

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 175

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

Federal Court (Corporations) Amendment Rules 2012 (No. 1)

Section 59 of the *Federal Court of Australia Act 1976* (Federal Court Act) 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.

Section 1337S of the *Corporations Act 2001* (Corporations Act) extends the power to make rules of court conferred by section 59 of the Federal Court Act to proceedings and practice and procedure under the Corporations Act and *Australian Securities and Investments Commission Act 2001* (ASIC Act), associated matters and costs (including costs of meetings).

Under sub-section 59 (4) of the Federal Court Act, 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 Act 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 Act.

Section 9 of the *Legislative Instruments Act 2003* provides that Rules of Court made for the Federal Court of Australia are not legislative instruments for the purposes of that Act. As a result the *Human Rights (Parliamentary Scrutiny) Act 2011* does not apply to any such Rules of Court and no statement of compatibility for the purposes of that latter Act is included in this Explanatory Statement.

The Federal Court (Corporations) Rules 2000 (Corporations Rules) apply to a proceeding in the Court under the Corporations Act or the ASIC Act commenced on or after 1 January 2000.

The Judges have agreed to amend the Corporations Rules to give effect to the recommendation of the Council of Chief Justices' Harmonised Corporations Rules Monitoring Committee.

These Amendment Rules will amend the Corporations Rules by:

1. omitting from rule 1.4 references to a number of terms as being defined in section 9 or elsewhere in the Corporation Act which have, over recent years, been omitted from that section or from that Act;

2. inserting in rule 1.4 a reference to ‘foreign company’ being defined in section 9 of that Act;
3. omitting rule 2.11, which provides for publication of notices generally;
4. omitting any reference to rule 2.11 appearing elsewhere in the Corporations Rules and, where appropriate, substituting the elements of the omitted rule 2.11 that still apply where the application is for one other than one for winding up;
5. amending Form 9, Notice of application for winding up order, at paragraph 1 to insert an additional requirement for information, being for any trading name of the company, as required by the new Regulation 5.4.01A.

The Amendment Rules are consequential on the enactment of the *Corporations Amendment (Phoenixing and Other Measures) Act 2012* and *Corporations Legislation Amendment Regulation 2012 (No. 1)* which commenced on 1 July 2012.

Part of this new legislation implements the transition from newspaper notices to electronic publication on a single website administered by the Australian Securities Investments Commission (ASIC) of events in the external administration of corporations.

Details of the Rules are in the Attachment.

The Rules commence on the day after they are registered.

ATTACHMENT

Federal Court (Corporations) Amendment Rules 2012 (No. 1)**RULE 1 Name of rules**

This rule provides that the Rules are to be cited as the *Federal Court (Corporations) Amendment Rules 2012 (No. 1)*.

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] Rule 1.4, note

Rule 1.4 provides that, unless the contrary intention appears, an expression used in the Corporations Rules and in the Corporations Act has the same meaning in these Rules as in the Corporations Act.

To assist, a note appears at the foot of this rule listing a number of terms used in the Corporations Rules which are defined in the Corporations Act and provides a reference to the section in that Act in which each of these terms is defined.

This amendment omits ‘foreign country’, ‘futures broker’, ‘Gazette’, and ‘officer, in relation to a body corporate’ from that list of terms. These terms were either included in the list in error or the definitions for them have, over recent years, been omitted from the Corporations Act but these omissions overlooked.

The amendment also inserts in the list the term ‘foreign company’ which was previously overlooked.

[2] Rule 2.11

Rule 2.11 provides for the publication of notices. This rule states that if a rule requires a notice in relation to a body to be published in accordance with rule 2.11, the notice must be published once in a daily newspaper circulating generally in the State or Territory where the body has its principal, or last known, place of business. The note at the foot of the rule states that under the Corporations Act, certain notices may also be required to be published in the Gazette. Nothing in this rule is intended to affect the operation of any provision of the Corporations Act that requires publication of a notice in the Gazette.

This amendment omits rule 2.11. This omission and the associated changes described below are as a consequence of changes to the requirements for the publication of notices relating to events before, during and after the external administration of a

corporation resulting from the commencement of the *Corporations Amendment (Phoenixing and Other Measures) Act 2012* and *Corporations Legislation Amendment Regulation 2012 (No.1)* (the phoenixing legislation) on 1 July 2012. This legislation has made changes to the Corporations Act and the *Corporations Regulations 2001* (Corporations Regulations). These changes repealed a number of existing requirements to publish notice of external administration events in the print media or the ASIC Gazette and replace them with publication on a single website administered by ASIC.

- [3] Paragraph 3.4 (3) (b)
- [4] Paragraph 5.6 (2) (b)
- [5] Subparagraph 5.10 (2) (b) (i)

Rules 3.4, 5.6 and 5.10 refer to a notice of the hearing under subsections 411(4) and 413(1) of the Corporations Act, a notice of the application for winding up and an order substituting a plaintiff in the application for winding up under section 465B of the Corporations Act, respectively.

The amendments in items [3], [4] and [5] remove references to rule 2.11 as a consequence of the amendment omitting rule 2.11 as outlined in item [2] above. The changes implemented by the phoenix legislation are, as a result, allowed to apply and the necessary notifications must now be published in accordance with the requirements of the Corporations Act and Corporations Regulations but otherwise the form and timing of the notification must be as specified in respective rule.

