



**FEDERAL CIRCUIT COURT OF AUSTRALIA**

**EXPLANATORY STATEMENT**

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

**Federal Circuit Court (Bankruptcy) Amendment (Insolvency and Other Measures) Rules 2017**

**Authority for Federal Circuit Court Rules**

Section 81 of the *Federal Circuit Court of Australia Act 1999* permits the Judges of the Federal Circuit Court of Australia (Federal Circuit 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 81(3) of the *Federal Circuit Court of Australia Act 1999*, 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 Circuit Court of Australia Act 1999* 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 Judge 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 120 of the *Federal Circuit Court of Australia Act 1999*.

**Background to the Federal Circuit Court (Bankruptcy) Rules 2016**

The Federal Circuit Court has jurisdiction under the *Bankruptcy Act 1966* to deal with a range of proceedings and matters which is concurrent with that of the Federal Court of Australia (Federal Court) in bankruptcy. The Family Court of Australia (Family Court) also has jurisdiction under the Bankruptcy Act limited to circumstances where proceedings for property settlement or spousal maintenance under the *Family Law Act 1975* are current in the Family Court.

In addition, the Federal Court has jurisdiction under the *Cross-Border Insolvency Act 2008* to deal with a range of proceedings involving a debtor who is an individual. The Federal Court also has jurisdiction under the Cross-Border Insolvency Act to deal with a range of proceedings involving a debtor other than an individual. That latter jurisdiction is shared with the Supreme Courts of each of the States and Territories of Australia.

With effect from 1 April 2016, the Judges of the Federal Circuit Court made the *Federal Circuit Court (Bankruptcy) Rules 2016*. Parts 1 to 13 deal with the practice and procedure followed in proceedings in the Federal Circuit Court under the Bankruptcy Act. These Parts are closely harmonised with the rules for proceedings under the Bankruptcy Act in the Federal Court (*Federal Court (Bankruptcy) Rules 2016*).

Some rules in the *Family Law Rules 2004* relevant to proceedings under the Bankruptcy Act in which the Family Court has jurisdiction are also harmonised with relevant rules of the Federal Circuit Court and Federal Court in bankruptcy.

To ensure that the harmonised rules for proceedings under the Bankruptcy Act remain current, relevant and appropriate, the Chief Judge of the Federal Circuit Court and Chief Justice of the Federal Court have established a Harmonised Bankruptcy Rules Monitoring Committee. The Committee is chaired by a Judge of the Federal Court and comprised of Judges and Registrars from each of the Federal Court, Family Court and Federal Circuit Court as well as an experienced insolvency practitioner nominated by the Law Council of Australia. Changes to these rules are developed upon the advice of the Committee. Its recommendations are referred to the Rules Committee of each Court for consideration and, if agreed, implementation through the usual processes of the relevant Court.

Part 14 of the Federal Court (Bankruptcy) Rules deals with the practice and procedure followed in proceedings in the Federal Court under the Cross-Border Insolvency Act involving a debtor who is an individual. This Part is modelled on rules developed by the Harmonisation of Rules Committee established by the Council of Chief Justices of Australia and New Zealand and is harmonised with Part 15A of the *Federal Court (Corporations) Rules 2000* for proceedings in the Federal Court under the Cross-Border Insolvency Act by a debtor other than an individual and similar rules for proceedings under that Act involving such a debtor of each of the State and Territory Supreme Courts.

### **Insolvency Reform**

Following extensive community consultation, significant regulatory reforms of Australia's insolvency laws and industry were made by the *Insolvency Law Reform Act 2016*. These included a large number of amendments to the Bankruptcy Act. The first tranche of these, largely concerned with registration and discipline of insolvency practitioners, commenced on 1 March 2017 and the second tranche, dealing with insolvency administration processes, commences on 1 September 2017.

As part of the second tranche of the reforms, the *Insolvency Practice Schedule (Bankruptcy)* (supported by the *Insolvency Practice Rules (Bankruptcy) 2016*) will take effect as Schedule 2 to the Bankruptcy Act. In conjunction, a number of procedural provisions of the former Bankruptcy Act are replaced by equivalent provisions in the new Insolvency Practice Schedule (Bankruptcy).

Consequently, a small number of minor technical changes are required to the harmonised bankruptcy rules for proceedings under the Bankruptcy Act of the Federal Circuit Court and Federal Court. These involve removing or substituting a number of references in rules and notes to rules to repealed sections of the Bankruptcy Act with references, where appropriate, to equivalent replacement provisions in the new Insolvency Practice Schedule (Bankruptcy). In addition, one rule is substituted. It is in substantially the same terms as the existing rule but references, rather than a repealed section of the Bankruptcy Act, the equivalent provision of the new Insolvency Practice Schedule (Bankruptcy) and clarifies that, if the Court makes the order sought under the rule, the applicant must serve a copy of the order on the Official Receiver.

