Question 1

- This question was generally handled well although not in great detail in relation to all relevant issues.
- There is no clear definition of insolvency – s 5(2) and (3) of Brptcy Act and s 95A Corporations Act
- Keay’s p 16 – retrospective and current insolvency – Lewis v Doran per Palmer J at Keay’s pp 17 – 18 – longer term views eg Re Cube Footwear at Keay’s p 18
- Tests of insolvency
  - Keay’s p 19 - use of a cash flow test for rather than balance sheet
  - SBW p 12 – Bank of Australasia v Hall – court introduced a commercial sense of insolvency and considering what debts will fall due in the future
  - SBW pp 15-17 - Sandell v Porter per Barwick CJ at [15] – see Keay’s p 21
  - SBW p 18 – Rees v Bank of NSW per Barwick CJ at [7]
  - Look at financial position as a whole – SBW p 20 – Southern Cross Interiors Pty Ltd v DCT per Palmer J at [54]
  - SBW p 29 – Powell v Fryer per Olsson J at [75]
  - Keay’s pp 21 – 22 - ASIC’s Information Sheet 42 Insolvency: A Guide for Directors summarises the indicators of insolvency
  - SBW p 32 – ASIC v Plymin, Elliott, Harrison (No 1) per Mandie J at [386]
  - SBW p 20 – Crema Pty Ltd v Mark Property Developments Pty Ltd … s95A enshrines the cash flow test – emphasis on whether assets are immediately realisable – temporary lack of liquidity v endemic shortage of working capital
- “debts v claims” in s 95A – Keay’s p 22 – s95A only concerned with debts not unliquidated claims see Box Valley Pty Ltd v Kidd and can include contingent claims eg guarantees see Hawkins v Bank of China (at Keay’s p 23)
- Relevance of creditor concessions – what effect? Failure to demand payment not prevent a debt from being due and payable see Southern Cross Interiors Pty Ltd v DCT but an assessment of insolvency can take into account the dates when a debt might reasonably be expected that the creditor might receive debts due and owing: Manpac Industries Pty Ltd v Ceccattini at Keay’s p 23
- Relevance of realisable assets – debtors are not limited to their cash resources – Keay’s p 24 - Hall v Poolman (ability to realise assets within 90 days): Bell Group Ltd v Westpac (No 9) at Keay’s p 24 Owen J said could take into account the following 12 months obligations
- Relevance of ability to borrow unsecured – the old legislations prescribed “from debtor’s own property” but now not in s 95A – Keay’s at 25 Lewis v Doran can include unsecured borrowings however this may be qualified: ASIC v Edwards per Barrett J
- Recalcitrant or unwilling debtors – other reasons for non-payment

Question 2

The marks for this question were lower than for other questions.
This question involved an analysis of section 121 of the Bankruptcy Act 1966. The question is whether section 121(1) is satisfied. Pursuant to that section, a transfer of property by a person who later becomes a bankrupt to another person is void in certain circumstances. The transfer of the Glebe property could be argued to have been a transfer to defeat creditors. The criteria set out in section 121(1)(a) and (b) needed to be applied. Importantly, reference to section 122(2) was also needed and which provides that the transferor’s main purpose in making the transfer will be taken to be for the purposes of preventing the transferred property from becoming divisible amongst creditors, if it can be reasonably inferred from all the circumstances that at the time of the transfer the transferor was or was about to become insolvent. Mark transferred his interest in the property in January 2016. At that time he was heavily in debt.

The key issue in this question was whether the compromised payments were a preference: see Re Hasler. It does not appear to be the case that section 121(2) is satisfied and it does not appear that the rebuttable presumption of insolvency in section 121(4)A is satisfied. Attention also needed to be drawn to section 121(5) and (6) relating to consideration and, in particular, to section 121(6)(e) and (f). See Cummins (A Bankrupt) v Cummins [2006] HCA 6.

Art and rugs at auction – a discussion of s 123 was needed as well as the possible application of s 120. Was the auction sale one made in good faith and in the ordinary course of business? See generally Robertson v Grigg. What, if any defences are available?

Question 3

This question was also generally well answered.

The question arises as to whether the statutory demand served on Strong Foundations can be set aside. An application to set aside a statutory demand can be made pursuant to section 459G in the circumstances set out in section 459H or 459J (Keay’s p 389). The issue therefore that needed to be analysed was whether the circumstances set out in section 459H or 459J had been satisfied so as to justify the demand being set aside. In other words, was there a “genuine dispute” (Re Morris Catering at Keay’s p 390) between Concrete Building Supplies Pty Ltd and Strong Foundations? Was there an offsetting claim (s 459H(1)(b) that Strong Foundations had against Concrete Building Supplies Pty Ltd? Was there a defect in the demand such that substantial injustice would be caused unless the demand was set aside? or, was there some other reason why the demand should be set aside?

The facts reveal that there is an issue about the lack of quality of the concrete blocks that were sold. These factors could form the basis for a claim being made based on section 459H to set aside the statutory demand: Eyota Pty Ltd v Hanave Pty Ltd.

There was a need to outline the procedure set out in section 459G to set aside the statutory demand together with the statutory time limits: Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corp Ltd (SBW p 473) as well as to discuss the requirement and content for services
supporting affidavits with the application to set aside the statutory demand. Note the impact of the so-called *Graywinter* principle at SBW p 484.

(c) On extensions of time, see generally, *David Grant*’s case

(d) An application for an injunction to restrain the filing and advertising of a winding up application is possible. See Keay’s p 404 and authorities such as *Alperin Technical Pty Ltd v ACI; Australian Beverage Distributors v Evan & Tate*. Where does the balance of convenience lie?

**Question 4**

Again, generally well answered by most students.

This was a question that dealt with corporate insolvency not bankruptcy. That was because Ace Advisory Pty Ltd was a company. Application of the Bankruptcy Act provisions to the facts of this question was incorrect and students who approached the question from a bankruptcy perspective did not attain high grades.

(a) Dealing with the transfer by the company of the house to Toni - this transaction involved a number of possible alternatives. Was the transaction done with an intent to defeat creditors (s 588FE(5))? Was it an uncommercial transaction (s 588FB)? Was the transaction and unreasonable director-related transaction made within four years (s 588FDA)?

Looking at the transaction as one made with the intent to defeat creditors, a discussion of s 588FE(5) and s 588FE(6A) was needed. In addition, reference should have been made to possible orders such as those set out in s 588FF(1)(b).

Looking at the transaction is an unreasonable director-related payment a discussion of s 588FDA should have been examined. See also *Merrag v Khoury*. In addition, reference could have be made to the Corporations Amendment (Repayment of Directors Bonuses) Act if you thought that the transaction was such a payment.

Looking at the transaction is an uncommercial transaction, a discussion of s 588FB was required.

(b) Patrick has made a payment of 50% of what he owed Ace. Was this an uncommercial transaction? A discussion of s 588FB(1) and s 588FB(2) was needed. There was also a need to apply the reasonable business person test (see *Cussen v Commissioner of Taxation* and *Demondrille Nominees v Shirlaw* (1997). Can the bargain that Patrick obtain be explained by normal commercial practice?

(c) Transfer of the yacht - was this an uncommercial transaction? See s 588FB. Was it an “insolvent transaction”. What significance applies to the maintenance costs that were paid – see s 588FDA.
(d) The payment made to Fancy Cars - Was this an unfair preference? See s 588FA: Commissioner of Taxation v Kassem (2012) - the Fancy Cars get more than they would have? What defences are available?