

EXPLANATORY STATEMENT

Issued by the authority of the Chief Justice of the Federal Court of Australia on behalf of the Judges of the Court

Federal Court (Corporations) Amendment (Publication of Notices) Rules 2017

Authority for Federal Court Rules

Section 59 of the *Federal Court of Australia Act 1976* (Federal Court Act) permits the Judges of the Federal Court of Australia (Federal Court) or a majority of them, to make Rules of Court not inconsistent with the Federal Court 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 the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and associated matters and things, including costs.

Under subsection 59(4) of the Federal Court Act, the *Legislation Act 2003* (other than sections 8, 9, 10 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.

Background to and Monitoring of the Federal Court (Corporations) Rules 2000

The Federal Court has jurisdiction under the Corporations Act and the ASIC Act to deal with a range of civil proceedings and matters which is (subject to some limitation) concurrent with that of the Family Court of Australia and the Supreme Courts of the States and Territories.

Since 1996, Rules Harmonisation Committees established by the Council of Chief Justices of Australia, and later Australia and New Zealand (the Council), have produced harmonised court rules and forms in a number of distinct areas of common jurisdiction.

Harmonised Rules are prepared by the Committee and endorsed by the Council before adoption. Once Harmonised Rules have been adopted, it is expected that Courts in the

jurisdictions in which the Harmonised Rules are relevant will incorporate the Harmonised Rules into their rules of court, or, where necessary, will request that legislation governing the relevant practice and procedure be amended accordingly. Each participating jurisdiction retains authority to modify the application of the Harmonised Rules to suit the circumstances of that jurisdiction.

The present Harmonisation Committee comprises Judges nominated by the Chief Justices of the Federal Court, Family Court, Supreme Courts of the States and Territories of Australia and the High Court of New Zealand.

In addition to the formulation and drafting of rules and forms in subject areas identified or agreed to by the Council, the role of the Harmonisation Committee is to monitor the operation of all of the harmonised rules and generate amendments to address issues which may arise in one or more jurisdictions or as a result of legislative amendment.

In 1999, the Council adopted Harmonised Corporations Rules which had been prepared by a Harmonisation Committee. In the Federal Court, these were made as the *Federal Court (Corporations) Rules 2000* (Corporations Rules) and took effect on 1 January 2000. Similar rules were made by each Supreme Court of the States and Territories.

Since that time, Harmonisation Committees have monitored those Harmonised Corporations Rules and made a number of recommendations for their amendment consequential to amendments to the Corporations Act, ASIC Act and legislative instruments made under them, as well as developments in relevant case law and practice and procedure in jurisdictions more generally. In turn, these amendments have been adopted by the Council and implemented by each jurisdiction.

Outline of Amendment

The Rules amend rules 3.4, 5.6, 5.10, 5.11, 6.2 and 7.9 of the Corporations Rules. These amendments restore the requirement that notice of certain applications to the Federal Court and orders and appointments made by the Federal Court be published in a daily newspaper circulating generally in the State or Territory where the company or body the subject of the application, order or appointment had its principal, or last known, place of business.

The requirement that such notices be published in that manner was removed from 1 August 2012, in anticipation that publication of these could instead be on the website administered by the Australian Securities and Investments Commission (ASIC) for publication of insolvency and external administration-related notices under the Corporations Act and *Corporations Regulations 2001* (Corporations Regulations). The Corporations Act and the Corporations Regulations, however, limit the notices which ASIC may accept for publication on that website to only those in relation to the winding up of a company made under sections 459P, 462 and 464 of the Corporations Act (see section 465A) and notices which a person (other than ASIC) is required to “publish ... in the prescribed manner” under a provision of the Corporations Act (see section 1367A).

The notices the subject of the amendments are all required to be published under the Corporations Act, Corporations Regulations or Corporations Rules but not by virtue of section 465A or by virtue of any other provision to which section 1367A of the Corporations Act applies, that is to say, not by virtue of any provision of the Corporations Act which requires the notice to be published “in the prescribed manner”. As a result, ASIC has appropriately declined to accept these notices for publication on the website.

