



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

Select Legislative Instrument 2009 No. 47

We, Judges of the Federal Court of Australia, make the following Rules of Court under the *Federal Court of Australia Act 1976*.

Dated 17 March 2009

M.E.J. BLACK C.J.
J.E.J. SPENDER J.
D.M. RYAN J.
T.J. HIGGINS J.
M.F. MOORE J.
K.E. LINDGREN J.
P.D. FINN J.
R.A. SUNDBERG J.
S.R. MARSHALL J.
A.M. NORTH J.
J.R. MANSFIELD J.
A.H. GOLDBERG J.
A.R. EMMETT J.
R.A. FINKELSTEIN J.
J.A. DOWSETT J.
S.C. KENNY J.
M.A. STONE J.

P.M. JACOBSON J.
A.C. BENNETT J.
B.T. LANDER J.
A.N. SIOPIS J.
R.F EDMONDS J.
A.P. GREENWOOD J.
S.D. RARES J.
B. COLLIER J.
D.A. COWDROY J.
A.J. BESANKO J.
C.N. JESSUP J.
R.R.S. TRACEY J.
J.E. MIDDLETON J.
R.J. BUCHANAN J.
J. GILMOUR J.
M.M. GORDON J.
J.A. LOGAN J.
G.A. FLICK J.
N.W. McKERRACHER J.
J.E. REEVES J.
N. PERRAM J.
J.M. JAGOT J.
L.G. FOSTER J.
M.L. BARKER J.

Judges of the Federal
Court of Australia

W.G. SODEN
Registrar

1 Name of Rules

These Rules are the *Federal Court (Bankruptcy) Amendment Rules 2009 (No. 1)*.

2 Commencement

These Rules commence on 30 March 2009.

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

Schedule 1 amends the *Federal Court (Bankruptcy) Rules 2005*.

Schedule 1 Amendments

(rule 3)

[1] Rule 1.03

substitute

1.03 Application of these Rules and other rules of the Court

- (1) Unless the Court otherwise orders:
 - (a) these Rules apply to a proceeding to which the Bankruptcy Act applies; and
 - (b) Part 14 applies to a proceeding in the Court under the Cross-Border Insolvency Act.

Note The Federal Magistrates Court does not have jurisdiction under the Cross-Border Insolvency Act.

- (2) The other rules of the Court apply, to the extent that they are relevant and not inconsistent with these Rules:
 - (a) to a proceeding in the Court to which the Bankruptcy Act applies; and

- (b) to a proceeding in the Court under the Cross-Border Insolvency Act that is commenced after 29 March 2009.

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

insert

Cross-Border Insolvency Act means the *Cross-Border Insolvency Act 2008* including, unless the contrary intention appears, the Model Law.

Model Law means the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, the English text of which is set out in Schedule 1 to the Cross-Border Insolvency Act, with the modifications set out in Part 2 of that Act.

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

omit

or each regulation of the Bankruptcy Regulations,

insert

each regulation of the Bankruptcy Regulations or each section of the Cross-Border Insolvency Act,

[4] After Part 13

insert

**Part 14 Proceedings under
Cross-Border Insolvency Act**

14.01 Application of this Part and other rules of the Court

Unless the Court otherwise orders:

- (a) this Part applies to a proceeding in the Court, under the Cross-Border Insolvency Act, involving a debtor who is an individual; and

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- (b) the rules in the other Parts of these Rules, and the other rules of the Court, apply to a proceeding in the Court under the Cross-Border Insolvency Act if they are relevant and not inconsistent with this Part.

Note See rule 1.04 for definitions of *Cross-Border Insolvency Act* and *Model Law*.

14.02 Expressions used in the Cross-Border Insolvency Act

- (1) Unless the contrary intention appears, an expression used in this Part and in the Cross-Border Insolvency Act, whether or not a particular meaning is given to the expression by the Cross-Border Insolvency Act, has the same meaning in this Part as it has in the Cross-Border Insolvency Act.

Note The following expressions used in this Part (including in the notes to this Part) are defined in the Model Law as having the following meanings:

establishment means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

foreign court means a judicial or other authority competent to control or supervise a foreign proceeding.

foreign main proceeding means a foreign proceeding taking place in the State where the debtor has the centre of its main interests.

foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment as defined in the Model Law.

foreign proceeding means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

foreign representative means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

- (2) This Part is to be interpreted in a manner that gives effect to the Cross-Border Insolvency Act.

