

BANKRUPTCY AMENDMENT (SERVICE OF DOCUMENTS) REGULATIONS
2022

EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister to the Attorney-General

under the *Bankruptcy Act 1966*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Bankruptcy Act 1966* (the Act) and associated legislation regulates Australia's personal insolvency system and provides a framework to allow people in severe financial stress to discharge unmanageable debts while providing for the realisation of a debtor's available assets for distribution to affected creditors.

Section 315 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act. Paragraph 315(2)(g) prescribes that the regulations may provide for the means of service of documents.

On 1 April 2021, the *Bankruptcy Regulations 2021* (the Bankruptcy Regulations) commenced to address the sunset of the *Bankruptcy Regulations 1996* (the 1996 Regulations). The Bankruptcy Regulations 2021 remade the 1996 Regulations in substantially the same form with minor and technical amendments aimed at modernising references and ensuring alignment with the Act. Section 102 replaced regulation 16.01 in the 1996 Regulations regarding the service of documents, which did not contain a requirement to seek consent before serving documents electronically.

Section 102 of the Regulations refers to section 28A of the *Acts Interpretation Act 1901* (AIA) to specify additional methods of service. Section 28A of the AIA refers to the *Electronic Transactions Act 1999* (ETA) in relation to service by electronic communication. Under paragraphs 9(1)(d) and (2)(d) of the ETA, a party is required to seek the consent of the recipient to provide written information in an electronic form.

A number of stakeholders including insolvency practitioners, creditors, and the Australian Financial and Security Authority (AFSA) have raised concerns that the requirement to seek consent before documents can be served electronically could be used to frustrate the administration and operation of the Bankruptcy Act, particularly if a person refuses to consent to receive documents electronically.

The Regulations amend section 102 of the Bankruptcy Regulations so that paragraphs 9(1)(d) and 9(2)(d) of the ETA do not apply to the electronic service of documents required or permitted by the Act or the Regulations. This will ensure that valid service of documents in electronic form can occur without the need for a party to seek consent from the recipient.

The Regulations establish the methods for service of documents under the Act or the Regulations and in particular specify that:

- the ETA deals with giving information in writing by electronic communication; and
- paragraphs 9(1)(d) and (2)(d) of the ETA will not apply to documents that are required or permitted by the Act or the Bankruptcy Regulations to be given or sent to, or served on, a person.

The Regulations will commence the day after registration on the Federal Register of Legislation.

Details of the Regulations are set out in **Attachment A**.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

CONSULTATION

Consistent with the requirements of the *Legislation Act 2003*, the Regulations have been informed by close collaboration with AFSA, and a consultation process.

In November 2021, the Attorney-General's Department advised a targeted group of stakeholders that it would examine how section 102 of the Regulations could be amended to reflect the original policy setting of former regulations 16.01 of the 1996 Regulations. Stakeholders included insolvency practitioner industry and member associations, consumer advocates and relevant Australian Government agencies such as AFSA and Treasury.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation was consulted on the measures. It advised that the measures were unlikely to have a more than minor regulatory impact and, therefore, a Regulatory Impact Statement was not required (OBPR reference number 02013).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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*.

Overview of the Legislative Instrument

The *Bankruptcy Amendment (Service of Documents) Regulations 2022* (the Regulations) relates to paragraph 315(2)(g) of the *Bankruptcy Act 1966* (the Act) which prescribes that the regulations may provide for the means of service and section 102 of the Bankruptcy Regulations which establishes the methods of service.

The Regulations amend the *Bankruptcy Regulations 2021* to ensure that electronic service of bankruptcy documents can occur without the need for a party to seek consent from the recipient. It will address concerns that the requirement to seek consent in accordance with section 9 of the *Electronic Transactions Act 1999* before documents can be served electronically could be used to frustrate the administration and operation of the Act.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

NOTES ON SECTIONS

PART 1 – Preliminary

Section 1 – Name

This section provides that the name of the proposed Regulations is the Bankruptcy Amendment (Service of Documents) Regulations 2022.

Section 2 - Commencement

This section provides that the Regulations commence on the day after registration.

Section 3 - Authority

This section provides that the Regulations are made under the *Bankruptcy Act 1966*.

Section 4 - Schedule(s)

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 - Amendments

Items [1] and [2] – subsection 102(1)

These items amend subsection 102(1) to include an additional Note that the *Electronic Transactions Act 1999* deals with giving information in writing by means of an electronic communication, which mirrors the Note provided at subsection 28A(1) of the *Acts Interpretation Act 1901*. This item provides greater clarity that service by electronic communication is a valid method of service under the Act and Regulations.

Item [3] – section 102

This item amends section 102 to specify that paragraphs 9(1)(d) and (2)(d) of the *Electronic Transactions Act 1999* do not apply to documents that are required or permitted by the Act or this instrument to be given or sent to, or served on, a person.

The Note clarifies that those paragraphs of the *Electronic Transactions Act 1999* deal with the consent of the recipient of information or documents to the information being given by way of electronic communication.

This item ensures that parties do not need to seek this consent if a document is required or permitted by the Act or Regulations to be given to, sent to or served on a person by electronic communication.