INSOLVENCY EXAMINATION
GENERAL FEEDBACK

Question 1

(a) This question involved an analysis of sections 120 and 121 of the Bankruptcy Act 1966. The question is whether the criteria in sections 120(1) and section 121(1) are satisfied.

Pursuant to both sections 120 and 121, a transfer of property by a person who later becomes a bankrupt to another person is void in certain circumstances. The transfer of the property could be argued to have been an undervalued transaction or a transfer to defeat creditors. The criteria set out in sections 120(1)(a) and 120(1)(b) as well as 121(1)(a) and (b) needed to be applied.

With respect to section 120, could it be said that section 120(2) applies?

For section 121, reference to section 121(2)-(4) was also needed re transferor’s main purpose. Julian transferred his interest in the property in March 2016. At that time he (and Anna) were concerned about potential exposure to bad debts.

(b) The key issue in this question was whether the compromised payments were a preference – see section 122 and Re Hasler. See also, section 122(4) and Cummins (A Bankrupt) v Cummins [2006] HCA 6. Better answers dealt with section 124 as well.

(c) Art transfer to Steven – a discussion of s 120 was needed. Was the transfer one made in good faith and in the ordinary course of business? See generally Robertson v Grigg. What, if any defences are available? See also, section 121.

(d) Payment to Fancy Car Leasing Pty Ltd – a discussion of section 122 was needed.

Note, for all parts see also, section 123.

Question 2

(a) The question arises as to whether the statutory demand 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. 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 between the companies? Was there an offsetting claim (s 459H(1)(b)? 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 tiles 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.
(b) 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. On extensions of time, see generally, David Grant’s case.

Question 3

(a) You were required to advise the legal officer of Constellation as to whether action may be taken against Heydon and Rebecca directly under s 588G in order to obtain a compensation order. This advice primarily involved applying the criteria set out in section 588G(1)(a) to (c) including, in particular:

a. whether the persons were directors of the company at the relevant time (see section 9);
b. whether the company incurred a debt;
c. whether the company was insolvent (see section 95A) at the relevant time; and,
d. whether there were reasonable grounds to suspect that the company was insolvent or would become insolvent. See Elliott v ASIC [2004] VSCA 54 on section 588G(2), ASIC v Plymin (No 1) [2003] VSC 123 at [515]; and ASIC v Edwards [2005] NSWSC 831 at [81] and McLellan, Re The Stake Man Pty Ltd v Carroll [2009] FCA 1415.

A discussion of the consequences for insolvent trading was needed eg ss 588J, 588K, 588M(1) (2) and (3) and 1317H.

On procedure, see sections 588M, R S and T should have also been discussed. What about consent of the liquidators?

(b) There was a need to examine the statutory defences contained in section 588H. See Chan v First Strategic. Reference could also be made to the decisions in Metropolitan Fire Systems Pty Ltd v Miller and ASIC v Plymin, Elliot & Harrison (2003) 21 ACLC 700 at pages 776 – 786, ASIC v Plymin (No 1) [2003] VSC 123 at [560]; Metal Manufactures Ltd v Lewis (1988) 6 ACLC 725; Commonwealth Bank v Friedrich (1991) 9 ACLC 946; Statewide Tobacco Services Ltd v Morley (1990) 8 ACLC 827 and (1992) 10 ACLC 1233; Group Four Industries Pty Ltd v Brosnan (1992) 10 ACLC 1437; Hall v Poolman (2007) 65 ACSR 123 and McLellan, Re The Stake Man Pty Ltd v Carroll [2009] FCA 1415.

Could s 588GA apply? If so, how? Reference should have been made to the possible application of section 1317S and 1318.