### **Powers that may be exercised by a Registrar in Bankruptcy Proceedings**

Section 81 of the Bankruptcy Act provides expressly that certain powers under that Act may be exercised by Registrars. In addition, the Federal Circuit Court of Australia Act provides, subject to some limitations, that specific powers of the Court may be exercised by a Registrar, including a power of the Court prescribed by rules of court (see section 102).

The harmonised rules for proceedings under the Bankruptcy Act of the Federal Circuit Court and Federal Court set out the powers of the Court under a provision of the Bankruptcy Act which may be exercised by Registrars. There is little guidance in the harmonised bankruptcy rules on specific powers of the Court under provisions of the rules themselves which may be exercised by Registrars other than for some particular powers under some individual rules and by reference to the powers under a provision of the Act which have been delegated to Registrars.

To remove uncertainty, a list of the powers of the Court under a provision of the rules which may be exercised by Registrars over and above those powers included in individual rules has been added.

### **Consultation**

The amendment rules are made on the advice of the Harmonised Bankruptcy Rules Monitoring Committee. The Federal Circuit Court and Federal Court have also consulted with the Australian Financial Security Authority (the agency with regulatory and administrative responsibilities under the Bankruptcy Act) and the Australian Restructuring Insolvency and Turnaround Association (the peak body representing insolvency practitioners in Australia) in relation to the amendment rules. As the amendment rules involve only technical changes, primarily consequential to insolvency law reform which has been the subject of considerable community consultation over several years, further consultation is unnecessary.

### **Human Rights Scrutiny**

Subsection 8(8) of the Legislation Act provides that Rules of Court made for the Federal Circuit 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 1 September 2017.

## Federal Circuit Court (Bankruptcy) Amendment (Insolvency and Other Measures) 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 the Rules of Court. Rule 4 provides the details of the amendments made by the Rules are set out in the Schedule.

### Rule 1 - Name

Rule 1 provides that the Rules are named the *Federal Circuit Court (Bankruptcy) Amendment (Insolvency and Other Measures) Rules 2017*.

### Rule 2 - Commencement

Rule 2 provides that these Rules commence on 1 September 2017.

### Rule 3 - Authority

Rule 3 provides that these Rules are made under the *Federal Circuit Court of Australia Act 1999*.

### Rule 4 - Schedules

Rule 4 provides that the instrument specified in the Schedule, namely the *Federal Circuit Court (Bankruptcy) Rules 2016*, is amended or repealed as set out in the items in the Schedule to the Rules.

### Schedule 1 - Amendments

#### Item 1 - Rule 2.01 (paragraphs (f) and (g) of note 1)

Subrule 2.01(1) requires that a person making an application to the Court under the Bankruptcy Act does so in accordance with Form B2 (Application) if the application is not made in a proceeding that is already commenced in the Court. Note 1 to rule 2.01 provides a non-exhaustive list of examples of applications that must be made using Form B2. It includes applications objecting to the appointment of a person as a trustee under subsection 157(6) of the Bankruptcy Act (item (f)) and for an appeal from a decision of the Inspector-General in Bankruptcy in relation to a review under subsection 167(6) of that Act (item (g)).

As a result of the Insolvency Law Reform Act, sections 157 and 167 of the Bankruptcy Act are repealed and replaced by sections 90-15 and 90-20 and subsection 90-21(3) of the new Insolvency Practice Schedule (Bankruptcy).

Paragraphs (f) and (g) are repealed from Note 1. As the note is a non-exhaustive list, it is not necessary to replace the paragraphs with updated references to sections 90-15 and 90-20 and subsection 90-21(3) of the new Schedule. In any event, section 90-15 of the new Schedule is a general power and may require that applications under it be made using either Form B2 or Form B3 (Interim Application) depending on individual circumstances and the operation of subrule 2.01(1). Inclusion of a reference to new section 90-15 could, as a result, confuse.

Item 2 - Subrule 2.02(1)

Subrule 2.02(1) provides that, for the purposes of paragraph 102(2)(i) of the Federal Circuit Court of Australia Act, the powers of the Court that may be exercised by a Registrar under a provision of the Bankruptcy Act are as set out in Schedule 1.

The existing rules provide little guidance on the powers of the Court under the rules for Bankruptcy Act proceedings themselves which can be exercised by Registrars, although some individual rules provide that particular powers may be so exercised and the powers under a provision of the Act that may be exercised by a Registrar may also assist.

For clarification, subrule 2.02(1) is repealed and a new subrule substituted providing that, for the purposes of paragraph 102(2)(i) of the Federal Circuit Court of Australia Act, the powers of the Court that may be exercised by a Registrar under a provision of the Bankruptcy Act are set out in Part 1 of Schedule 1 and the powers of the Court under a provision of the rules for proceedings under the Bankruptcy Act that may be exercised by a Registrar are set out in Part 2 of Schedule 1.

