

FAMILY LAW AMENDMENT (INSOLVENCY LAW REFORM)

RULES 2017

EXPLANATORY STATEMENT

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

Section 123 of the *Family Law Act 1975* (the Act) provides that the Judges of the Family Court of Australia, or a majority of them, may make Rules of Court providing for the practice and procedure to be followed in the Family Court and some other courts exercising jurisdiction under the Act. The Judges of the Court made the *Family Law Rules 2004* (the Rules) which commenced on 29 March 2004. These amending Rules, the *Family Law Amendment (Insolvency Law Reform) Rules 2017* (the FLAR), have now been made by the Judges to amend the Rules.

Section 123(2) of the Act provides that the *Legislation Act 2003* (other than sections 8, 9, 10 and 16) applies to Rules of Court. In this application, references to a legislative instrument in the Act are to be read as references to Rules and references to a rule-maker as references to the Chief Justice.

Section 8(8)(d) of the *Legislation Act 2003* provides that the Rules of Court made for the Family 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.

1. GENERAL OUTLINE

The Federal Court of Australia (the Federal Court) and the Federal Circuit of Australia (the Federal Circuit Court) have almost concurrent jurisdiction under the *Bankruptcy Act 1966* (the Bankruptcy Act). The Family Court of Australia also has jurisdiction in limited circumstances under the Bankruptcy Act in relation to property settlement or spousal maintenance proceedings under the Act. Chapter 26 of the Rules sets out the rules about a case in which a Family Court has jurisdiction in bankruptcy under section 35, 35A or 35B of the Bankruptcy Act. The *Insolvency Law Reform Act 2016* (the Insolvency Law Reform Act) amended a number of procedural provisions of the Bankruptcy Act. As a consequence of the Insolvency Law Reform Act a small number of minor technical changes to the Rules are required to update references to provisions that are repealed or replaced. Rule 26.26 of the FLAR is substituted in substantially the same terms as the existing rule with an additional requirement that a copy of an order made about a person ceasing to be the trustee of an estate or another person being appointed as trustee of an estate be served on the Official Receiver.

The general rule making power conferred on the Judges of the Court (or the majority of them) by s 123(1) of the Act provides the source of the power for the amendments. In addition to the general rule making power the Judges are conferred with specific rule making power by s 123(1)(bb) in relation to proceedings transferred to the Family Court under s 35A of the Bankruptcy Act.

2. CONSULTATION

The Federal Court and the Federal Circuit Court have harmonised rules for proceedings under the Bankruptcy Act in the *Federal Court (Bankruptcy) Rules 2016* (the Federal Court (Bankruptcy) Rules) and the *Federal Circuit Court (Bankruptcy) Rules 2016* (the Federal Circuit Court (Bankruptcy) Rules). The Rules relevant to proceedings under the Bankruptcy Act in which the Family Court has jurisdiction are also harmonised with the Federal Court (Bankruptcy) Rules and the Federal Circuit Court (Bankruptcy) Rules.

To ensure that the harmonised rules for proceedings under the Bankruptcy Act remain current, relevant and appropriate, the Chief Justice of the Federal Court and Chief Judge of the Federal Circuit Court have established a Harmonised Bankruptcy Rules Monitoring Committee (the Committee). The Committee is chaired by a Judge of the Federal Court and is 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 the 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. The Committee considered the amendments required for the harmonised rules as a consequence of the Insolvency Reform Act.

Also the reforms made by the Insolvency Law Reform Act followed extensive community consultation. The FLAR involve minor technical changes as a consequence of the Insolvency Law Reform Act. No further consultation is considered necessary.

The FLAR mirror the amendments to the equivalent provisions of the Federal Court (Bankruptcy) Rules and the Federal Circuit Court (Bankruptcy) Rules.

3. SUMMARY OF MAJOR CHANGES

Part 26.2 — General

- a. To repeal paragraph (d) of the Note to rule 26.04 that provides for a Bankruptcy Application in a Case to be filed in relation to an application under repealed subsection 157(6) of the Bankruptcy Act, objecting to the appointment of a person as a trustee.
- b. To repeal paragraph (g) of the Note to rule 26.04 that provides for a Bankruptcy Application in a Case to be filed in relation to an appeal from a decision of a taxing officer under repealed section 167(8) of the Bankruptcy Act in relation to allowing or disallowing a bill of costs or item in a bill of costs.