- [6] Subrule 5.11 (4)
- [7] Subrule 6.2 (4)
- [8] Subrule 7.9 (3)

Rules 5.11, 6.2 and 7.9 refer to a notice of a winding up order and appointment of a liquidator, a notice of the appointment of a provisional liquidator and the distribution of a surplus by the liquidator with special leave of the Court under ss 488(2) of the Corporations Act, respectively.

These amendments remove references to rule 2.11 as a consequence of the amendment omitting rule 2.11 as outlined in item [2] above. The changes implemented by the phoenix legislation are, as a result, allowed to apply and the necessary notifications must now be published in accordance with the requirements of the Corporations Act and Corporations Regulations but otherwise the form of the notification must be as specified in respective rule.

- [9] Paragraph 15A.6 (1) (b)

Rule 15A.6 provides for a notice of the filing of an application for recognition of a foreign proceeding under Article 15 of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (the Model Law). Subrule 15A.6(1) requires that, unless the Court orders otherwise, the plaintiff in the proceeding mentioned in rule 15A.3 must send a notice of the filing of the application in accordance with Form 20 to each person whose claim to be a creditor of the defendant is known to the plaintiff and for publication of a notice of the filing, *inter alia*, in accordance with rule 2.11.

This amendment replaces in paragraph 15A.6(1)(b) the reference to rule 2.11 with the relevant part of repealed rule 2.11 that still applies in relation to this notice. This notice is not one that is captured by the phoenixing legislation changes and consequently the provisions of the old rule 2.11 that the notice must be published in a daily newspaper circulating generally in the State or Territory where the defendant has its principal, or last known, place of business will still apply.

[10] Subrule 15A.6 (2)

Subrule 15A.6(2) states that the Court may direct the plaintiff to publish a notice in accordance with Form 20 in a daily newspaper circulating generally in any State or Territory not described in rule 2.11.

This amendment replaces the reference to rule 2.11 in this subrule with a reference to paragraph 15A.6(1)(b). As a consequence of the amendment mentioned in item [9] above, paragraph 15A.6(1)(b) now contains the relevant provisions of the old rule 2.11 which still apply requiring that the notice be published in a daily newspaper circulating generally in the State or Territory where the defendant has its principal, or last known, place of business.

[11] Paragraph 15A.7 (1) (d)

[12] Subrule 15A.7 (2)

[13] Paragraph 15A.7 (3) (d)

[14] Subrule 15A.7 (4)

Rule 15A.7 sets out what the plaintiff must do if the Court makes:

- an order for recognition of a foreign proceeding under article 17 of the Model Law, or
- any order under article 19 or 20 of the Model Law.

These include that the plaintiff must:

- publish a notice of the making of the order in accordance with rule 2.11 (paragraph 15A.7(1)(d));
- if directed to do so by the Court, also publish the notice in a daily newspaper circulating generally in any State or Territory not described in rule 2.11 (subrule 15A.7(2));
- publish a notice of any withdrawal or dismissal in accordance with rule 2.11 (paragraph 15A.7(3)(d)); and
- if directed to do so by the Court, also publish the notice in a daily newspaper circulating generally in any State or Territory not described in rule 2.11 (subrule 15A.7(4)).

The publication of such notices is not one that is captured by the phoenixing legislation changes and consequently the provisions of the old rule 2.11, that the notice must be published in a daily newspaper circulating generally in the State or Territory where the defendant has its principal, or last known, place of business, will still apply.

These amendments replace the references to rule 2.11 in the relevant subrules and paragraphs with direct or indirect requirements for publication in a daily newspaper

circulating generally in the State or Territory where the defendant has its principal, or last known, place of business.

[15] Paragraph 15A.9 (4) (b)

[16] Subrule 15A.9 (5)

Rule 15A.9 sets out what must be done for 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
- paragraph 3 of article 22 of the Model Law for an order modifying or terminating an order for recognition of a foreign proceeding article 19 or 20 of the Model Law.

These include that the plaintiff must:

- publish a notice of the making of the filing of the application in accordance with rule 2.11 (paragraph 15A.9(4)(b)); and
- if directed to do so by the Court, also publish the notice in a daily newspaper circulating generally in any State or Territory not described in rule 2.11 (subrule 15A.9(5)).

The publication of such notices is not one that is captured by the phoenixing legislation changes and consequently the provisions of the old rule 2.11, that the notice must be published in a daily newspaper circulating generally in the State or Territory where the defendant has its principal, or last known, place of business, will still apply.

These amendments replace the references to rule 2.11 in the relevant subrules and paragraphs with direct or indirect requirements for publication in a daily newspaper circulating generally in the State or Territory where the defendant has its principal, or last known, place of business.

[17] Schedule 1, form 9, paragraph 1

Form 9 is the prescribed form of a notice of application for a winding up order of a company. In the first line of paragraph 1 of this form, the name of the company in relation to which the order is sought must be inserted.

This amendment inserts into paragraph 1, after the requirement for the insertion of name of the corporation, the words ‘and, if applicable, the words ‘trading as’ and any trading name or names of the company’.

Regulation 5.4.01A was inserted in the Corporations Regulations by the *Corporations Legislation Amendment Regulation 2012 (No 1)*. The Regulation specifies the information that must be included in any notification under the Regulations of an application to a court to wind up a company but the Regulation applies only if there are no court rules which specify the required information.

The addition of a requirement to include in Form 9 any trading name of the company achieves consistency between the information required by that form and that required by Regulation 5.4.01A.