

INSOLVENCY PRACTICE (BANKRUPTCY) AMENDMENT RULES 2022

EXPLANATORY STATEMENT

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

under Schedule 2 of the *Bankruptcy Act 1966*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Insolvency Practice (Bankruptcy) Amendment Rules 2022* (amending Rules) relates to section 105-1(1) of Schedule 2 of the *Bankruptcy Act 1966* (Act) which prescribes that the Minister may make rules providing for matters required or permitted by the Act, or necessary or convenient in order to carry out or give effect to the Act.

The *Insolvency Practice Rules (Bankruptcy) 2016* provide for the registration, discipline and remuneration of insolvency practitioners and for matters related to the administration of personal insolvencies, such as meetings and information provision.

The amending Rules will make trustee registration and education requirements more flexible, introduce further efficiencies, transparency and certainty to creditor meetings, and further harmonise with similar provisions contained in the *Insolvency Practice Rules (Corporations) 2016*.

Following close consultation between the Attorney-General's Department, the Australian Financial Security Authority (AFSA) and the Treasury, the following issues with the *Insolvency Practice Rules (Bankruptcy) 2016* were identified:

(i) **Trustee Registration**

The experience expected of applicants wishing to become a registered trustee is too narrowly focused on 'direct exposure' to restructuring companies.

The professional education requirements of registered trustees are inflexible. There are concerns that the requirement to undertake 40 hours of Continuous Professional Education each year has been particularly burdensome for certain classes of trustees.

(ii) **Administrative matters**

Certain requirements related to the provision of information, creditor meetings and administering the regulated debtor's estate require greater efficiency, transparency and certainty. For example, trustees are required to provide creditors with prescribed information regardless of whether the trustee they are replacing has already provided the information.

(iii) **Valuation of a creditor**

The current method for determining the valuation of a creditor is a disincentive to the participation of creditors in voting on resolutions, as it requires the provision of commercially sensitive information, specifically the consideration provided in exchange for the assignment of debt. This method is also not harmonised with the valuation of creditors for the purposes of debt agreements under the Act, or debts under the *Insolvency Practice Rules (Corporations) 2016*.

(iv) *Insolvency Law Reform Act 2016*

When the Rules were formulated in 2016, certain provisions related to trustee remuneration, creditor meetings and the administration of the regulated debtor's estate, which had previously contributed to the integrity of the bankruptcy system, were repealed by the *Insolvency Law Reform Act 2016*.

These issues demonstrate there is a need to amend the *Insolvency Practice Rules (Bankruptcy) 2016*, namely to streamline trustee registration and discipline, introduce further efficiencies, transparency and certainty to creditor meetings and to the extent that it is appropriate, harmonise with relevant provisions under the *Insolvency Practice Rules (Corporations) 2016*.

The provisions in the Amendment Rules are technical and minor and will address the issues identified above.

The Amendment Rules will commence three months after registration on the Federal Register of Legislation.

Details of the Amendment Rules are set out in **Attachment A**.

The Amendment Rules are a disallowable legislative instrument for the purposes of the *Legislation Act 2003*.

CONSULTATION

Consistent with the requirements of the *Legislation Act 2003*, the Amendment Rules have been informed by close collaboration and consultation with AFSA and the Treasury.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) was consulted on the measures contained in the Amendment Rules. 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 44600).

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 *Insolvency Practice (Bankruptcy) Amendment Rules 2022* (Amendment Rules) relates to section 105-1(1) of Schedule 2 of the *Bankruptcy Act 1966* (Act), which prescribes that the Minister may make rules providing for matters required or permitted by the Act, or necessary or convenient in order to carry out or give effect to the Act.

The Amendment Rules amend the *Insolvency Practice Rules (Bankruptcy) 2016*, which provide for the registration, discipline and remuneration of insolvency practitioners and for matters related to the administration of personal insolvencies, such as meetings and information provision. The amendments contained within the Rules will make trustee registration and education requirements more flexible, introduce further efficiencies, transparency and certainty to creditor meetings, and further harmonise with similar provisions in the *Insolvency Practice Rules (Corporations) 2016*.

Human rights implications

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

Conclusion

This Disallowable 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

Section 1 provides that the title of the instrument is the *Insolvency Practice (Bankruptcy) Amendment Rules 2022*.

Section 2 – Commencement

The instrument commences the day after the end of the period of 3 months beginning on the day this instrument is registered.

Section 3 – Authority

This section provides that the instrument is made under the *Bankruptcy Act 1966*.

