

***FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA***  
***(DIVISION 2) (BANKRUPTCY) RULES 2021***

**EXPLANATORY STATEMENT**

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)  
(BANKRUPTCY) RULES 2021

**EXPLANATORY STATEMENT**

**Issued by the authority of the Chief Judge of the Federal Circuit and Family Court of Australia (Division 2)**

The Federal Circuit and Family Court of Australia bills were passed on 18 February 2021. The *Federal Circuit and Family Court of Australia Act 2021* (the Federal Circuit and Family Court Act) unifies the administrative structure of the Family Court of Australia and the Federal Circuit Court of Australia (Federal Circuit Court) to create the Federal Circuit and Family Court of Australia. The Federal Circuit and Family Court Act commences operation on 1 September 2021.

Section 8 of the Federal Circuit and Family Court Act provides that from the commencement day of the Federal Circuit and Family Court Act, the Family Court of Australia is continued in existence as the Federal Circuit and Family Court of Australia (Division 1). The Federal Circuit Court is continued in existence as the Federal Circuit and Family Court of Australia (Division 2). General federal law proceedings, including bankruptcy proceedings, will be heard only in Division 2. The jurisdiction of the Federal Circuit and Family Court (Division 2) to deal with bankruptcy matters is the same as the jurisdiction of the Federal Circuit Court in those matters and is concurrent with the jurisdiction of the Federal Court of Australia. The Federal Circuit and Family Court (Division 1) 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.

Subsection 217(1) of the Federal Circuit and Family Court Act provides that the Chief Judge may make Rules of Court providing for, or in relation to, the practice and procedure to be followed in the Federal Circuit and Family Court of Australia (Division 2). The rules may also provide for all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Court.

The power to make Rules of Court under section 217 of the Federal Circuit and Family Court Act will be amended 18 months after section 217 commences to provide for the Rules to be made by the Judges of the Federal Circuit and Family Court (Division 2), or a majority of them (see Part 4 of Schedule 1 to the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021*).

With effect from 1 April 2016, the Judges of the Federal Circuit Court made the *Federal Circuit Court (Bankruptcy) Rules 2016* (existing Bankruptcy Rules) in relation to the practice and procedure to be followed in proceedings in the Federal Circuit Court under the Bankruptcy Act. These Rules were harmonised with the rules for proceedings under the Bankruptcy Act in the Federal Court of Australia as well as some rules in the *Family Law Rules 2004* relevant to proceedings under the Bankruptcy Act in which the Family Court of Australia has jurisdiction. These new Rules, the *Federal Circuit and Family Court of Australia (Division 2) (Bankruptcy) Rules 2021* have been made by the Chief Judge of the Federal Circuit and Family Court (Division 2), in consultation with the Judges of

the FCFCOA (Division 2), to replace the existing Bankruptcy Rules with effect from the commencement date of the Federal Circuit and Family Court, being 1 September 2021.

Subsection 217(3) of the Federal Circuit and Family Court Act provides that the *Legislation Act 2003* (Cth) (other than sections 8, 9, 10, 16 and Part 4 of Chapter 3) applies to rules of court. In this application, a reference to a legislative instrument is to be read as a reference to a rule of court.

The Court has proceeded on the basis that a statement of compatibility with human rights is not required to be included in an explanatory statement to rules of court, as whilst the Federal Circuit and Family Court Act applies the *Legislation Act 2003* (Cth) to rules of court, it does not expressly translate a reference to a legislative instrument in legislation other than the *Legislation Act 2003* (Cth) into a reference to rules of court, such as in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The Court notes that different views are held as to whether a statement of compatibility with human rights is formally required to be included in an explanatory statement to rules of court. However for the avoidance of doubt, a statement of compatibility with human rights is included below.

### **Development and consultation on these Rules**

The *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth) repeals the Federal Circuit Court Act in its entirety on the day the Federal Circuit and Family Court Act commences. The existing Bankruptcy Rules are made under the Federal Circuit Court Act and will lapse on that day.

The Federal Circuit and Family Court has developed new rules to replace the existing Bankruptcy Rules in the Federal Circuit and Family Court of Australia. These Rules are substantially the same as the existing Bankruptcy Rules and remain substantially harmonised with the rules for proceedings under the Bankruptcy Act in the Federal Court. These Rules do not substantially alter existing arrangements.

Consultation with Judges and Registrars of the Court occurred in the development of the Rules, as well as consultation with the Harmonised Bankruptcy Rules Monitoring Committee – a joint committee with the Federal Court of Australia.

Due to the minimal changes being made, limited consultation occurred with the legal profession via the Australian Bar Association and Law Council of Australia.

## Statement of Compatibility with Human Rights

### Federal Circuit and Family Court of Australia (Division 2) (Bankruptcy) Rules 2021

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

#### Overview of the Legislative Instrument

The *Federal Circuit and Family Court of Australia (Division 2) (Bankruptcy) Rules 2021* (the Rules) are made under the Federal Circuit and Family Court Act, which continues in existence the Federal Circuit Court as Division 2 of the Federal Circuit and Family Court of Australia (the Court).