Item 3 - Rule 8.01

Rule 8.01 requires that an application objecting to the appointment of a person as a trustee under section 157(6) of the Bankruptcy Act be accompanied by an affidavit and that the application and supporting affidavit be served on the trustee and any petitioning creditor at least 28 days before the date fixed for the hearing of the objection. In addition, those documents must be served on each other person known to the objecting creditor to be a creditor of the bankrupt or estate of the deceased person at least 14 days before the date fixed for the hearing of the objection. A note to the rule refers to subsection 157(7A) of the Act. That subsection provides that, if the Court cancels the appointment of a trustee and appoints another trustee, the objecting creditor must give the Official Receiver written notice of the cancellation and appointment as soon as practicable.

As a result of the Insolvency Law Reform Act, section 157 of the Act is repealed and replaced by sections 90-15 and 90-20 of the new Insolvency Practice Schedule (Bankruptcy).

Rule 8.01 is repealed and a new rule is substituted. The new rule is in substantially the same terms as the existing rule but references section 90-20 of the new Schedule and clarifies that if the Court makes under section 90-15 of the new Schedule the order sought, the applicant must, as soon as practicable, serve a copy of the order on the Official Receiver.

Item 4 - Paragraph 8.02(3)(b)

Rule 8.02 deals with an application for the release of a trustee from the trusteeship of an estate under subsection 183(1) of the Bankruptcy Act. Subrule (3) requires that the affidavit in support of such an application must have attached to it "a copy of the most recent account required under subsection 173(1) of the Bankruptcy Act".

Section 173, which requires a trustee to keep accounts and records relating to an estate, is repealed by the Insolvency Law Reform Act and is replaced by section 70-10 of the new Insolvency Practice Schedule (Bankruptcy). New section 70-10 requires that a trustee keep books.

Paragraph 8.02(3)(b) is amended by omitting "the most recent account required under subsection 173(1) of the Bankruptcy Act" and substituting "the books referred to in section 70-10 of Schedule 2 to the Bankruptcy Act in relation to the estate".

Item 5 - Part 14

The Insolvency Law Reform Act contains extensive transitional provisions.

Item 143 of Schedule 1 to that Act provides that a trustee is required to keep accounts and records in relation to the estate in accordance with section 173 of the Bankruptcy Act (as in force immediately before 1 September 2017). For any estate under administration which commenced before 1 September 2017, those accounts and records will be relevant to any application for the release a trustee from the trusteeship of the estate.

The Insolvency Law Reform Act repeals section 173 of the Bankruptcy Act. Item 143 of Schedule 1 to the Insolvency Law Reform Act (as affected by section 4 of the Insolvency Law Reform (Transitional Provisions) Regulation 2016) provides that the requirements in section 173 of the Bankruptcy Act relating to the keeping of accounts and records continue to apply in relation to events occurring before 1 September 2017 despite the repeal of that section. For any estate under administration which commenced before 1 September 2017, the accounts and records required to be kept under section 173 of the Bankruptcy Act will be relevant to any application for the release of a trustee from the trusteeship of the estate.

Part 14, containing transitional provisions relating to the amending rule, is added.

Rule 14.01 applies if an application is made after 1 September 2017 under paragraph 8.02(1)(b) of the rules for proceedings under the Bankruptcy Act and, because of item 143 of the Insolvency Law Reform Act, the trustee is required to keep accounts and records (the **old accounts**) in relation to the estate under section 173 of the Bankruptcy Act (as in force before it was repealed by the Insolvency Law Reform Act). In that event, in addition to the books referred to in paragraph 8.02(3)(b) of the rules, the old accounts must be attached to the affidavit supporting the application.

Items 6 and 7 - Schedule 1

As noted in relation to the repeal and substitution of subrule 2.02(1) above, for clarity, better guidance on the powers of the Court under the harmonised rules for Bankruptcy Act proceedings has being added.

The existing Schedule 1 lists the powers of the Court under a provision of the Act which may be exercised by Registrars. This list is retained unchanged but named as “Part 1 –Bankruptcy Act”.

Schedule 1 is also amended by adding a new part, named “Part 2 – Federal Circuit Court (Bankruptcy) Rules 2016”, listing the powers of the Court under the rules for proceedings under the Bankruptcy Act which may be exercised by Registrars. These are the powers under rule 1.04, rule 2.03, rule 2.06, subrule 3.03(5), rule 4.05, rule 6.02, rule 6.07, rule 6.13, paragraph 8.02(4)(c), rule 11.02, rule 11.05 and rule 13.01. To avoid confusion, rule provisions which explicitly confer on Registrars particular powers (for example rules 6.09, 6.10 and 12.02) are not included in this list.