Section 4 – Schedules

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

Item 1 – Subsection 20-1(3)

This item broadens the scope of experience a trustee registration committee can consider relevant to become a registered trustee to include employment that provides direct or indirect exposure to any of the following: the external administration of companies, receivership or receivership and management; or the restructuring of companies or the giving of advice in relation to the restructuring of companies.

Item 2 – Subsections 20-5(2) and (3)

This item makes it requisite that registered trustees undertake a total of 120 hours of continuing professional education (CPE) over a three-year period, with 30 hours requiring verification. Noting that the previous requirement was to undertake at least 40 hours of CPE each year the person was registered, this amendment provides greater flexibility to trustees.

Item 3 – Section 50-47

This item inserts a provision which allows a Part 2 committee to terminate its consideration of a matter in circumstances where there is no utility in any committee proceeding with the matter, for example where a practitioner, or applicant for registration as a practitioner, dies. While it might be implied that the committee could terminate the matter, this new provision removes any doubt.

Item 4 – Paragraph 60-10(2)(g)

Paragraph 60-10(2)(g) requires that applications to the Inspector-General to determine trustee remuneration be accompanied by any notices given by the trustee or the creditors under Division 60.

However, the required information is not given under Division 60 but under provisions contained in Division 70.

Accordingly, this item removes the reference to notices given under Division 60 and prescribes the information required by the Inspector-General to make a remuneration determination, specifically:

- the initial remuneration notice required under section 70-35 of the Rules
- reports about remuneration required under section 70-45 of the Rules
- the remuneration claim notice required under section 70-47 of the Rules.

Item 5 – Section 60-17

This item will reinstate a previous requirement which was repealed by the *Insolvency Law Reform Act 2016*.

Section 60-5 provides that, under certain circumstances, the Inspector-General may determine the remuneration that a trustee is entitled to receive for work properly performed by the trustee in relation to the administration of a regulated debtor's estate.

This item requires the Inspector-General to provide a copy of this determination to the trustee, the debtor and as many creditors as reasonably practicable. It is desirable that these parties receive notice given their interest in the outcome of such a decision. This item will increase the transparency and certainty of the review process and reflects the current practices of the Inspector-General.

Items 6, 7, 28, 29 and 30 – Sections 65-20 and 65-25; Paragraph 90-65(4)(e)

Under section 65-20, the Inspector-General can, on application by the trustee, review a bill of costs provided by a third party in relation to the administration of a regulated debtor's estate.

Item 7 inserts a new provision which enables third parties to appeal the Inspector-General's decision of such a review to the Court. This must occur no later than 60 days after the day on which the person making the application was notified of the Inspector-General's decision. Item 28 provides that the Inspector-General's written statement must set out the effect of the Inspector-General's decision, if the decision is in relation to an application for such a review.

Item 8 – paragraph 70-30(2)(c)

This item introduces an objective standard to paragraph 70-30(2)(c). It provides that the trustee only needs to give information about associated or related entities of the regulated debtor that the trustee is, or should reasonably be, aware of.

Item 9 – subsection 70-30(2AA)

This item removes the need for a replacement trustee to provide information to creditors unnecessarily when it has been already provided by the previous trustee, while still ensuring the replacement trustee provides creditors with the necessary information.

Item 10 – paragraph 70-35(5)(aa)

This item will qualify the current requirement for bankruptcies by debtor's petition by requiring a trustee to provide an initial remuneration notice to the debtor and creditors within 20 business days of receiving the debtor's statement of affairs.

Item 11 – subsection 75-27(2AA)

This item will reinstate a previous requirement which was repealed by the *Insolvency Law Reform Act 2016*.

When giving notice to creditors of a meeting held under section 88 of the Act, a trustee is required to provide creditors with a copy of the debtor's statement of affairs, trustee's report and the trustee's statement.

This item will require the trustee to provide the debtor with the notice of the meeting and the copies of documents provided to the creditors, at the same time they are given to creditors. This is appropriate as debtors are required to attend the meeting and should therefore be given this information.

Items 12 and 13 – subsections 75-60(1) and (2)

These items insert appropriate headings '*Meetings in relation to compositions or arrangements*' and '*Meetings in relation to personal insolvency agreements*' for ease of reference.

Item 14 – paragraph 75-60(2)(aa)

This item will reinstate a previous requirement which was repealed by the *Insolvency Law Reform Act 2016*.

This item will require the trustee to table a copy of the proposal for dealing with their affairs under Part X of the Act at a meeting called under section 188 of the Act.

Item 15 – subsections 75-60(2A) and (2B)

This item will reinstate previous requirements which were repealed by the *Insolvency Law Reform Act 2016*.

The first amendment under this item will introduce a requirement for the debtor, at a meeting called under section 188 of the Act, to table a written statement detailing any material changes that would have been made to the statement of affairs immediately before the meeting.

