

# **Federal Court (Corporations) Amendment Rules 2001 (No. 1)**

## **2001 No. 127**

### **EXPLANATORY STATEMENT**

#### **Statutory Rule 2001 No. 127**

**Issued by the authority of the Judges of the Federal Court of Australia**

#### **Federal Court (Corporations) Amendment Rules 2001 (No 1)**

Section 59 of the *Federal Court of Australia Act 1976* permits the Judges of the Court or a majority of them, to make rules of Court not inconsistent with the Act. These rules may provide for the practice and procedure to be followed in the Court and in Registries of the Court. They may extend to all matters incidental to any such practice or procedure that are necessary or convenient to be prescribed for the conduct of any business of the Court.

Under sub-section 59 (4) of the *Federal Court of Australia Act 1976*, sections 48, 48A, 48B, 49 and 50 of the *Acts Interpretation Act 1901* which relate to the making of regulations, apply to these Rules of Court as if references to the regulations in those sections were references to Rules of Court.

### **DIVISION 1 PRELIMINARY**

#### **RULE 1 Name of rules**

This rule provides that the Rules are to be cited as the *Federal Court (Corporations) Amendment Rules 2001 (No 1)*.

#### **RULE 2 Commencement**

This rule provides that these Rules commence on 30 June 2001.

#### **RULE 3 Amendment of *Federal Court (Corporations) Rules 2000***

This rule provides that the *Federal Court (Corporations) Rules 2000* are amended as set out in Schedule 1.

### **SCHEDULE 1 - AMENDMENTS**

#### **Supporting affidavits**

[1] Subrule 2.4 (2)

This amendment makes subrule 2.4 (2), which provides that an affidavit in support of an originating process must annex a record of a search of the records maintained by the Commission in relation to the company that is the subject of the application, subject to the new rule 2.4A.

#### **Application for order setting aside statutory demand (s 459G of the Law)**

[2] After rule 2.4

This amendment inserts a new rule 2.4A.

Subrule 2.4A (1) provides that rule 2.4A applies, and subrule 2.4 (2) does not apply, to an application by a company under section 459G of the Law for an order setting aside a statutory demand served on the company. In such an application there is no need for the affidavit in support of the application to annex a record of a search of the records maintained by the Commission in relation to the company that is the subject of the application.

Subrule 2.4A (2) provides that the plaintiff may file with the originating process a copy of the statutory demand that is the subject of the application and a copy of any affidavit that accompanied the statutory demand.

Paragraph 2.4A (3) (a) provides that the plaintiff must carry out a search of the records of the Commission in relation to the plaintiff no earlier than 7 days before the originating process is filed and no later than the hearing of the application. Paragraph 2.4A (3) (b) provides that the record of the search may be annexed to the affidavit in support of the originating process, or be filed before, or tendered at, the hearing of the application.

### **Order for meetings to identify proposed scheme**

[3] Rule 3.3

This amendment replaces rule 3.3 with a new rule 3.3. The new rule 3.3 includes provisions for the convening and conduct of meetings of members and meetings of holders of convertible securities ordered under section 411 of the Law.

Section 411 of the Law provides that the Court may make an order for a meeting of members or creditors to be convened in such manner and held in such place or places as the Court directs, for the purpose of considering a proposed scheme of compromise or arrangement. Rule 2.15 provides that, subject to the Law, these Rules and any direction of the Court to the contrary, regulations 5.6.12 to 5.6.36A of the Corporations Regulations apply to meetings ordered by the Court.

Regulations 5.6.12 to 5.6.36A deal with meetings of creditors. They contain provisions which, for example, deal with measuring votes on a poll by the value of debts, and give the chairperson of the meeting a casting vote where the numerical majority of creditors disagree with creditors with the majority value of debts.

These Regulations are not appropriate where the Court orders a meeting of members or of holders of convertible securities (defined in the Law to include options). In meetings of both of these kinds, it would be expected that voting power on a poll would be determined by the number of securities held, and the chairperson's casting vote would be more narrowly circumscribed.

The amendment retains the existing text of rule 3.3 as new subrule 3.3 (1), and inserts new subrules (2) and (3).

Subrule 3.3 (2) provides that, unless the Court otherwise orders, a meeting of members ordered under section 411 of the Law must be convened, held and conducted in accordance with the provisions of Part 2G.2 of the Law (which deals with meetings of members of a company) that

apply to the members of a company; and the provisions of the plaintiff's constitution that apply in relation to meetings of members and are not inconsistent with Part 2G.2 of the Law.

Subrule 3.3 (3) provides that, unless the Court otherwise orders, a meeting of a class of holders of convertible securities ordered under section 411 of the Law must be convened, held and conducted as if:

(a) the holders were a separate class of members; and

(b) the meeting were a meeting of members convened, held and conducted under subrule (2);

but in accordance with, and subject to, the applicable provisions of the instrument under which the securities were issued.

**Application for examination or investigation under s 411 (9) (b), s 423 or s 536 (3) of the Law**

[4] Subrule 11.2 (2)

Rule 11.2 sets out the rules for an application for the examination or investigation of a person under paragraph 411 (9) (b), section 423 or subsection 536 (3) of the Law. The amendment substitutes a new subrule 11.2 (2) which provides that an application may be made without notice to any person. This means, in particular, that the person whose examination or investigation is sought need not be a party to the application for the examination or investigation.

## **Application for examination summons (s 596A, s 596B of the Law) – Form 17**

[5] Subrule 11.3 (2)

Under subrule 11.3 (1), an application for the issue of an examination summons must be made by filing an originating process or interlocutory process, as the case requires. The amendment substitutes a new subrule 11.3 (2) which provides that an application may be made without notice to any person. This means, in particular, that the person whose examination is sought need not be a party to the application for the examination summons.

### **Powers of Registrars**

[6] Subrule 16.1 (1)

This amendment makes it clear that the subrule operates to prescribe powers of the Court for the purpose of paragraph 35A (1) (h) of the *Federal Court of Australia Act 1976*. Paragraph 35A (1) (h) provides, inter alia, that the Court or a Judge may direct that a power of the Court prescribed by the Rules be exercised by a Registrar.

### **Schedule 1**

[7] Schedule 1, Form 7, paragraph 1

[8] Schedule 1, Form 7, paragraph 4

Form 7 is the form prescribed by rule 5.2 for an affidavit accompanying a statutory demand.

Form 7 refers to the statutory demand as a document which the affidavit 'accompanies', and so assumes that the statutory demand pre-exists the swearing or affirmation of the affidavit. However, the form of statutory demand prescribed by paragraph 459E (2) (c) of the Law (being Form 509H in the Second Schedule to the *Corporations Regulations*) refers to the affidavit as being attached to the statutory demand, and so requires that the affidavit exist before the statutory demand is signed.

To ensure that Form 7 is consistent with the prescribed form of statutory demand, Form 7 is amended by replacing paragraphs 1 and 4 with new paragraphs that do not suggest that the statutory demand must exist by the time the affidavit to accompany it on the occasion of service is already sworn or affirmed.