

Insolvency Examination March 2009

Examiner's Comments.

Question 1

Sections 121 and 120 of the Bankruptcy Act must be applied to the family home and BHP shares. The satchel of diamonds raises the effects of a sequestration order and section 40(1) (c) with 115(1) of the Bankruptcy Act. Advanced students will analyse section 120 on this issue and its lack of connection to section 40(1) (b) of the Bankruptcy Act.

Question 2

Students will analyse sections 40(1) (c) with section 44(1) of the Bankruptcy Act on standing to make Francless bankrupt. Students then should apply sections 40(1) (b), 122(1) and 115(1) of the Bankruptcy Act identifying all preferential transactions and their connection to the relation back of the sequestration order.

Question 3

Re Suco Gold Pty Ltd should be applied to the winding up of an insolvent trading trust. *Sons of Galia v Magaretic* should be applied to the unit holders as to whether they can or should prove for the purchase price of the units in the winding up. *Shirlaw v Taylor* should be applied to the costs of the provisional liquidator. Sections 555, 556 and 563A of the Corporations Act are relevant to all transactions. The better students will discuss the liquidators powers under section 598 and 1324 of the Corporations Act mentioning *Kinsela's case* and *Angus Legal Services v Carabelas* .

Question 4

All transactions should be analysed under Division 2 of Part 5.7 B of the Corporations Act especially unfair loans under sections 5888FD and 5888FE (6). There should be some discussion of registrable charges under section 262 (1) (f) of the Corporations Act with the *Associated Alloys Case*. *Re Emmanuel No.14* on unfair preferences is clearly raised on the facts. There are numerous breaches of director's duties and unreasonable director related transactions that allow the liquidator to pursue the directors of the

company alternatively in recovery proceedings under section 588FF or through the company under section 598.

Question 5

This involves a complete discussion of *Re Sarina* and all the cases relevant to the nature of insolvency. Better students will appreciate the policy reasons behind the onus of proof falling on the debtor to prove solvency under section 52(2) (a) of the Bankruptcy Act and whether the Court has a discretion in making a sequestration order.

Question 6

The presumption of insolvency is to facilitate proof by a creditor in having a company wound up. Students should be acutely aware that contested winding up cases are often fought out before an application to wind up is made because the mere making of the application has detrimental commercial and legal effects upon the company independently of the winding up order. Students should know the procedures to set aside a statutory demand and the importance of accurately determining when there is a failure to comply with the statutory demand under section 459F of the Corporations Act.