

Law of Associations

Examiner's Comments

September 2008

Question 1

The responses to this question were of a particularly high standard. The question related to the personal remedies that might be available to Angela, Robert and Julian in the circumstances and, in this regard, a detailed reference was expected to be made to sections 232 and 233 of the *Corporations Act* and to cases relating to those sections. High-quality answers analysed the circumstances where section 232 applied including when Christine's conduct was contrary to the interests of the members as a whole as well as to when her conduct was oppressive in the prejudicial and discriminatory sense. See *NRMA v Parkin* and *Wayde v New South Wales Rugby League*, in particular. See also *Fexuto Pty Ltd v Bosnjax Holdings Pty Ltd* and *Turnbull v NRMA* (at paragraphs 23-39)

Better responses also referred to the possible application of particular orders that could be made under section 233 against Christine.

Question 2

This question related to the application of the indoor management rule at common law and pursuant to the *Corporations Act* (see section 128 – 129). Of particular importance was the possible application of section 128(3).

The majority of students who attempted this question performed well and made particular reference to decisions such as *Storey v Advance Bank* and *Northside Developments v Registrar General* as those decisions applied to assist Mrs Windsor. Some students also made reference to the decision of Hodgson CJ (in Eq) *Stoyfer v Earlmaze Pty Ltd* [2000] NSWSC 1068 and to *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd*.

Students "lost" marks for simply paraphrasing the legislation rather than simply applying it to the facts in issue.

Question 3

This question related to the "insolvent trading" provisions contained in sections 588G – 588Z of the *Corporations Act*. It was answered particularly well by the small number of students who attempted it.

Students were required to advise the Mr Burke and Mr McLeod of their prospects of resisting the liquidator's action. This primarily involved an analysis of the application of the defences contained in section 588H. Better responses analysed the possible application of section 1317S and canvassed the issue of whether the criteria set out in section 588G(1) had been satisfied so as to thwart the liquidator's claim.

See *Metropolitan Fire Systems Pty Ltd v Miller* and *ASIC v Plymin, Elliot & Harrison* (2003) 21 ACLC 700 at pages 776 – 786. Reference could also be made to the decisions in *Metal Manufactures Ltd v Lewis*, *Commonwealth Bank v Friedrich*, *Statewide Tobacco Services Ltd v Morley* and *Group Four Industries Pty Ltd v Brosnan* in relation to the statutory defences.

Question 4

This question was, in the main, answered competently by the majority of candidates. In advising the owner of the Nyngan premises as to whether they have a cause of action and, if so, against whom, there was a need to acknowledge the fact that the Kangaroo Shooters' Association was an unincorporated association. It followed that there was a need to emphasise that, as the association was not a legal entity, it could not hold property. This meant that any cause of action that the owner of the premises had, it could not be against the association.

A fundamental question arose as to whether the committee could be held liable for the lease and, if so, which committee would be liable. Particular reference should have been made to the following decisions: *Freeman v McManus*, *Carlton Cricket and Social Club v Joseph*, *Bradley Egg Farm v Clifford* and *Peckham v Moore*.

Question 5

A good response to this question called for an analysis of whether or not the relationship between the band members constituted a partnership and, if so, whether all the band members would be liable as partners to the musical supplier. This involved an analysis of sections 1 and 2 of the Partnership Act: see *Canny Gabriel Castle Advertising v Volume Sales (Finances) Pty Ltd*.

If it was concluded that a partnership between all the band members existed then there was a need to examine their liability to the musical supplier. This involved a detailed analysis of sections 5 and 9 of the Act: see *Polkinghorne v Holland*, *Mercantile Credit v Garrod* and *Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd*.

Many students performed well in analysing sections 1 and 2 of the Act but were less certain as to how to integrate section 5 into their answer.

Question 6

Most candidates provided good responses to this question.

The question related to directors' duties generally and was answered well by the majority of students who attempted the question. Detailed reference was expected to be made to sections 180 – 184 of the *Corporations Act* and to cases relating to those sections together with references to the need for directors to act in good faith and to act for a proper purpose. In relation to the latter, reference was expected to decisions such as ***Whitehouse v Carlton Hotels*** and ***Howard Smith v Ampol Petroleum***.

Question 7

This question involved an analysis of the statutory derivative action provisions contained in sections 236 – 242 of the *Corporations Act*.

Students were required, in particular, to apply the criteria set out in section 237(2) and (3) to the facts set out in the question as well as to apply the effect of several of the leading decisions in this area to those facts. Reference to decisions such as ***Swansson v RA Pratt Properties Pty Ltd*** and ***Fiduciary Ltd v Morningstar Research Pty Ltd*** was expected. Additional reference was made by some students to the decision in ***Maher v Honeysett & Maher Electrical Contractors*** [2005] NSWSC 859 a decision which provides a good summary of the principles in this area.

Merely setting out the criteria in the *Corporations Act* without comprehensive analysis was not enough to attain a passing standard for the question.