The Rules address the practice and procedure to be followed in the conduct of proceedings in the Court to which the Bankruptcy Act applies. Accordingly, the Rules are procedural in nature and are essential for the efficient administration of bankruptcy proceedings in the Court. In light of the repeal of the Federal Circuit Court Act, the Rules remake the Bankruptcy Rules, replicating those rules with only minor adjustments.

#### Human rights implications

The impact of the Rules on the following human rights has been considered:

- the rights of equality and non-discrimination,
- the right to a fair trial,
- the right to privacy and reputation, and
- the right to security of the person and freedom from arbitrary detention.

As the provisions in the Rules replicate existing provisions of the Bankruptcy Rules, there is almost no change in the treatment of the rights mentioned above. As such, while the Rules promote human rights by increasing access to justice, the limitations they impose on human rights maintain existing limitations. The Rules do not alter the substantive powers of the judiciary or the rights of parties to have a matter heard by the Court.

#### *Right to equality and non-discrimination*

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states that ‘[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

Section 217 of the Act permits the Chief Judge of the Court to make Rules of Court providing for the practice and procedure to be followed in Division 2 of the Court (including the practice and procedure to be followed in Registries of the Court).

The Rules address procedural matters relevant to all bankruptcy proceedings. They are harmonised with the *Federal Court (Bankruptcy) Rules 2016* to achieve consistency in bankruptcy proceedings in the two jurisdictions, thereby promoting equality and non-discrimination before the law.

### *Right to a fair trial and fair hearing rights*

Article 14 of the ICCPR enshrines the right of a person to a fair trial. Specifically, article 14(1) provides that ‘all persons shall be equal before courts and tribunals’ and ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’. The right to a fair trial is engaged by laws that regulate the conduct of court proceedings.

What constitutes a fair hearing requires recognition of the interests of all parties in a civil proceeding and requires that all parties to a proceeding have a reasonable opportunity of presenting their case in circumstances that do not disadvantage them as against other parties to the proceedings.

Each of rules 6.02, 6.07 and 6.13 provides that an application for a person to be summoned for examination may be heard in closed court. The hearing of an application in closed court has the potential to limit the fairness of a hearing.

The possibility of a closed court hearing of an application for a summons addresses the legitimate objective of improving the efficiency of court proceedings and avoiding a person’s unnecessary involvement in court proceedings, as the application for the summons may be refused. If the Court or Registrar does issue the summons, each of rules 6.05, 6.11 and 6.11 provides that the person on whom the summons is served may apply for an order to discharge the summons. The examination, which is the purpose of the summons, must be held in public (see sections 50 and 81 of the Bankruptcy Act).

The Rules address the legitimate objective of promoting the administration of justice and improving the efficiency of court proceedings. Any potential limitation on the right to a fair trial entailed by hearing an application in closed court, is reasonable, necessary and proportionate to this objective.

### *Prohibition on interference with privacy*

Article 17 of the ICCPR prohibits unlawful or arbitrary interference with a person's privacy and correspondence. It provides that persons have the right to the protection of the law against such interference.

The prohibition on interference with privacy may be engaged by legislation that involves mandatory disclosure of information. Relevantly, the right may be impacted by Part 6 of the Rules, which deals with examinations and the summoning of examinable persons for examination.

The power to summon an examinable person arises under the Bankruptcy Act.

- Section 50 of the Bankruptcy Act provides that the Court may summon a debtor, or an examinable person in relation to the debtor, for examination in relation to the debtor. The summons requires the person to attend to be examined on oath.
- Section 81 of the Bankruptcy Act provides that the Court may summon:
  - (a) a person who has become a bankrupt or
  - (b) another person in relation to the person who has become a bankrupt, for examination in relation to the bankruptcy.

The summons requires the person to attend to be examined on oath.

The Rules do not create the power to summon a person for examination. They deal with the procedure of applying for the summons. As such, the rules in Part 6 do not limit the right to freedom from interference with privacy.

*The right to security of the person and freedom from arbitrary detention*

Article 9 of the ICCPR requires that persons not be subject to arrest and detention, except as provided for by law, and provided that neither the arrest nor the detention is arbitrary. The right applies to all forms of detention where people are deprived of their liberty. This right may be engaged by policies and laws which grant a power of arrest.

The Rules may impact this right to freedom from arbitrary detention, as certain provisions relate to arrest powers created by the Bankruptcy Act. For example:

- Section 78 of the Bankruptcy Act permits a Court to issue a warrant for the arrest of a debtor or bankrupt in certain circumstances, including where they have absconded to avoid paying their debts, they have destroyed or concealed property or books relating to their examinable affairs, or they have failed to comply with a Court order. Rule 12.01 provides that the person who carried out the arrest must immediately give notice of the arrest to a Registrar in the Registry from which the warrant was issued.
- Subsection 264B(1) of the Bankruptcy Act permits a Court to issue an arrest warrant to apprehend a debtor who, despite a Court summons, fails to attend before the Court. Rule 12.02 provides that, the person who carried out the apprehension must immediately give notice of the apprehension to a Registrar in the Registry from which the warrant was issued.

These provisions do not create the power to arrest a debtor, but instead place limits upon the person executing an arrest warrant. As such, rules 12.01 and 12.02 promote the right to freedom from arbitrary arrest and detention.

