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 = 44/50 (88%)

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

Commented [BB2]: Sub-total = 8 marks

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

Question 1.1

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 <u>are not provable</u> ***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

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

Select the correct answer:

A receiver:

(a) is an agent of the secured creditor that appointed the receiver.

(b) owes a duty of care to unsecured creditors.

(c) is an agent of the company and not of the secured creditor that appointed the receiver.

(d) is an agent of the company, until the appointment of a liquidator to the company.

(e) is required to meet the priority claims of employees out of assets subject to a non-circulating security interest.

Question 1.9

Select the correct answer:

Australia has excluded from the definition of "laws relating to insolvency" for the purposes of Article 1 of the Model Law the following parts of the Corporations Act:

(a) the part dealing with schemes of arrangement.

(b) the part dealing with windings up of companies by the court on grounds of insolvency.

(c) the part dealing with taxes and penalties payable to foreign revenue creditors.

(d) the part dealing with the supervision of voluntary administrators.

(e) the part dealing with receivers, and other controllers, of property of the corporation.

Question 1.10

Select the correct answer:

Laws regarding the following came into effect on 1 January 2021:

(a) An *ipso facto* moratorium in voluntary administrations and liquidations.

(b) Simplified restructuring and liquidation regimes for small companies.

(c) Reducing the default bankruptcy period from three years to one year.

(d) A safe harbour from insolvent trading liability.

MULTIPLE CHOICE: 8/10

QUESTION 2 (direct questions) [10 marks]

Commented [BB5]: Sub-total = 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.

1. unfair preferences: It is a defence if the defendant process they were not aware the Company was insolvent at the time if they can also show that an order permitting the recovery of property would prejudice a right or interest of that paty; and they acted in good faith and provided valuable consideration or changed its position in reliance on the transaction.

2. uncommercial transactions: The defence is available assuming all the grounds detailed above are met.

3. unreasonable director related transactions: the defence is not available.

4. unfair loans: the defence is not available.

5. circulating security interests: the defence is not available.

QUESTION 2.1: 2/3

Question 2.2 [maximum 3 marks]

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

The scope of a stay available in Australia under Article 20 of the Model Law is prescribed as being the same that would apply if the stay arose under the Bankruptcy Act or Chapter 5 of the Corporations Act, excluding parts 5.2 and 5.4A.

Determining the scope of a stay in relation to a corporate debtor will require an analysis of what the case requires. Accordingly, the Court will consider whether a broad stay as available under the voluntary administration scheme which encompasses secured creditor, or alternatively, whether a standard liquidation stay is appropriate, solely impacting unsecured creditors.

Whether the foreign proceeding is rescue or liquidation focused will be a key consideration in determining whether a broad or standard stay is required. A broad stay will be more appropriate for rescue proceedings where a standard stay will be more appropriate for liquidation focused proceedings.

QUESTION 2.2: 3/3

Question 2.3 [maximum 4 marks]

What are the differences between liquidations and small company liquidations?

Small company liquidations are a simplified process available for small companies. The Small company liquidation process is only available if the company's total liabilities do not exceed AUD 1 million and no director (or former director in the last 12 months) has been a

director of another company that has undergone restructuring or been the subject of a simplified liquidation process in the last seven years.

The key differences between small and standard liquidations are that small company liquidations have the following features:

1. claw back of voidable transactions will only apply to unfair preferences of over AUD 30,000 paid to related parties of the company within three months of the commencement of liquidation.

2. Liquidators are only required to report to the ASIC on potential misconduct where they have reasonable grounds to exist misconduct has occurred.

3. there is no requirement to hold creditor meetings and committees of inspection are removed.

4. the proof of debt process and dividend process are simplified.

5. there are provisions for electronic communications and voting.

QUESTION 2.3: 4/4

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

Commented [BB6]: Sub-total = 14 marks

"Australia's insolvency and restructuring options have in the past been very creditor-friendly. However, recent reforms have made Australia more of a debtor-friendly jurisdiction."

Critically discuss this statement and indicate whether you agree or disagree with it, providing reasons for your answer.

I agree with the above statement. Generally speaking, Australia is considered a creditor friendly jurisdiction. However, as set out in the statement above, there have been recent reforms which have made Australia a more debtor friendly jurisdiction in principle. Ultimately however, in practice, Australia very much remains on the creditor friendly end of the scale. Indeed, there have also been a number of reforms which are debtor friendly in nature.

Creditor friendly jurisdiction

There are numerous reasons which support the position that Australia is a creditor friendly jurisdiction. Almost all of Australia's insolvency processes are creditor-in-possession processes which require the appointment of an external administrator. While schemes of arrangement and small business restructurings are debtor-in-possession processes, they still require the appointment of a qualified insolvency practitioner.

Secured creditors are entitled to enforce their rights in a liquidation or restructuring. In particular, the Australian liquidation Moratorium does not apply to secured creditors. Accordingly, a secured creditor may take priority and prevent a restructuring from being possible (unless they agree to co-operate) or significantly reduce assets available for distribution to debtors in a liquidation.