These amendments will avoid applicants and liquidators having to obtain, on the commencement of any of the relevant proceedings or when obtaining relevant orders or appointments, a direction on how the notices must be published and, as a result, the cost of doing so having to be met as an expense of the proceeding or liquidation.

Human Rights Scrutiny

Subsection 8(8) of the Legislation Act provides that Rules of Court made for the Federal Court 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.

Explanation and Commencement of the Rules

Details of the Rules are in the Attachment.

The Rules commence on the day after they are registered on the Federal Register of Legislation.

Federal Court (Corporations) Amendment (Publication of Notices) Rules 2017

Outline

Rules 1 to 3 deal with formal matters including the name of the Rules, the commencement date and the source of authority to make Rules of Court. Rule 4 provides that the details of the amendment made by the Rules are set out in the Schedule.

Rule 1 - Name

Rule 1 provides that the Rules are to be cited as the *Federal Court (Corporations) Amendment (Publication of Notices) Rules 2017*.

Rule 2 - Commencement

Rule 2 provides that the Rules commence on the day after they are registered on the Federal Register of Legislation.

Rule 3 - Authority

Rule 3 provides that the Rules are made under the *Federal Court of Australia Act 1976*.

Rule 4 – Schedules

Rule 4 provides that the instrument specified in the Schedule, namely the *Federal Court (Corporations) Rules 2000*, is amended as set out in the items in the Schedule to the Rules.

Schedule 1 - Amendments

From 1 August 2012, the Corporations Rules were amended consequential to the enactment of the *Corporations Amendment (Phoenixing and Other Measures) Act 2012* and *Corporations Legislation Amendment Regulation 2012 (No. 1)* which, in part, implemented the transition from newspaper notices to electronic publication on a single website administered by ASIC of events in the external administration of corporations.

Prior to 1 August 2012, rule 2.11 of the Corporations Rules provided that if a rule required a notice in relation to a company or relevant body be published in accordance with that rule, the notice must be published once in a daily newspaper circulating generally in the State or Territory where the company or body had its principal, or last known, place of business.

Amendments made to the Corporations Rules from 1 August 2012 by the *Federal Court (Corporations) Amendment Rules 2012 (No 1)* omitted the former rule 2.11 and amended

various rules, including 3.4, 5.6, 5.10, 5.11, 6.2 and 7.9, to remove references to the former rule 2.11 in anticipation that publication of these could instead be on the website administered by ASIC for publication of insolvency and external administration-related notices under the Corporations Act and Corporations Regulations.

The Corporations Act and the Corporations Regulations, however, limit the notices which ASIC may accept for publication on that website to only those in relation to the winding up of a company made under sections 459P, 462 and 464 of the Corporations Act (see section 465A) and notices which a person (other than ASIC) is required to “publish ... in the prescribed manner” under a provision of the Corporations Act (see section 1367A).

The notices referred to in items 1 to 7 below are all required to be published under the Corporations Act, Corporations Regulations or Corporations Rules but not by virtue of section 465A or by virtue of any other provision to which section 1367A of the Corporations Act applies, that is to say, not by virtue of any provision of the Corporations Act which requires the notice to be published “in the prescribed manner”. As a result, ASIC has appropriately declined to accept these notices for publication on the website.

The amendment in items 1 to 7 will avoid applicants and liquidators having to obtain, on the commencement of any of the relevant proceeding or when obtaining relevant orders or appointments, a direction on how the notices must be published and, as a result, the cost of doing so having to be met as an expense of the proceeding or liquidation.

Item 1 – Rule 3.4

Rule 3.4 sets out the procedural requirements for applications under section 411(4) of the Corporations Act for an order approving a proposed compromise or arrangement in relation to a company or other relevant body and under section 413(1) of that Act for an order in relation to the reconstruction of such companies or bodies or amalgamation of 2 or more such companies or bodies.

Prior to 1 August 2012, it was required that notices of the hearing of any such applications were to be published in accord with the former rule 2.11. However, from that date, this was removed in anticipation that these notices would, instead, be published electronically on the ASIC website by virtue of regulation 5.6.75 of the Corporations Regulations.

