Law of Associations
Examiners Comments
March 2018

Question 1

This question was concerned with section 180(1) and 180(2) of the Corporations Act and with the general principles discussed in cases such as ASIC v Healy [2011] FCA 717; ASIC v Vines (2003) 48 ACSR 322; ASIC v MacDonald (2009) 71 ACSR 368; ASIC v Hellicar & Ors [2012] HCA 17; ASIC v Rich (2010) 75 ACSR 1; ASIC v Adler (2002) ACSR 72.

Students were required to identify the legal principles discussed in the cases above and to apply them to the facts.

Question 2

This question required an analysis of section 232 and 233 of the Corporations Act.

The question required reference to the general test of oppression in section 232 by reference to such cases as Wayde v NSW Rugby League Limited (1985) 180 CLR 459; Nassar v Innovative Precasters Group Pty Limited (2009) 71 ACSR 343; Mopeke Pty Limited v Airport Fine Foods Pty limited (2007) 61 ACLR and how those general principles applied to the facts in the question. Central to answering the question was understanding the concept of “commercial unfairness” and understanding that the Court can look beyond legal rights and do what is just and equitable in the circumstances.

The question also required and understanding and application to the facts of Campbell v Backoffice Investments Pty Limited (2009) CLR 30

Question 3

This question required an analysis of sections 236 and 237 (1) (2) (3) of the Corporations Act dealing with derivative actions.

Reference should have been made to section 236 of the Act regarding standing to bring an application under 237 and to Swanson v R A Pratt Properties Pty Limited (2002) 42 ACSR 313 and the test set out by Justice Palmer to satisfy the requirements in section 237(2) of the Act. Answers should have included reference to and application of the principles in Charlton v Baher (2003) 47 ACSR 31; Chahwen v Euphoric Pty Limited (2008) 65 ACSR 661 and to Justice Austin’s judgment in Fiduciary Limited v Morning Star Research Pty Limited [2004] NSWSC 664;
Students should have recognised that section 237(3) provides the circumstances in which there is a rebuttable presumption that granting leave would not be in the “best interests of the company” and determining whether that section applied to the facts in the question.

Question 4

This question required consideration of sections 127-130 of the Corporations Act dealing with the indoor management rule.

Students were required firstly to apply cases such as Story v Advance Bank of Australia Limited (1993) 31 NSWLR 722 to section 128 (1) of the Act. Most students understand the significance of this case in the light of the facts and adequately considered whether there was a “dealing” pursuant to section 128 (1) allowing the Bank to make the assumptions in section 129 of the Act.

Students were then required to specifically recognise sections 129(2) (3) (5) and (6) as containing the major assumptions that the Bank could make (assuming that section 128 (1) was satisfied) having regard to the facts in the question. Students should also have referred to Soyfer & Anor v Earlmaze & Ors [2000] NSWSC 1068 and the analysis of Hodgson J on the meaning of “appears” in sections 129(5) and 129(6).

Students were required to recognise that an important issue in the question was whether the Bank could make the assumptions in section 129 (assuming s 128(1) was satisfied) pursuant to sections 128(3) and 128(4) of the Act and whether the Bank had “actual knowledge” or “actual suspicion”.

Question 5

This question was in two parts, namely the liability of unincorporated non profit associations at common law and under the Associations Incorporation Act 2009 (NSW).

In relation to unincorporated non profit associations, the answer specifically required a consideration of the common law propositions set out in Peckman v Moore [1975] 1 NSWLR 353, The question also required an analysis of Bradley Egg Farm v Clifford [1943] 2 All ER 378 and Carlton Cricket and Social Club v Joseph [1970] VR 487 in the context of Peckman’s case. The facts in this question did not require an analysis, as many students did, of Cameron v Hogan (1934) 51 CLR 358.

Students were required to apply the above common law principles and to consider the liability of committee members.

The second part of the question required an analysis of the relevant sections of the Associations Incorporation Act to highlight the difference between unincorporated associations and incorporated associations and to explain whether relevant sections of the Act would change your advice on the facts in the question and why.
Question 6

This question concerned partnership and needed to be answered in two parts.

Firstly, the question required a consideration of whether a partnership existed between Kristen, Lynette, Gary and Felicity pursuant to section 1 and section 2 of the Partnership Act.

This part of the question also required reference to authorities such as Canny Gabriel Castle Advertising v Volume Sales (Finances) Pty Limited (1994) 131 CLR 321; United Dominions Corporation v Brian (1985) 157 CLR 1; Lang v James Morrison and Co Limited (1911) 13 CLR 1; Ex Parte Delhasse In re Megevant (1877-1878) 7 Ch D 511.

The second part of the question required a consideration of whether Kristen, Gary and Felicity (assuming that Felicity was a partner) was liable to Farm Fresh for the actions of Lynette pursuant to section 5 of the Partnership Act. This part of the question required students to find or assume that Felicity was a partner and to consider and properly apply to the question the elements of section 5 of the Partnership Act and have regard to the authorities such as Polkinghorne v Holland (1934) 51 CLR 143; Goldberg v Jenkins [1889] 15 VLR 36. Mercantile Credit v Garrod [1962] All ER 1103; Construction Engineering (Aust) Pty Limited v Hexyl Pty Limited (1985) 155 CLR.