14.03 Application for recognition

- (1) An application by a foreign representative for recognition of a foreign proceeding under article 15 of the Model Law must be made by filing an application in accordance with Form 2.
- (2) The application must:
 - (a) be accompanied by the statements mentioned in article 15 of the Model Law and in section 13 of the Cross-Border Insolvency Act; and
 - (b) name the foreign representative as the applicant and the debtor as the respondent; and
 - (c) be accompanied by an affidavit verifying the matters mentioned in paragraphs 2 and 3 of article 15 of the Model Law and in section 13 of the Cross-Border Insolvency Act.
- (3) When filing the application, the foreign representative must file, but need not serve, an interim application seeking directions as to service, and the Court may give any directions about service, and make any incidental orders, that it thinks just.
- (4) The applicant must serve a copy of the application and the other documents mentioned in subrule (2):
 - (a) unless the Court otherwise orders — on each respondent (if any) to the proceeding as soon as practicable after filing an application and, in any case, at least 5 days before the date fixed for hearing; and
 - (b) on any other persons the Court may direct at the hearing of the interim application.
- (5) A person who intends to appear before the Court at the hearing of an application for recognition must file and serve the documents mentioned in rule 2.05.

14.04 Application for provisional relief under article 19 of the Model Law

- (1) Any application by the applicant for provisional relief under article 19 of the Model Law must be made by filing an interim application in accordance with Form 3.

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- (2) Unless the Court otherwise orders, the interim application and any supporting affidavit must be served on each respondent at least 3 days before the date fixed for the hearing of the interim application.

14.05 Registered trustee's consent to act

If an application is made for an order:

- (a) under article 19 or 21 of the Model Law to entrust the administration or realisation of all or part of the debtor's assets to a person designated by the Court (other than the foreign representative); or
- (b) under article 21 to entrust the distribution of all or part of the debtor's assets to a person designated by the Court (other than the foreign representative);

then, unless the Court otherwise orders, the person must:

- (c) be a registered trustee; and
- (d) have filed a Consent to Act, in accordance with Form 18, that specifies an address for service for the person within Australia.

Note **registered trustee** is defined in subsection 5 (1) of the Bankruptcy Act.

14.06 Notice of filing of application for recognition

- (1) Unless the Court otherwise orders, the applicant in a proceeding mentioned in rule 14.03 must:
- (a) send a notice of the filing of the application in accordance with Form 19 to each person whose claim to be a creditor of the respondent is known to the applicant; and
- (b) publish a notice of the filing of the application:
- (i) in accordance with Form 19; and
- (ii) once in a daily newspaper circulating generally in the State or Territory where the respondent has his or her principal, or last known, place of residence.
- (2) The Court may direct the applicant to publish a notice in accordance with Form 19 in a daily newspaper circulating generally in any State or Territory not described in subparagraph (1) (b) (ii).

14.07 Notice of order for recognition, withdrawal etc

- (1) If the Court makes an order for recognition of a foreign proceeding under article 17 of the Model Law, or makes any order under article 19 or 21 of the Model Law, the applicant must, as soon as practicable after the order is made, do all of the following:
 - (a) have the order entered;
 - (b) serve a copy of the entered order on the respondent;
 - (c) send a notice of the making of the order in accordance with Form 20 to each person whose claim to be a creditor of the respondent is known to the applicant;
 - (d) publish a notice of the making of the order in accordance with Form 20, in accordance with subparagraph 14.06 (1) (b) (ii).
- (2) The Court may direct the applicant to publish the notice in accordance with Form 20 in a daily newspaper circulating generally in any State or Territory not described in subparagraph 14.06 (1) (b) (ii).
- (3) If the application for recognition is withdrawn or dismissed, the applicant must, as soon as practicable, do all of the following:
 - (a) for a dismissal — have the order of dismissal entered;
 - (b) serve a copy of the entered order of dismissal or notice of the withdrawal, on the respondent;
 - (c) send a notice of the dismissal or withdrawal in accordance with Form 21 to each person whose claim to be a creditor of the respondent is known to the applicant;
 - (d) publish a notice of the dismissal or withdrawal in accordance with Form 21, in accordance with subparagraph 14.06 (1) (b) (ii).
- (4) The Court may direct the applicant to publish the notice in accordance with Form 21 in a daily newspaper circulating generally in any State or Territory not described in subparagraph 14.06 (1) (b) (ii).

