director at the time a debt was incurred;*
- *The company was insolvent when the debt was incurred, or become insolvent as a result;*
- *There were reasonable grounds for suspecting the company was insolvent or would become so by incurring the debt;*
- *The director failed to prevent the company from incurring the debt; and*

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

In the present case, despite having known that HA has been insolvent since the judgment was handed down in October 2020, and yet allowed HA to continue trading between October 2020 and October 2021, incurring debts to trade creditors as well as borrowing AUD 5 million from its p 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, the Board of Directors may be found liable for insolvent trading under section 588 of the Corporations Act.

If found liable, compensation orders may be made against HA's directors or even the holding company, HLG, on the application of HA's liquidator (or individual creditors with the consent of the liquidator or the court). The court can also impose a civil penalty, a disqualification order.

QUESTION 4.2: 3/7

* End of Assessment *