This, however, is not possible and the amendment replaces subrule 3.4(2) to restore the requirement for notice of hearing of any such applications to be published in a newspaper thus avoiding the additional cost of seeking a direction from the Court in these terms.

Item 2 – Rule 5.6

Rule 5.6 requires that notice of an application for the winding up of a company that is made under Parts 2F.1, 5.4 or 5.4A of the Corporations Act be published. Prior to 1 August 2012, it was required that such notices be published in accord with the former rule 2.11. However, from that date, this was removed in anticipation that these notices would, instead, be published electronically on the ASIC website by virtue of regulation 5.6.75 of the Corporations Regulations.

Section 465A of the Corporations Act requires that notice of an application for the winding up of a company that is made under section 459P (in Part 5.4) or sections 462 and 464 (both in Part 5.4A) be “published in the prescribed manner”. Notice of applications under Parts 5.4 and 5.4A, as a result, may be published electronically on the ASIC website by virtue of regulation 5.6.75 of the Corporations Regulations but this is not possible for notice of applications under Part 2F.1.

The amendment adds a new subrule 5.6(3) to restore the requirement for notice of applications under Part 2F.1 to be published in a newspaper, thus avoiding the additional cost of seeking a direction from the Court in these terms.

Item 3 – Rule 5.10

Rule 5.10 permits the Federal Court, if it makes an order under section 465B of the Corporations Act, to also order that the substituted plaintiff or plaintiffs publish a notice stating that the substituted plaintiff or plaintiffs intend to apply for an order that the company be wound up.

Prior to 1 August 2012, it was required that such notices be published in accord with the former rule 2.11. However, from that date, this was removed in anticipation that these notices would, instead, be published electronically on the ASIC website by virtue of regulation 5.6.75 of the Corporations Regulations.

This, however, is not possible and the amendment replaces subrule 5.10(2) to restore the requirement for such notices to be published in a newspaper, thus avoiding the additional cost of seeking a direction from the Court in these terms.

Item 4 – Rule 5.11

Rule 5.11 sets out procedural requirements if the Federal Court orders that a company be wound up and an official liquidator be appointed as liquidator of the company. These include that the liquidator must publish notice of the winding up order and liquidator’s appointment.

Prior to 1 August 2012, it was required that such notices be published in accord with the former rule 2.11. However, from that date, this was removed in anticipation that these notices would, instead, be published electronically on the ASIC website by virtue of regulation 5.6.75 of the Corporations Regulations.

This, however, is not possible and the amendment inserts into subrule 5.11(3) additional words to restore the requirement for such notices to be published in a newspaper, thus avoiding the additional cost of seeking a direction from the Court in these terms.

Item 5 – Rule 6.2

Rule 6.2 sets out the procedural requirements if the Federal Court orders that an official liquidator be appointed as a provisional liquidator of a company. These include that the provisional liquidator must publish notice of the provisional liquidator's appointment.

Prior to 1 August 2012, it was required that such notices be published in accord with the former rule 2.11. However, from that date, this was removed in anticipation that these notices would, instead, be published electronically on the ASIC website by virtue of regulation 5.6.75 of the Corporations Regulations.

This, however, is not possible and the amendment inserts into subrule 6.2(3) additional words to restore the requirement for such notices to be published in a newspaper, thus avoiding the additional cost of seeking a direction from the Court in these terms.

Items 6 and 7 – Rule 7.9

Rule 7.9 of the Corporations Rules sets out the procedural requirements for applications by a liquidator for special leave under subsection 488(2) of the Corporations Act to distribute a surplus. These include that the liquidator must publish a notice of the application in a prescribed form at least 14 days before the hearing.

Prior to 1 August 2012, it was required that such notices be published in accord with the former rule 2.11. However, from that date, this was removed in anticipation that these notices would, instead, be published electronically on the ASIC website by virtue of regulation 5.6.75 of the Corporations Regulations.

This, however, is not possible. Item 6 amends subrule 7.9(1) to clarify that the requirements of the rule relate to a proposed distribution of a surplus by the liquidator in relation to a company. Item 7 inserts into subrule 7.9(2) additional words to restore the requirement for such notices to be published in a newspaper, thus avoiding the additional cost of seeking a direction from the Court in these terms.