**Conclusion**

The Rules are compatible with human rights because they promote the rights to equality and non-discrimination, and place limits on the Act's ability to interfere with a person's freedom from arbitrary arrest and detention. To the extent that the Regulations may limit certain human rights, those limitations are reasonable, necessary and proportionate.

## **Details of rules**

### **Part 1—Preliminary**

Part 1 deals with preliminary matters and is substantially the same as Part 1 of the existing Bankruptcy Rules.

Rule 1.01 provides that these Rules are to be cited as the *Federal Circuit and Family Court of Australia (Division 2) (Bankruptcy) Rules 2021*.

Rule 1.02 provides that these Rules commence on 1 September 2021.

Rule 1.03 provides that these Rules are made under Chapter 4 of the *Federal Circuit and Family Court of Australia Act 2021*.

Rule 1.04 provides that these Rules apply to a proceeding in the Court to which the Bankruptcy Act applies; and, in addition, that the other rules of the Court apply to a proceeding in the Court under the Bankruptcy Act but only to the extent that they are relevant and not inconsistent with these Rules.

Rule 1.05 defines, for the purposes of these Rules, the meaning of a number of terms used in the Rules and provides that an expression used in both the Rules and in the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* has the same meaning in these Rules as it does in those Rules.

Rule 1.06 provides that an expression used in these Rules and in the Bankruptcy Act has the same meaning in these Rules as it does in the Bankruptcy Act. For the assistance of court users, the rule also contains a non-exhaustive list of terms used in the Rules and in the Bankruptcy Act.

Rule 1.07 provides that the Chief Judge may approve forms for the purposes of these Rules and notes that these will be made available on the Court’s website at [www.fcfoa.gov.au](http://www.fcfoa.gov.au). A reference in the Rules to “Form” followed by the letter “B” and a number (for example “Form B1”) is a reference to an approved form so numbered.

The rule also provides that it is sufficient compliance with these Rules if a document required to be in accordance with an approved form is substantially in accordance with that form with only such variations as the nature of the case requires and that, where no approved form is specified for a particular purpose, a form specified in other rules of the Court for the same purpose may be used but it must use the heading title for bankruptcy proceedings approved by the Chief Judge (Form B1).

### **Part 2—General**

Part 2 contains rules dealing with:

- the form and content of an application to commence a proceeding;
- powers of the Court that may be exercised by a Registrar;
- the exercise of delegated powers by a Registrar;
- the granting of leave to be heard to a person who is not a party to the proceeding;
- appearance at a hearing or examination;
- adjournment of the first court date for the creditor’s petition;
- the inapplicability of rule 10.02 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* to the hearing date fixed for a creditor’s petition;

- opposition to an application, interim application or petition.

Rule 2.01 deals with the form and content of an application to commence a proceeding (where this is not otherwise specified in the Rules) and of an interim application in a proceeding that has been commenced (rule 2.01). For the assistance of court users, rule 2.01 also contains a non-exhaustive list of applications where the general form of application (Form B2) and form of interim application (Form B3) must be used. The non-exhaustive list does not include a reference to an application for review of the exercise of a power made by a Registrar as this must be made by filing a form B3A in the Federal Circuit and Family Court. The rule is substantially the same as rule 2.01 of the existing Bankruptcy Rules.

Rule 2.02 deals with the exercise of Court powers by a Registrar. Subrule 2.02(1), together with Schedule 1, prescribes, for the purposes of paragraph 254(2)(1) of the Federal Circuit and Family Court Act, powers of the Court that may be exercised by a Registrar. The subrule is substantially the same as subrule 2.02(1) of the existing Bankruptcy Rules.

Subrule 2.02(2) delegates to a Registrar approved by the Chief Judge, for the purposes of subsection 254(1) of the Federal Circuit and Family Court Act, a power of the Court specified in Schedule 1. Subrule 2.02(2) has no equivalent in the existing Bankruptcy Rules.

Subrule 2.02(3) provides that, subject to any direction by the Court or a Judge to the contrary, an application under subsection 256(1) of the Act for review of the exercise of a power of the Court by a Registrar must be made by filing an application in accordance with Form B3A within 21 days after the day on which the power was exercised. The subrule is substantially the same as subrule 2.02(3) of the existing Bankruptcy Rules.

Rule 2.03 deals with the Court's power to grant leave, including conditional leave, to a person who is not a party to a proceeding to be heard in the proceeding. The rule is substantially the same as rule 2.03 of the existing Bankruptcy Rules.

Rule 2.04 requires a person who intends to appear at the hearing of an application or petition, or take part in an examination, to file a notice of appearance in accordance with Form B4. The rule is substantially the same as rule 2.04 of the existing Bankruptcy Rules.

Rule 2.05 provides that rule 10.02 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Adjournment of first court date) does not apply to the return date fixed for a creditor's petition. Rule 2.05 is substantially the same as rule 2.05 of the existing Bankruptcy Rules.

Rule 2.06 requires a person who intends to oppose an application or petition to file a notice of appearance in accordance with Form B4, a notice stating the grounds of opposition in accordance with Form B5 and an affidavit in support and to serve the notices and affidavit on the applicant, at least 3 days before the date fixed for the hearing. The rule is the same as rule 2.06 of the existing Bankruptcy Rules.