14.08 Relief after recognition

- (1) If the Court has made an order for recognition of a foreign proceeding, any application by the applicant for relief under paragraph 1 of article 21 of the Model Law must be made by filing an interim application, and any supporting affidavit, in accordance with Form 3.
- (2) Unless the Court otherwise orders, an interim application under subrule (1) and any supporting affidavit must be served at least 3 days before the date fixed for the hearing of the interim application on the following persons:
 - (a) the respondent;
 - (b) any person that the Court directed be served with the originating process by which the application for recognition was made;
 - (c) any other person that the Court directs.
- (3) A person who intends to appear before the Court at the hearing of an application under subrule (1) must file and serve the documents mentioned in rule 2.05.

14.09 Application to modify or terminate an order for recognition or other relief

- (1) This rule applies to:
 - (a) an application under paragraph 4 of article 17 of the Model Law for an order modifying or terminating an order for recognition of a foreign proceeding; and
 - (b) an application under paragraph 3 of article 22 of the Model Law for an order modifying or terminating relief granted under article 19 or 21 of the Model Law.
- (2) The application must be made by filing an interim application in accordance with Form 3.
- (3) An interim application and any supporting affidavit must be served on:
 - (a) for an application under paragraph (1)(a) — the respondent and other persons who were served with, or filed a notice of appearance in relation to, the application for recognition; and

- (b) for an application under paragraph (1)(b) — the respondent and other persons who were served with, or filed a notice of appearance in relation to, the application for relief under article 19 or 21.
- (4) Unless the Court otherwise orders, the applicant must:
 - (a) send a notice of the filing of the application in accordance with Form 22 to each person whose claim to be a creditor of the respondent is known to the applicant; and
 - (b) publish a notice of the filing of the application in accordance with Form 22, in accordance with subparagraph 14.06 (1) (b) (ii).
- (5) The Court may direct the applicant to publish the notice in accordance with Form 22 in a daily newspaper circulating generally in any State or Territory not described in subparagraph 14.06 (1) (b) (ii).
- (6) A person who intends to appear before the Court at the hearing of the application must file and serve the documents mentioned in rule 2.05.

[5] Schedule 1, Form 2, heading

substitute

Form 2 Application

(rules 2.01 and 14.03)

[6] Schedule 1, Form 2, note

omit

Bankruptcy Act or the Bankruptcy Regulations

insert

Bankruptcy Act, regulation of the Bankruptcy Regulations or section of the Cross-Border Insolvency Act

[7] Schedule 1, Form 3, heading

substitute

Form 3 Interim application

(rules 2.01, 2.04, 6.06, 6.12, 6.17, 14.04, 14.08 and 14.09)

[8] Schedule 1, Form 3, note

omit

Bankruptcy Act or the Bankruptcy Regulations

insert

Bankruptcy Act, regulation of the Bankruptcy Regulations or section of the Cross-Border Insolvency Act

[9] Schedule 1, after Form 17

insert

Form 18 Consent to act as designated person

(rule 14.05)

[*Title*]

I, [*name*], of [*address*], a registered trustee, consent to be appointed by the Court and to act as the person designated by the Court under *article 19/*article 21 of the Model Law to administer or realise all or part of the assets of [*name of debtor or bankrupt estate*] or under article 21 to distribute all or part of the assets of [*name of debtor or bankrupt estate*].

I am not aware of any conflict of interest or duty that would make it improper for me to act as the person designated by the Court.

The hourly rates currently charged in respect of work done as the person designated by the Court by me, and by my partners and employees who may perform work in this administration, are set out below or in the Schedule which is attached to this Consent.

I acknowledge that my appointment by the Court does not constitute an express or implied approval by the Court of these hourly rates.