Part 26.5 — Trustees

- c. To repeal and substitute in substantially similar form rule 26.26 about applications in relation to the appointment of a trustee and include an updated reference to the relevant equivalent provision of the Bankruptcy Act and also add a requirement that a copy of a court order be served on the Official Receiver.
- d. To replace the requirement that an application for acceptance of a trustee's resignation from the office of trustee of an estate or release of a trustee from the trusteeship of an estate be accompanied by a copy of the most recent of the accounts required under the repealed subsection 173(1) of the Bankruptcy Act with the requirement to provide the books referred to in section 70-10 of Schedule 2 to the Bankruptcy Act.

Part 27.2 — Transitional provisions relating to the Family Law Amendment (Insolvency Law Reform) Rules 2017

- e. To provide that when an application for resignation or release of a trustee is made under rule 26.27 in relation any estate under administration on 1 September 2017 the previous requirements will continue to apply. Both the old accounts under repealed subsection 173(1) and the books under section 70-10 of the Bankruptcy Act must accompany the application.

4. DETAILS OF AMENDMENTS

Rule 1 Name

The name of the Rules is the *Family Law Amendment (Insolvency Law Reform) Rules 2017*.

Rule 2 Commencement

The Rules commence on 1 September 2017.

Rule 3 Authority

The Rules are made under the *Family Law Act 1975*.

Rule 4 Schedules

Schedule 1 amends the *Family Law Rules 2004*.

Schedule 1 — Amendments

[1] Rule 26.04 (paragraph (d) of the note)

Rule 26.04 requires that a person making an application to the court under the Bankruptcy Act in a bankruptcy case that has not already commenced must do so by filing a Bankruptcy Application. Otherwise an application under the Bankruptcy Act must be made by filing a Bankruptcy Application in a Case. The note to rule 26.04 provides a non-exhaustive list of applications and appeals that must be commenced by filing the Bankruptcy Application in a Case. The amendment repeals paragraph (d) from the note which provides that an application under subsection 157(6) of the Bankruptcy Act objecting to the appointment of a person as a trustee must be made by filing a Bankruptcy Application in a Case. Section 157 of the Bankruptcy Act has been repealed by the Insolvency Law Reform Act.

[2] Rule 26.04 (paragraph (f) of the note)

The semicolon at the end of the paragraph is replaced by a full stop because paragraph (f) becomes the last paragraph in the note.

[3] Rule 26.04 (paragraph (g) of the note)

The amendment repeals paragraph (g) of the note which provides that an appeal from a decision of a taxing officer appointed under subsection 167(8) of the Bankruptcy Act in relation to a bill of costs must be made by filing a Bankruptcy Application in a Case. Section 167 of the Bankruptcy Act has been repealed by the Insolvency Law Reform Act.

[4] Rule 26.26

The amendment substitutes rule 26.26, which provides for applications in relation to the appointment of a trustee, in substantially the same terms. The amendment replaces the reference to subsection 157(6) of the Bankruptcy Act, repealed by the Insolvency Reform Law, with a reference to the new section 90-20 of Schedule 2 to the Bankruptcy Act. The amendment provides for an additional requirement that if the court makes the order sought (either that a person ceases to be the trustee of an estate or that another person be appointed as the trustee of an estate) the applicant must serve a copy of the order on the Official Receiver as soon as practicable.

[5] Subparagraph 26.27(1)(b)(ii)

The amendment omits the reference to the requirement for an application for acceptance of a trustee's resignation from the office of trustee or release of a trustee from the trusteeship of an estate to be accompanied by a copy of the most recent of the accounts required under the

repealed subsection 173(1) of the Bankruptcy Act. The amendment substitutes the requirement to provide the books referred to in section 70-10 of Schedule 2 to the Bankruptcy Act.

[6] In the appropriate position in Chapter 27 Part 27.2—Transitional provisions relating to the Family Law Amendment (Insolvency Law Reform) Rules 2017

The amendment ensures that for any estate under administration on 1 September 2017 the previous requirements will continue to apply and when an application for resignation or release of a trustee is made under rule 26.27 then both the old accounts under repealed subsection 173(1) and the books under section 70-10 must accompany the application.