### **Part 3—Bankruptcy notices**

Part 3 deals with bankruptcy notices and is substantially the same as Part 3 of the existing Bankruptcy Rules.



Rule 3.01 provides that an application under section 309(2) of the Bankruptcy Act for substituted service of a bankruptcy notice must be accompanied by an affidavit stating the grounds in support of the application to which a copy of the bankruptcy notice must be attached.

Rule 3.02 provides that:

- an application to set aside a bankruptcy notice under the Bankruptcy Act must be accompanied by an affidavit setting out the grounds in support of the application and the date when the bankruptcy notice was served on the applicant;
- a copy of the bankruptcy notice must be attached to that affidavit;
- if the application is based on the ground that the debtor has a counter-claim, set-off or cross demand mentioned in paragraph 40(1)(g) of the Bankruptcy Act, that affidavit must also include:
  - full details of the counter-claim, set-off or cross-demand; and
  - the amount of the counter-claim, set-off or cross-demand and the amount by which it exceeds the amount claimed in the bankruptcy notice; and
  - why the counter-claim, set-off or cross-demand was not raised in the proceeding that resulted in the judgment or order;
- if the application is based on the ground that the debtor has instituted proceedings to set aside a judgment or order in relation to which the bankruptcy notice was issued, a copy of that application and any material in support must also be attached to that affidavit; and
- the application and supporting affidavit must be served on the creditor within 3 days after the application is filed.

For the assistance of court users, notes to rule 3.02 reference the legislative provisions for extension of time for compliance with a bankruptcy notice and deemed extension of time for relevant applications.

Rule 3.03 deals with an application for an extension of time under subsection 41(6A) of the Bankruptcy Act for compliance with a bankruptcy notice. An application must be accompanied by an affidavit:

- stating the grounds in support of the application and the date when the bankruptcy notice was served on the applicant; and
- a copy of the bankruptcy notice and a copy of any application to set aside the judgment or order in relation to which the notice was issued and any material in support of that application must be attached to that affidavit.

The application may be made in the absence of another party and need be heard in open court only if it is for an extension of time to a date after the first directions hearing. If an order extending the time for compliance is made, the application, the order and any supporting documents must be served on the respondent within 3 days after the order is made.

#### **Part 4 – Creditors’ petitions**

Part 4 applies in relation to a creditor’s petition seeking a sequestration order against the estate of a debtor (rule 4.01). Part 4 is substantially the same as Part 4 of the existing Bankruptcy Rules.

Rule 4.02 deals with the form and content of a creditor’s petition and the documents that must accompany it.

Rule 4.03 deals with the additional information that must be included in the affidavit verifying a petition which is founded on an act of bankruptcy mentioned in paragraph 40(1)(d) of the Bankruptcy Act.

Rule 4.04 deals with the additional documents that must accompany a creditor's petition which is founded on an act of bankruptcy mentioned in paragraph 40(1)(g) of the Bankruptcy Act.

Rule 4.05 prescribes the documents that, unless the Court otherwise orders, the applicant creditor must serve on the respondent debtor at least 5 days before the date fixed for the hearing of a creditor's petition.

Rule 4.06 sets out the additional affidavits that the applicant creditor must file before the hearing of a creditor's petition.

Rule 4.07 requires a sequestration order to be in accordance with Form B7. The rule also sets out the times within which the applicant creditor must notify the trustee of, and enter, a sequestration order against the estate of the debtor.

Rule 4.08 sets out the time within which the applicant creditor must enter an order dismissing a creditor's petition, giving leave for a petition to be withdrawn, or made under subsection 52(5) of the Bankruptcy Act (being an order to extend the time before the petition will lapse).

Rule 4.09 requires the applicant creditor to serve an order that is entered under rule 4.07 or 4.08 on any person who has consented to act as trustee under section 156A of the Bankruptcy Act and on the Official Receiver within 2 days after the entry is stamped.

#### **Part 5—Debtors' petitions**

Part 5 deals with debtors' petitions and is substantially the same as Part 5 of the existing Bankruptcy Rules.

Rule 5.01 sets out the procedure in relation to a referral to the Court by the Official Receiver of a debtor's petition for a direction to accept or reject the petition:

- the referral must be in accordance with Form B8;
- a Registrar must fix a time, date and place for the hearing of the referral;
- at least 3 days before the date fixed, the Official Receiver must serve a sealed copy of the referral and the notice, in accordance with Form B8, of the time, date and place fixed for hearing on all relevant debtors and creditors and, if subsection 56C(4) of the Bankruptcy Act applies, the person administering the relevant proclaimed law.

#### **Part 6—Examinations**

Part 6 sets out the rules in relation to an examination of a debtor, examinable person or relevant person. Part 6 is substantially the same as Part 6 of the existing Bankruptcy Rules.

Division 6.1 deals with an application to examine a debtor or examinable person under section 50 of the Bankruptcy Act.