The second amendment will introduce a requirement for the trustee, at a meeting called under section 188 of the Act, to table a written statement detailing any material changes that would have been made to the related entity declaration immediately before the meeting.

Items 16, 17, 18 and 19 – subsections 75-105(1), (3) and (6)

These items streamline provisions under section 75-105 by removing the requirement for a meeting to be 'sufficiently constituted', and leaving only the requirement that a quorum is present.

Items 20, 21 and 22 – paragraph 75-110(4)(aa)

This item provides that, when voting on resolutions, the value of a creditor that is a 'related entity' of the bankrupt is worked out by taking the value of the assigned debt to be equal to the value of the consideration that the creditor gave for the assignment of the debt.

This will prevent manipulation of voting through the purchase of debts by parties associated with the debtor, while minimising the effect of the provision on creditors who may assign debts for other commercial reasons.

Item 23 – paragraph 75-115(6)(a)

This item will extend the current requirement for a trustee to provide reasons for exercising, or not exercising, a casting vote under subsection 75-115(3), to include reasons for exercising, or not exercising, a casting vote under subsection 75-115(5).

Items 24, 25 and 26 – subsections 75-130(4), 75-132(3) and 75-137(4)

Sections 75-130, 75-133 and 75-137 provide for when a resolution is passed without a meeting of creditors, when a special resolution is passed at a meeting of creditors, and when a special resolution is passed without a meeting of creditors.

These items provide that, when voting on the respective resolution, the value of a creditor that is a ‘related entity’ of the bankrupt is worked out by taking the value of the assigned debt to be equal to the value of the consideration that the creditor gave for the assignment of the debt.

This will prevent manipulation of voting through the purchase of debts by parties associated with the debtor, while minimising the effect of the provision on creditors who may assign debts for other commercial reasons.

These amendments align with the valuation of related party creditors for the purposes of debt agreements under section 185EC of the Act, and generally aligns with the valuation of creditors that have been assigned debts under the *Insolvency Practice Rules (Corporations) 2016*.

Item 27 – subsection 75-140(2A)

Subsection 75-140(2) provides that a meeting of creditors must not be adjourned to a day that is more than 15 business days after the first day on which the original meeting is held. In the case of meetings called under section 188 of the Act, 15 business days is often not sufficient for a trustee to adequately investigate the affairs of the debtor and provide a report to the creditors as required under subsection 189A of the Act.

This item will ensure a trustee has adequate time to conduct investigations of the debtor’s affairs, however it will not mean that matters can be adjourned indefinitely. This is noting subsection 189(1A) of the Act which provides that the period of a trustee’s control of the debtor’s property under the personal insolvency provisions of the Act ceases after four months.

Item 31 – Transitional matters

This item provides for transitional matters under the amending Rules, notably the extent to which particular amendments will apply in relation to commencement day.

Section 110-2 provides that the amendment of subsection 20-1(3) applies in relation to applications for registration as a trustee properly made on or after the commencement day.

Section 110-3 provides that the amendment of section 20-5 applies in relation to a person who is a registered trustee regardless of whether the person’s registration began, or was renewed, before, on or after the commencement day.

Section 110-4 provides that newly inserted section 50-47 applies in relation to a Part 2 committee, regardless of whether the committee was established before, on or after the commencement day.

Section 110-5 provides that newly inserted section 60-17 applies in relation to a remuneration determination made by the Inspector-General on or after the commencement day.

Section 110-6 provides that newly inserted section 65-25 and the amendments of subsection 90-65(4) apply in relation to a decision of the Inspector-General made on or after the commencement day.

Section 110-7 provides that the amendment of paragraph 70-30(2)(c), and newly inserted subsection 70-30(2AA) and paragraph 70-35(5)(aa) apply in relation to the administration of estates by a registered trustee that the trustee started on or after the commencement day.

Section 110-8 provides that newly inserted subsections 75-27(2AA) and 75-140(2A), and the amendments of sections 75-60 and 75-105 and paragraph 75-115(6)(a) apply in relation to a meeting of regulated debtor's creditors for which notice was given in writing on or after the commencement day.

Section 110-9 provides that the amendments to subsection 75-110(4), and newly inserted subsections 75-130(4A), 75-132(3) and 75-137(4A) apply in relation to a resolution in respect of which:

- a) if the resolution is to be passed at a meeting of creditors – notice of the meeting was given in writing on or after the commencement day; and
- b) if the resolution is to be taken to have been passed based on a proposal put to creditors – notice of the proposal was given in writing to the creditors on or after the commencement day.