

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2009 No. 47**

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

#### **Federal Court (Bankruptcy) Amendment Rules 2009 (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*, 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 Judges have agreed to amend the *Federal Court (Bankruptcy) Rules 2005* by:

1. inserting a new Part 14 'Proceedings under the Cross-Border Insolvency Act' which sets out the rules as to how particular applications under the *Cross-Border Insolvency Act 2008* (Cth) are to be made and notified;
2. inserting into Schedule 1 to the *Federal Court (Bankruptcy) Rules 2005* the following new forms:
  - Form 18 Consent to act as designated person
  - Form 19 Notice of filing of application for recognition of foreign proceeding
  - Form 20 Notice of making of order under the *Cross-Border Insolvency Act 2008*
  - Form 21 Notice of dismissal or withdrawal of application for recognition of foreign proceeding
  - Form 22 Notice of filing of application to modify or terminate an order for recognition or other relief
3. making consequential amendments to rules 1.03 and 1.04, and to paragraphs 2.01 (3) (a) and (4) (a) and forms 2 and 3.

The amendments have been the subject of consultation with the Law Council of Australia and been considered by the Harmonised Bankruptcy Rules Monitoring Committee.

Details of the Rules are in the Attachment.

The Rules commence on 30 March 2009.

## ATTACHMENT

### Federal Court (Bankruptcy) Amendment Rules 2009 (No. 1)

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

This rule provides that the Rules are to be cited as the *Federal Court (Bankruptcy) Amendment Rules 2009 (No. 1)*.

#### **RULE 2**      **Commencement**

This rule provides that these Rules commence on 30 March 2009.

#### **RULE 3**      **Amendment of *Federal Court (Bankruptcy) Rules 2005***

This rule provides that the *Federal Court (Bankruptcy) Rules 2005* ('the Bankruptcy Rules') are amended as set out in Schedule 1.

#### SCHEDULE 1

##### [1]      Rule 1.03

Rule 1.03 states that, unless the Court otherwise orders, the Bankruptcy Rules apply to a proceeding in the Court under the Bankruptcy Act.

The amendment replaces subrules 1.03 (1) and (2) with new subrules that provide, inter alia, that the Bankruptcy Rules and other rules of the Court apply to proceedings under the Bankruptcy Act and the *Cross-Border Insolvency Act*.

##### [2]      Rule 1.04, after definition of *Bankruptcy Regulations*

Rule 1.04 sets out the meaning of various terms used in the Bankruptcy Rules.

Subrule 1.04 (1) is amended by:

- inserting a definition of 'Cross-Border Insolvency Act';
- inserting a definition of 'Model Law'.

##### [3]      Paragraphs 2.01 (3) (a) and (4) (a)

Rule 2.01 provides that an originating application and interim application must state each section of the Bankruptcy Act or each regulation of the Bankruptcy Regulations under which the orders are sought.

Paragraphs 2.01 (3) (a) and (4) (a) are amended to include a requirement that these documents must, if relevant, include a reference to each section of the *Cross-Border Insolvency Act*.

[4] After Part 13

This amendment inserts a new Part 14 into the Rules.

The new Part 14 sets out the rules as to how particular applications under the *Cross-Border Insolvency Act* are to be made and notified.

Rule 14.01 describes the proceedings to which the Part applies. Unless the Court otherwise orders, this Part applies to proceedings in the Court under the *Cross-Border Insolvency Act* involving a debtor other than a corporation.

Rule 14.02 provides that an expression used in the Part and in the *Cross-Border Insolvency Act* has the same meaning in the Part as it has in the *Cross-Border Insolvency Act*.

Rule 14.03 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 14.04 sets out the procedure for an application for provisional relief under article 19 of the Model Law.

Rule 14.05 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 a registered trustee and have filed a Consent to Act in accordance with Form 18 that specifies an address for service for the person within Australia.

Rule 14.06 sets out the requirements for the notification of an application for recognition filed pursuant to rule 14.03.

Rule 14.07 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 14.08 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 14.09 sets out the procedure for an application to modify or terminate an order for recognition or other relief.

[5] Schedule 1, Form 2, heading

[6] Schedule 1, Form 2, note

[7] Schedule 1, Form 3, heading

[8] Schedule 1, Form 3, note

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

These forms are amended to include references to the Cross-Border Insolvency Act and the relevant rules in the new Part 14.

[9] Schedule 1, after Form 17

This amendment inserts into Schedule 1 the new forms mentioned in rules 14.05, 14.06, 14.07 and 14.09.

Form 18 is the form for *Consent to act as designated person* mentioned in rule 14.05.

Form 19 is the form for *Notice of filing of application for recognition for foreign proceeding* mentioned in rule 14.06.

Form 20 is the form for *Notice of making of order under Cross-Border Insolvency Act 2008* mentioned in rule 14.07.

Form 21 is the form for *Notice of dismissal or withdrawal of application for recognition of foreign proceeding* mentioned in rule 14.07.

Form 22 is the form for *Notice of filing of application to modify or terminate an order for recognition or other relief* mentioned in rule 14.09.