Rule 6.01 provides that an application under section 50 of the Bankruptcy Act for a debtor, or examinable person in relation to the debtor, to be summoned for an examination must be in Form B2 and accompanied by an affidavit which:

- identifies the person to be examined and, if that person is an examinable person in relation to a debtor, the debtor in relation to whom the examination is to be conducted;
- if the person sought to be examined is an examinable person, states the facts relied on by the applicant to establish that the person to be summoned is an examinable person; and
- identifies any books that are to be produced and gives details of any inquiry by the applicant about the books to be produced and any refusal by the person to cooperate with the inquiry.

A note to subrule 6.01(1) clarifies that more than one application may be included in the same Form B2.

Rule 6.02 specifies that an application for a summons under rule 6.01 may be heard in the absence of a party or in closed court.

Rule 6.03 requires that:

- a summons under subsection 50(2) of the Bankruptcy Act be in accordance with Form B9;
- a Registrar sign and affix the stamp of the Court to the summons and give it to the applicant for service on the person to be examined; and
- the summons identify any books that are to be produced pursuant to the summons.

Rule 6.04 provides that the applicant must, at least 8 days before the date fixed for the examination:

- serve the summons on the relevant person personally, or as directed by the Court or a Registrar; and
- give written notice of the date, time and place fixed for the examination to each person known to the applicant to be a creditor of the debtor.

Rule 6.05 provides that a person served with a summons may apply for an order to discharge that summons by filing, at least 3 days before the date fixed for the examination, an interim application in accordance with Form B3 and a supporting affidavit setting out the grounds for the application. As soon as possible after filing the application and supporting affidavit, a copy of the application and supporting affidavit must be served on the person who applied for the summons and, if that person is not the Official Receiver, also on the Official Receiver.

Division 6.2 deals with an application to examine a relevant person under section 81 of the Bankruptcy Act.

Rule 6.06 provides that an application for a relevant person to be summoned for examination under section 81 of the Bankruptcy Act must be in accordance with Form B10 and must be accompanied by a draft of the summons applied for as well as an affidavit which:

- states whether the applicant is a creditor with a debt provable in the bankruptcy, the trustee of the relevant person's estate or the Official Receiver; and
- if the person is being summoned to produce books, identifies the books that are to be produced and contains details of any inquiry by the applicant about those books and any refusal by the relevant person to cooperate with that inquiry.

A note to subrule 6.06(1) clarifies that more than one application may be included in the same Form B10.

Rule 6.07 provides that an application for examination summons under rule 6.06 may be heard in the absence of a party or in closed court.

Rule 6.08 requires that:

- a summons under subsection 81(1) of the Bankruptcy Act be in accordance with Form B9;
- a Registrar sign and affix the stamp of the Court to the summons and give it to the applicant for service on the person to be examined;
- the summons identify any books that are to be produced pursuant to the summons.

Rule 6.09 requires that the applicant, at least 8 days before the date fixed for the examination:

- serve the summons on the relevant person personally, or as directed by the Court or a Registrar; and
- give written notice of the date, time and place fixed for the examination to each person known to the applicant to be a creditor of the relevant person.

Rule 6.10 gives the Court or a Registrar the power to either adjourn an examination or discharge the summons if the relevant person does not appear for the examination.

Rule 6.11 provides that a person served with a summons may apply for an order to discharge that summons by filing, at least 3 days before the date fixed for the examination, an interim application in accordance with Form B3 and a supporting affidavit setting out the grounds for the application. As soon as possible after filing the application and supporting affidavit, a copy of the application and supporting affidavit must be served on the person who applied for the summons and, if that person is not the Official Receiver, also on the Official Receiver.

Division 6.3 deals with an application to examine an examinable person under section 81 of the Bankruptcy Act.

Rule 6.12 provides that an application under section 81 of the Bankruptcy Act for an examinable person to be summoned for examination must be in accordance with Form B10 and must be accompanied by a draft of the summons applied for as well as an affidavit which:

- states whether the applicant is a creditor with a debt provable in the bankruptcy, the trustee of the relevant person's estate or the Official Receiver;
- states the facts relied on by the applicant to establish that the person to be summoned is an examinable person;
- if the person is being summoned to produce books, identifies the books that are to be produced and details of any inquiry by the applicant about those books and any refusal by the examinable person to cooperate with that inquiry;
- if lodged for filing other than by electronic means, may be filed in a sealed and marked envelope and, in that event, the affidavit cannot then be made available for public inspection; and
- if lodged for filing by electronic means, may be accompanied by a statement that the affidavit is confidential and, in that event, it cannot then be made available for public inspection.

A note to subrule 6.12(1) clarifies that more than one application may be included in the same Form B10.

Rule 6.13 provides that an application for examination summons under rule 6.12 may be heard in the absence of a party or in closed court.

Rule 6.14 requires that:

- a summons under subsection 81(1) of the Bankruptcy Act be in accordance with Form B9;
- a Registrar sign and affix the stamp of the Court to the summons and give it to the applicant for service;
- the summons identify any books that are to be produced pursuant to the summons.

Rule 6.15 provides that the applicant must, at least 8 days before the date fixed for the examination:

- serve the summons on the relevant person personally, or as directed by the Court or a Registrar; and
- give written notice of the date, time and place fixed for the examination to each person known to the applicant to be a creditor of the relevant person.