While restructuring and corporate rescue mechanisms are available in Australia, the primary rescue process of voluntary administration features an alternative aim of enabling a maximum return to be achieved for distribution to creditors.

Substantial secured creditors may apply for the appointment of a receiver regardless of the fact that a voluntary administrator has been appointed. Similarly, non-major secured creditors can continue enforcement action commenced prior to the appointment of a voluntary administrator, enforcement action in relation to perishable property, or with consent of the Court.

Finally, Australia's insolvent trading and voidable transaction regime are broad which is a creditor friendly feature of the jurisdiction. The claw back periods are long and the provisions do not require an intention to defeat creditors. Both regimes may allow creditors to recover significant sums for the benefit of creditors.

Recent debtor friendly reforms

Despite the fact that Australia is largely a creditor friendly jurisdiction, there have been some developments which have debtor friendly features.

For example, the simplified liquidation process introduced for small companies limits the recovery of unfair preferences unless they exceed $30,000 paid to related parties three months prior to the commencement of liquidation. This limitation does not exist under the "standard" liquidation process and while the limitation was introduced to streamline smaller liquidations, the $30,000 minimum requirement could be seen as a debtor friendly development.

Notwithstanding that an alternative aim of the voluntary administration process is to maximise distribution to creditors as detailed above, the primary aim of the regime is to maximise the chance of an insolvent company continuing in existence under the terms of a deed of company arrangement.

The introduction of the ipso facto moratorium in 2018 prevents creditors from enforcing contractual ipso facto rights that are exclusively contingent on a company's insolvency. These reforms are likely to increase the chance that a corporation recovers from insolvency. However, it does so at the cost of limiting creditors rights indicating a shift towards a more debtor friendly jurisdiction. That being said, there are a number of exceptions to the ipso facto moratorium which limit its applicability. However, it is worth noting that the ipso facto moratorium applies in a range of insolvency processes: voluntary administrations, creditors' schemes of arrangement, receiverships and small company restructurings (with certain exceptions).

Another relatively recent development introduced in 2017 is the safe harbour provisions which allow company directors to avoid liability for insolvent trading. These reforms allow the company to continue to incur debts with a view to implementing an informal restructuring attempt under the supervision of an appointed restructuring expert. These provisions have the effect that the pool of assets available to creditors may be reduced compared to what might have been available prior to the introduction of the provisions and so are not likely to be viewed as creditor friendly developments.

Debtor friendly reforms

As noted above, notwithstanding the introduction of debtor friendly reforms, there have also been a number of recent developments which further enhance the interests of creditors. For example, new anti pheonixing laws were introduced in 2019 and 2020 which prevent asset

stripping of company's so that debtor company's may not continue to operate under a new name. The amendments expand the potential scope of personal director liability in addition to a range of other mechanisms which ultimately increase protection of creditors and deter certain acts of debtors.

Conclusion

Australia remains a creditor friendly jurisdiction and has a number of features that protect and priorities creditor's interests. However, recent developments have introduced debtor friendly provisions which have shifted its position slightly in favour of debtors, notwithstanding that creditors retain significant rights in liquidation and restructuring processes and there have also been a range of reforms increasing the protection afforded to creditors.

14/15 marks – ***very strong essay. It addresses all of the relevant issues and arguments for both creditor- and debtor-friendly. The answer could only have been strengthened by mentioning some of the procedural rights which creditors have gained (including the right to require IPs to provide information, the ability for creditors to vote out IPs more easily).***

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

Commented [BB7]: Sub-total = 13 marks

Question 4.1 [maximum 8 marks]

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

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

Aussiebee is insolvent. NewYums, however, remains solvent.

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

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

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

It would not be in the ATO's interests for the foreign liquidator to obtain control of Aussibee's assets including the valuable NewYums shares without preserving the ATO's position. Realisation of the Newyums shares for the benefit of Lyonesse creditors may have the effect of leaving the debt to ATO unsatisfied to the extent that it ought to be. I would advise the ATO to notify the foreign liquidator of the debt to ensure that they are aware that the ATO is a significant creditor.

I would advise the ATO to issue a statutory demand on Aussibee for the tax debt and issue proceedings to wind up Aussiebee if it remains unpaid within 21 days. Having commenced proceedings, I would advise the ATO to consider opposing the foreign liquidators recognition application on the basis that the proceeding is not a foreign main proceeding but rather that recognition should only be granted on the basis that the liquidation is a foreign non-main proceeding whereas the ATO's liquidation of Aussibee could be considered as the main proceeding. Primacy will therefore be given to the domestic, Australian proceeding pursuant to Article 29. As a result, any relief granted in the non-main proceeding would therefore need to be consistent with the domestic Australian proceeding.

