

EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 206

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

Federal Court (Corporations) Amendment Rules 2008 (No. 2)

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*, the *Legislative Instruments Act 2003* (other than sections 5, 6, 7, 10, 11 and 16 of that Act) applies in relation to rules of court made by the Court under the *Federal Court of Australia Act 1976* or another Act:

- (a) as if a reference to a legislative instrument were a reference to a rule of court; and
- (b) as if a reference to a rule-maker were a reference to the Chief Justice acting on behalf of the Judges of the Court; and
- (c) subject to such further modifications or adaptations as are provided for in regulations made under section 59A of the *Federal Court of Australia Act 1976*.

The *Federal Court (Corporations) Rules 2000* apply to a proceeding in the Court under the *Corporations Act 2001* or the *Australian Securities and Investments Commission Act 2001* commenced on or after 1 January 2000.

The Judges have agreed to amendments to the *Federal Court (Corporations) Rules 2000* that are consequential upon the enactment of the *Cross-Border Insolvency Act 2008* (Cth). This Act gives effect to the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (the Model Law). The Model Law outlines a system of insolvency procedures to be used in cases where the insolvent party has assets in more than one country, or when there are foreign creditors present in a domestic insolvency proceeding.

These Amendment Rules will amend the *Federal Court (Corporations) Rules 2000* by:

1. inserting a new Division 15A 'Proceedings under the Cross-Border Insolvency Act' which sets out the rules as to how particular applications under the Act are to be made and notified;
2. inserting into Schedule 1 to the *Federal Court (Corporations) Rules 2000* the following new forms:
 - Form 19 Consent to act as designated person
 - Form 20 Notice of filing of application for recognition of foreign proceeding
 - Form 21 Notice of making of order under the *Cross-Border Insolvency Act 2008*

- Form 22 Notice of dismissal or withdrawal of application for recognition of foreign proceeding
 - Form 23 Notice of filing of application to modify or terminate an order for recognition or other relief
3. making consequential amendments to rules 1.3 and 1.5, and to forms 2 and 3.

The amendments have been the subject of consultation with the Insolvency Practitioners Association of Australia and the Law Council of Australia and give effect to recommendations by the Council of Chief Justices' Harmonised Corporations Rules Monitoring Committee.

Details of the Rules are in the Attachment.

The Rules commence on the day after they are registered.

Federal Court (Corporations) Amendment Rules 2008 (No. 2)

RULE 1 Name of rules

This rule provides that the Rules are to be cited as the *Federal Court (Corporations) Amendment Rules 2008 (No. 2)*.

RULE 2 Commencement

This rule provides that these Rules commence on the day after they are registered.

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

[1] Subrules 1.3 (1) and (2)

Rule 1.3 states that, unless the Court otherwise orders, the Federal Court (Corporations) Rules 2000 (Corporations Rules) apply to a proceeding in the Court under the Corporations Act or the Australian Securities and Investments Commission Act (ASIC Act).

The amendment replaces subrules 1.3 (1) and (2) with new subrules that provide, inter alia, that the Corporations Rules and other rules of the Court apply to proceedings under the Corporations Act, ASIC Act and the *Cross-Border Insolvency Act*.

[2] Rule 1.5, after definition of *Corporations Regulations*

[3] Rule 1.5, definition of *defendant*

[4] Rule 1.5, after definition of *interlocutory process*

[5] Rule 1.5, definition of *plaintiff*

Rule 1.5 sets out the meaning of various terms used in the Corporations Rules.

Rule 1.5 is amended by:

- inserting a definition of ‘Cross-Border Insolvency Act’;
- inserting a reference to the *Cross-Border Insolvency Act* in the definition of ‘defendant’;
- inserting a definition of ‘Model Law’;
- inserting a reference to the *Cross-Border Insolvency Act* in the definition of ‘plaintiff’.

[6] After Division 15

This amendment inserts a new division, Division 15A, into the Rules.

The new Division 15A sets out the rules as to how particular applications under the *Cross-Border Insolvency Act* are to be made and notified.

Rule 15A.1 outlines the application of this Division. In particular, it provides that, unless the Court otherwise orders, this Division applies to proceedings in the Court, under the *Cross-Border Insolvency Act*, involving a debtor other than an individual.

Rule 15A.2 provides that an expression used in the Division and in the *Cross-Border Insolvency Act* has the same meaning in the Division as it has in the *Cross-Border Insolvency Act*.

Rule 15A.3 sets out the procedure for an application by a foreign representative for recognition of a foreign proceeding under article 15 of the Model Law.

Rule 15A.4 sets out the procedure for an application for provisional relief under article 19 of the Model Law.

Rule 15A.5 provides that, where an application made under article 15 of the Model Law includes an application for an order to entrust the distribution of the debtor's assets to a person designated by the Court, the person must be an official liquidator and have filed a Consent to Act in accordance with Form 19 that specifies an address for service for the person within Australia.

Rule 15A.6 sets out the requirements for the notification of an application for recognition filed pursuant to rule 15A.3.

Rule 15A.7 sets out the requirements for the notification of an order for recognition of a foreign proceeding, an order dismissing an application for recognition and the withdrawal of an application for recognition.

Rule 15A.8 sets out the procedure for an application for relief under paragraph 1 of article 21 of the Model Law after the Court has made an order for recognition of a foreign proceeding.

Rule 15A.9 sets out the procedure for an application to modify or terminate an order for recognition or other relief.

[7] Schedule 1, Form 2, heading

[8] Schedule 1, Form 2

[9] Schedule 1, Form 3, heading

[10] Schedule 1, Form 3

Form 2 is the prescribed form for an originating process application and form 3 is the prescribed form for an interlocutory process application.

These forms are amended to include references to the *Cross-Border Insolvency Act* and the relevant rules in the new Division 15A.

[11] Schedule 1, after Form 18

This amendment inserts into Schedule 1 the new forms mentioned in rules 15A.5, 15A.6, 15A.7 and 15A.9.

Form 19 is the form for *Consent to act as designated person* mentioned in rule 15A.5.

Form 20 is the form for *Notice of filing of application for recognition for foreign proceeding* mentioned in rule 15A.6.

Form 21 is the form for *Notice of making of order under Cross-Border Insolvency Act 2008* mentioned in rule 15A.7.

Form 22 is the form for *Notice of dismissal or withdrawal of application for recognition of foreign proceeding* mentioned in rule 15A.7.

Form 23 is the form for *Notice of filing of application to modify or terminate an order for recognition or other relief* mentioned in rule 15A.9.