Rule 6.16 provides that a person served with a summons under subsection 81(1) of the Bankruptcy Act may apply for an order to discharge that summons by filing, at least 3 days before the date fixed for the examination, an interim application in accordance with Form B3 and a supporting affidavit setting out the grounds for the application. As soon as possible after filing the application and supporting affidavit, a copy of the application and supporting affidavit must be served on the person who applied for the summons and, if that person is not the Official Receiver, also on the Official Receiver. The Court or a Registrar may make the order to discharge.

Rule 6.17 deals with conduct money and witness expenses in relation to an examinable person who attends an examination in accordance with a summons under subsection 81(1) of the Bankruptcy Act. It provides that the applicant for the summons must, within a reasonable time before the examination, pay to the person:

- enough conduct money to cover the reasonable expenses of travelling to and from the place where the person lives and any reasonable accommodation expenses; and
- reasonable expenses for the person's attendance as a witness.

## **Part 7—Annulment or review of bankruptcy**

Part 7 deals with the annulment or review of bankruptcy and is substantially the same as Part 7 of the existing Bankruptcy Rules.

Division 7.1 deals with the annulment of a bankruptcy.

Rule 7.01 provides that the Division applies to applications:

- under section 153B of the Bankruptcy Act for the annulment of a bankruptcy; and
- under section 252B of the Bankruptcy Act for the annulment of the administration of the estate of a deceased person.

Rule 7.02 provides that an application under the Division must:

- set out the grounds on which the annulment is sought; and
- be served on the trustee at least 7 days before the hearing date fixed for the application.

Rule 7.03 provides that, at least 7 days before the date fixed for the application, the applicant must serve a notice in accordance with Form B11 on each person known to the applicant to be a creditor of the bankrupt or of the estate of the deceased person.

Rule 7.04 applies if the Court makes an order annulling a bankruptcy under section 153B of the Bankruptcy Act or annulling the administration of an estate under section 252B of that Act. It provides that:

- an annulment order must, unless it is entered in the Court at the time it is made, be entered within 1 day after it is made; and
- the applicant must give a copy of the order to the trustee and the Official Receiver within 2 days after the order is entered.

Division 7.2 deals with the review of a sequestration order made by a Registrar.

Rule 7.05 provides that:

- an application for review of a decision by a Registrar to make a sequestration order against the estate of a debtor (the ‘bankrupt’) must be served on the trustee at least 7 days before the date fixed for the hearing of the application;
- the applicant must give notice (in accordance with Form B12) of the application to each person known to the applicant to be a creditor of the bankrupt; and
- the applicant must serve the notice on each creditor at least 7 days before the date fixed for the hearing of the application.

A note to subrule 7.05(1) clarifies that the form of application and the time for filing the application are specified in rule 2.02.

Division 7.3 deals with reports by a trustee in applications for an annulment of a bankruptcy or for review of a Registrar’s decision to make a sequestration order.

Rule 7.06 applies to applications:

- under section 153B of the Bankruptcy Act for the annulment of a bankruptcy;
- under section 252B of the Bankruptcy Act for the annulment of the administration of the estate of a deceased person; and
- for review of a decision by a Registrar to make a sequestration order against the estate of a debtor.

It provides that a trustee must prepare a report for the periods before and after the bankruptcy or the administration of the estate of a deceased person if directed by the Court to do so. If that report is in relation to a bankrupt, it must include information about the bankrupt’s conduct, the bankrupt’s examinable affairs and the administration of the bankrupt’s estate. If the report is in relation to the estate of a deceased person, it must include information about the administration of the deceased person’s estate.

The report must be in the form of an affidavit and be filed at least 5 days before the date fixed for the hearing of the application.

## **Part 8—Trustees**

Part 8 deals with the appointment and removal of trustees and is substantially the same as Part 8 of the existing Bankruptcy Rules.

Rule 8.01 specifies the procedure to be followed in making an application under section 90 20 of Schedule 2 to the Bankruptcy Act for either of the following orders:

- an order that a person cease to be the trustee of an estate;
- an order that another person be appointed as the trustee of an estate.

It provides that:

- an application must be accompanied by an affidavit stating the grounds in support;
- the application and supporting affidavit must be served on the trustee and any petitioning creditor at least 28 days before the hearing date (subrule 8.01(3));
- the application and supporting affidavit must be served on each person known to the applicant to be a creditor of the estate at least 14 days before the hearing date.

If the Court makes the order sought, the applicant must, as soon as practicable, serve a copy of the order on the Official Receiver.

Rule 8.02 deals with an application for acceptance of the resignation or for the release of a trustee under section 180 or subsection 183(1) of the Bankruptcy Act. It provides that:

- the application must be accompanied by a supporting affidavit stating the grounds in support of the application;
- the affidavit in support of an application for release must have attached a statement of details of the realisation of the bankrupt's property and the distribution of the estate by the trustee as well as a copy of the books referred to in section 70 10 of Schedule 2 to the Bankruptcy Act in relation to the estate;
- the application and supporting affidavit must be served on the Official Receiver, the bankrupt and anyone else ordered by the Court (subrule 8.02(4));
- any order, unless it is entered in the Court at the time it is made, must be entered within 1 day after it is made;
- the trustee must give a copy of the order to the Official Receiver within 2 days after the order is entered.