The basis for this position would be that it is arguable that Lyonesse is not the COMI for Aussiebee, but rather, the COMI is located in Australia (despite being incorporated in Lyoness). While there are there are a number of neutrally balanced considerations (for example, offices in Australia and Lyonesse and equal staff numbers in both jurisdictions) there are a number of factors that indicate that Australia is in fact the COMI. These include the fact that Aussiebee only has warehouses in Australia, uses Australian flavoured native plants and also manufactures its products in Australia. Further, the majority of the directors are Australian, as are its CFO (resident in Australia) and its CEO (albeit resident in Lyonesse). Accordingly, there are reasonable grounds to persuade an Australian Court that Australia is in fact Aussibee's COMI such that such that the foreign liquidation is non-main.

Even if the Lyoness proceeding is recognised as the main proceeding, I would advise the ATO of its ability to apply for the modification of any recognition orders. In particular, the orders may be modified such that they expressly give leave to the ATO to take steps to enforce its claim for the unpaid taxes in Australia for the express purpose of recovering an amount up to the parri passu amount it would be entitled to have receive if it was entitled to prove the tax debts in the foreign main proceeding. I would inform the ATO that similar circumstances were considered by the Full Court of the Federal Court of *Australia in Ackers v Deputy Commissioner of Taxation* and that the Court held that modification of recognition orders were an appropriate way to ensure that the interests of the DCT in that case were adequately protected.

The ATO might also consider opposing recognition of the foreign proceeding on the basis that it would be a breach of the public policy safeguard. If the foreign representative realises the assets for the benefit of the Lyonesse based creditors, the ATO will prejudiced and the Australian public (as ultimate beneficiaries of tax money) would suffer as a result. However, I would note that the public policy exception is a high threshold. In circumstances where the recognition orders can be modified to protect the ATO, an application to invoke the public policy exception is unlikely to be necessary or successful.

8/8 marks – ***this is a very good answer. It correctly advises that the ATO should oppose recognition of the foreign proceeding on the basis that the COMI is in Australia and not Lyonesse. The answer identifies all of the relevant factors which displace the presumption that the COMI is the place of incorporation. The answer identifies the appropriate authority (*Ackers*) to support its arguments.***

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?

What to do about HA?

HA needs to consider liquidation or a restructuring process. While the fact that the Perth re-refining plant may indicate it may be worth attempting a corporate rescue procedure, given there are no funds to continue operations and all refinancing options have been exhausted, informal or formal restructuring options do not seem to be viable options worth pursuing in the circumstances.

Realistically, the directors should immediately resolve that the company is insolvent and that an administrator should be appointed. In the circumstances, the appointment of administrators will be to preserve the business of the Perth re-refining plant such that it may be sold as a going concern. By preserving the Perth plant's business, a better sale price will likely be achieved so that creditors' claims can be better satisfied upon the ultimate liquidation of HA. Ultimately, any decision to sell the Perth plant business will be the creditors' decision unless there is no prospect of an alternative purchaser at a later time and an immediate sale of the business is in the interests of unsecured creditors.

The benefit to appointing an administrator is the secured and unsecured creditors will not be able to enforce their rights against HA, thereby permitting the possibility of a sale of the Perth plant as a going concern. In particular, I would advise the directors of HA that while the loan from HGL's shareholder records that the loan will become immediately repayable upon entry into either of these processes, the ipso facto moratorium provisions will prevent this clause from being actioned upon by appointment of an administrator given the contract was entered into after 1 July 2018.

Main issues

I would advise the board of HA that as the mortgages of the trucks held by CBA were not registered on the Personal Property Securities Register, that the security interest was not perfected. Accordingly, the security interest will vest in HA upon commencement of voluntary administration or liquidation.

I would also advise the Board of HA that they are at risk of being pursued for permitting HA to continue trading while insolvent Pursuant to s 588G of the Corporations Act, such that they may be required to personally satisfy a compensation order (or be issued with civil/and or criminal penalties). As noted, HA has been insolvent since the judgment was handed down in October 2020, yet it continued trading and incurring debts for a year. Any of the directors that were on the board following the issuance of the judgment will be at risk of being pursued as debts were incurred at a time when the company was insolvent. The fact of the judgment provides reasonable grounds for suspecting that the company was insolvent yet the directors failed to prevent the company from incurring debts. The directors would have been aware of the judgment and if not, a reasonable person in a like position in the

company's circumstances would be so aware. On the facts detailed above, the safe harbour provisions are unlikely to protect the directors. However, I would make full enquires with the directors as to whether the directors began developing one or more course of action that were reasonably likely to lead to a better outcome for HA upon issuance of the judgment.

Equally, I would also advise the directors of HGL that the company is at risk of being liable for permitting/causing the insolvent trading of its subsidiary HA if it is held to be a holding company pursuant to 588V of the Corporations Act.

I would advise the Board of HGL that while it is not at risk of a general pooling order being made to satisfy the majority of unsatisfied claims made against HA. However, I would note there may be scope for the court to make an employment entitlements contribution order should HA be intentionally left with insufficient assets to meet its liabilities to such vulnerable parties.

QUESTION 4.2: 5/7

*** End of Assessment ***