Date:

[signed, registered trustee]

registered trustee

* *Omit if inapplicable*

Schedule

[description of hourly rate(s)]

Form 19 Notice of filing of application for recognition of foreign proceeding

(rule 14.06)

IN THE FEDERAL COURT OF AUSTRALIA

No. of [year]

[Name of debtor or bankrupt estate]

TO all the creditors of [name of respondent debtor]

TAKE NOTICE that:

1. An application under the *Cross-Border Insolvency Act 2008* for recognition of a foreign proceeding in relation to [name of debtor or bankrupt estate] was commenced by the applicant, [name of applicant], on [date of filing of application] and will be heard by the Court at [address of Court] at [time] on [date]. Copies of documents filed may be obtained from the applicant's address for service.
2. The applicant's address for service is [name and address of applicant's legal practitioner or, if there is no legal practitioner, address of the applicant].
3. Any person intending to appear at the hearing must file a notice of appearance, in accordance with the prescribed form, together with any affidavit on which the person intends to rely, and serve a copy of the notice and any affidavit on the applicant at the applicant's address for service at least 3 days before the date fixed for the hearing.
4. If you are a foreign creditor you must file in the registry of the Court at the address mentioned in paragraph 1 an affidavit setting out the details of any claim, secured or unsecured, that you may have against the debtor or bankrupt estate above at least 3 days before the date fixed for the hearing.

Date:

Name of applicant or applicant's legal practitioner: [name]

**Form 20 Notice of making of order under
Cross-Border Insolvency Act 2008**

(rule 14.07)

IN THE FEDERAL COURT OF AUSTRALIA

No. of [year]

[Name of debtor or bankrupt estate]

TO all the creditors of [name of debtor or bankrupt estate]

TAKE NOTICE that:

1. On [date], the [name of Court] in Proceeding No. of [year], commenced by the applicant [name of applicant], made the following orders under the *Cross-Border Insolvency Act 2008* in relation to [name of debtor or bankrupt estate]: [insert details of order].
2. The applicant's address for service is [name and address of applicant's legal practitioner or, if there is no legal practitioner, address of the applicant].
3. The name and address of the foreign representative is [insert name and address].
- *4. The name and address of the person entrusted with distribution of the assets is [insert name and address].

Date:

Name of applicant or applicant's legal practitioner: [name]

* Omit if inapplicable

**Form 21 Notice of dismissal or withdrawal of
application for recognition of foreign
proceeding**

(rule 14.07)

IN THE FEDERAL COURT OF AUSTRALIA

No. of [year]

[Name of debtor or bankrupt estate]

TO all the creditors of [name of debtor or bankrupt estate]

TAKE NOTICE that the application under the *Cross-Border Insolvency Act 2008* for recognition of a foreign proceeding in relation to [name of debtor or bankrupt estate] commenced by the applicant, [name of applicant], on [date of filing of application] was *dismissed/*withdrawn on [date of dismissal/withdrawal]

Date:

Name of person giving notice or of person's legal practitioner: [name]

* Omit if inapplicable

Form 22 Notice of filing of application to modify or terminate an order for recognition or other relief

(rule 14.09)

IN THE FEDERAL COURT OF AUSTRALIA No. of [year]

[Name of debtor or bankrupt estate]

TO all the creditors of [name of debtor or bankrupt estate]

TAKE NOTICE that:

- *1. An application under the *Cross-Border Insolvency Act 2008* for an order *modifying/*terminating an order for recognition of a foreign proceeding in relation to [name of debtor or bankrupt estate] was filed by the applicant, [name of applicant], on [date of filing of interim application] and will be heard by at [address of Court] at [time] on [date]. Copies of documents filed may be obtained from the applicant's address for service.
- *1. An application under the *Cross-Border Insolvency Act 2008* for an order *modifying/*terminating relief granted under *article 19/*article 21 of the Model Law in relation to [name of debtor or bankrupt estate] was filed by the applicant, [name of applicant], on [date of filing of interim application] and will be heard by at [address of Court] at [time] on [date]. Copies of documents filed may be obtained from the applicant's address for service.
- 2. The applicant's address for service is [name and address of applicant's legal practitioner or, if there is no legal practitioner, address of the applicant].
- 3. Any person intending to appear at the hearing must file a notice of appearance (if the person has not already done so), in accordance with the prescribed form, together with any affidavit on which the person intends to rely, and serve a copy of the notice (if applicable) and any affidavit on the applicant at the applicant's address for service at least 3 days before the date fixed for the hearing.

Date:

Name of applicant or applicant's legal practitioner: *[name]*

* *Omit if inapplicable*

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.