## **Part 9—Debt agreements**

Part 9 deals with setting aside debt agreements and is substantially the same as Part 9 of the existing Bankruptcy Rules.

Rule 9.01 provides that the Part applies to:

- an application under section 185Q of the Bankruptcy Act for an order terminating a debt agreement; and
- an application under section 185T of the Bankruptcy Act for an order declaring that all, or part, of a debt agreement is void.

Rule 9.02 provides that:

- if the application is for an order terminating a debt agreement, a supporting affidavit must be filed stating the facts relied on to satisfy the relevant prerequisite in subsection 185Q(4) of the Bankruptcy Act for making the order;
- if the application is for an order declaring that all, or a specified part, of a debt agreement is void, a supporting affidavit must be filed stating the facts relied on to establish the relevant ground in subsection 185T(2) of the Bankruptcy Act for applying for the order;
- a copy of the debt agreement must be attached to the relevant affidavit;

- if an application is made by a creditor who is also seeking a sequestration order, that must state as much in the application.

Rule 9.03 provides that, at least 5 days before the date fixed for the hearing, an application and supporting affidavit must be served on both the debtor (or, if the debtor has died, the debtor's personal representative) and the Official Receiver (if the applicant is not the Official Receiver).

Rule 9.04 provides that, at least 5 days before the hearing date, the applicant must serve a written notice in accordance with Form B13, of the time, date and place fixed for the hearing on each person known to the applicant to be a creditor of the debtor.

Rule 9.05 provides that if the Court makes an order under section 185Q or 185U of the Bankruptcy Act:

- the order, unless it is entered in the Court at the time it is made, must be entered within 1 day after it is made; and
- the applicant must give a copy of the order to the Official Receiver within 2 days after the order is entered.

### **Part 10—Personal insolvency agreements**

Part 10 deals with applications to set aside or terminate personal insolvency agreements and compositions or schemes of arrangement. It is substantially the same as Part 10 of the existing Bankruptcy Rules.

Rule 10.01 sets out, by reference to the relevant sections of the Bankruptcy Act (namely sections 76B, 222 and 222C), the applications to which the Part applies.

Rule 10.02 provides that an application must be accompanied by an affidavit stating the facts relied on to establish the relevant ground for making the order and:

- if the application is for an order under subsection 222(2) of the Bankruptcy Act, the affidavit must also state the facts relied on to satisfy the prerequisite in subsection 222(4) for making the order;
- if the application is for an order under subsection 222(5) of the Bankruptcy Act, the affidavit must also state the facts relied on to satisfy the prerequisite in subsection 222(7) for making an order;
- if the application is made by a trustee or creditor who also seeks a sequestration order in accordance with subsection 222(10) or 222C(5) of the Bankruptcy Act, that must also be stated in the affidavit.

Rule 10.03 provides that, unless the Court otherwise orders, the application and supporting affidavit must be served on the debtor, the trustee and the Official Receiver at least 5 days before the hearing date.

Rule 10.04 provides that, at least 5 days before the hearing date, the applicant must serve a written notice in accordance with Form B13 of the time, date and place fixed for the hearing on each creditor named in the debtor's statement of affairs.

Rule 10.05 provides that if the Court makes an order under subsection 222(1), (2) or (5) or subsection 222C(1) of the Bankruptcy Act:



- the order, unless it is entered in the Court at the time it is made, must be entered as soon as possible after it is made; and
- notes that a copy of the order must be given to the Official Receiver within 2 days after the order is made as a result of subsection 67(1) of the *Bankruptcy Regulations 2021*.

### **Part 11—Administration of estates of deceased persons**

Part 11 deals with creditors' petitions in relation to the administration of estates of deceased persons and is substantially the same as Part 11 of the existing Bankruptcy Rules.

Rule 11.01 deals with a creditor's petition under section 244 of the Bankruptcy Act for an order for the administration of a deceased person's estate and provides that the petition must be:

- in accordance with Form B14; and
- accompanied by the affidavit verifying the petition required by subsection 244(5) of the Bankruptcy Act.

Rule 11.02 provides that, unless the Court otherwise orders, at least 5 days before the date fixed for the hearing of the creditor's petition presented under section 244 of the Bankruptcy Act, the applicant must serve the creditor's petition, a copy of the verifying affidavit and a copy of any consent to act as trustee filed under section 156A of the Bankruptcy Act on the legal representative of the deceased person and on any other person as the Court directs.

Rule 11.03 sets out the additional affidavits that the applicant creditor must file before the hearing of a creditor's petition under section 244 of the Bankruptcy Act.

Rule 11.04 provides that an administrator's petition under section 247 of the Bankruptcy Act for an order for the administration of a deceased person's estate must be:

- in accordance with Form B15; and
- accompanied by an affidavit verifying the relevant facts.

Rule 11.05 provides that, unless the Court otherwise orders, at least 5 days before the date fixed for the hearing of the petition presented under section 247 of the Bankruptcy Act, the applicant must serve the petition, a copy of the verifying affidavit and a copy of the statement of the deceased person's affairs and of the administrator's administration of the deceased person's estate required by subsection 247(1) of the Bankruptcy Act on each person known to be a creditor of the estate of the deceased person and such other persons as the Court directs.

Rule 11.06 provides that if the Court makes an order under section 244 or 247 of the Bankruptcy Act:

- the order, unless it is entered in the Court at the time it is made, must be entered as soon as possible after it is made;
- notes that, under subsections 244(14) and 247(3) of the Bankruptcy Act, a copy of the order must be given to the Official Receiver within 2 days after the order is made.

### **Part 12—Warrants**

Part 12 deals with warrants to arrest a debtor or bankrupt, apprehend persons failing to attend Court and for seizure of property connected with a bankrupt. It is substantially the same as Part 12 of the existing Bankruptcy Rules.

Rule 12.01 provides that:

- an application for the issue of a warrant under section 78 of the Bankruptcy Act for the arrest of a debtor or bankrupt must state the grounds for the issue of the warrant and be accompanied by an affidavit stating the facts in support;
- the warrant must be in accordance with Form B16; and
- if a debtor or bankrupt is arrested under the warrant, the person who carried out the arrest must immediately give notice of the arrest to the Registrar in the Registry from which the warrant was issued.

Rule 12.02 provides that a warrant under section 264B(1) of the Bankruptcy Act for the apprehension of a person who fails to comply with a summons to attend Court:

- must be in accordance with Form B17;
- may be kept in the Registry for a stated time and on any conditions which the Court or a Registrar thinks appropriate;
- if a person is apprehended under the warrant, the person who carried out the apprehension must immediately give notice of the apprehension to a Registrar in the Registry from which the warrant was issued.

Rule 12.03 provides that a warrant issued by an eligible judge under subsection 130(2) of the Bankruptcy Act may be in accordance with Form B18.

### **Part 13—Costs**

Part 13 deals with costs in proceedings under the Bankruptcy Act and is substantially the same as Part 13 of the existing Bankruptcy Rules.

Division 13.1 deals with orders for costs.

Rule 13.01 provides that, subject to Division 13.2:

- a person who is entitled to costs in a proceeding to which the Bankruptcy Act applies is entitled to costs in accordance with Part 40 of the *Federal Court Rules 2011* unless the Court otherwise orders;
- the Court may fix the amount of the costs when making an order; and
- if the Court fixes the amount of the costs, Part 40 of the *Federal Court Rules 2011* does not apply to a bill of costs submitted, except for the issue of a certificate of taxation.

Division 13.2 deals with the short form bills of costs.

Rule 13.02 clarifies that Division 13.2 provides for the costs that may be charged by a lawyer for a creditor for work done in relation to a creditor's petition against the estate of a debtor on the basis of an act of bankruptcy specified in paragraph 40(1)(g) of the Bankruptcy Act, but not where the Court fixes the amount of costs.

Rule 13.03 provides that:

- if the Court makes a sequestration order against the debtor's estate, the lawyer may charge for costs the amount, applying on the date when the petition was presented, stated in item 14.1 of Schedule 3 to the *Federal Court Rules 2011*;
- if the petition is dismissed, and the creditor obtains an order for costs, the lawyer may charge for costs the amount, applying on the date when the petition was presented, stated in item 14.2 of Schedule 3 to the *Federal Court Rules 2011*;

- if adjournment costs are reserved or awarded on a day, the lawyer may also charge the amount stated in item 1 of Schedule 3 to the *Federal Court Rules 2011*;
- the lawyer may also charge proper disbursements incurred; and
- if the lawyer charges an amount for costs under subrule 13.03(1) or (2), Part 40 of the *Federal Court Rules 2011* does not apply to a bill of costs submitted, except for the issue of a certificate of taxation.

Rule 13.04 sets out the procedure to be followed where a legal practitioner wishes to claim costs.

Rule 13.05 provides that a creditor, the trustee or a legal practitioner representing the creditor or trustee may attend a taxation of the bill of costs and disbursements only if a taxing officer directs the creditor, trustee or legal practitioner to attend.

#### **Part 14—Transitional provisions**

Part 14 deals with transitional provisions and is the same as Part 14 of the existing Bankruptcy Rules.

Division 14.1 deals with transitional provisions relating to the *Federal Circuit Court (Bankruptcy) Amendment (Insolvency and Other Measures) Rules 2017*.

Rule 14.01 provides that this rule applies if:

- an application referred to in paragraph 8.02(1)(b) is made after 1 September 2017 for the release of a trustee from the trusteeship of an estate; and
- because of item 143 of Schedule 1 to the *Insolvency Law Reform Act 2016*, the trustee is required to keep accounts and records (the old accounts) in relation to the estate in accordance with section 173 of the Bankruptcy Act (as that section was in force immediately before it was repealed by Schedule 1 to the *Insolvency Law Reform Act 2016*).

The rule also requires that, in addition to the books referred to in paragraph 8.02(3)(b), a copy of the old accounts be attached to the affidavit accompanying the application.

#### **Schedule 1—Powers of the Court that may be exercised by a Registrar**

Schedule 1 sets out the powers of the Court that may be exercised by a Registrar. Part 1 of Schedule 1 sets out and describes powers under the Bankruptcy Act that may be exercised by a Registrar. Part 2 of Schedule 1 sets out and describes powers under these Rules that may be exercised by a Registrar. It is substantially the same as Schedule 1 to the existing Bankruptcy Rules.