

BANKRUPTCY AMENDMENT (ELECTRONIC SERVICE) REGULATIONS 2024

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

under the *Bankruptcy Act 1966*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Bankruptcy Act 1966* (the Act) regulates Australia's personal insolvency system and provides a framework that allows 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, not inconsistent with the Act, 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) enables regulations to be made to provide for the means of service of documents.

The purpose of the *Bankruptcy Amendment (Electronic Service) Regulations 2024* (proposed Regulations) is to repeal and substitute section 102 of the *Bankruptcy Regulations 2021* (Bankruptcy Regulations) to clearly engage the exemption provided by subsection 9(3) of the *Electronic Transactions Act 1999* (ETA) and continue to allow documents to be served electronically to individuals in the personal insolvency system without seeking the recipient's prior consent.

On 1 April 2021, the Bankruptcy Regulations commenced to address the sunset of the *Bankruptcy Regulations 1996* (the 1996 Regulations). The Bankruptcy Regulations 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. Regulation 16.01 did not contain a requirement to seek consent before serving documents electronically.

Section 102 of the Bankruptcy 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 ETA in relation to service by electronic communication. Under paragraphs 9(1)(d) and (2)(d) of the ETA, where a law of the Commonwealth requires information to be given in writing, a party is required to seek the consent of the recipient to provide written information in an electronic form.

In response to stakeholder concerns, section 102 of the Bankruptcy Regulations was amended by the *Bankruptcy Amendment (Service of Documents) Regulations 2022* to disapply paragraphs 9(1)(d) and 9(2)(d) of the ETA in order to better reflect the original policy setting of former section 16.01 of the 1996 Regulations that the consent of the recipient to service by electronic means is not required.

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) raised scrutiny concerns in relation to the 2022 Regulations. The Committee's concern was that delegated legislation had been used to disapply provisions of primary legislation. The 2022 Regulations disappplied paragraphs 9(1)(d) and 9(2)(d) of the ETA.

In order to address the Committee's concerns, the proposed Regulations amend section 102 to make clear that it operates within the exemption already provided by subsection 9(3) of the ETA.

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

Given the minor and machinery nature of these amendments no consultation has occurred.

IMPACT ANALYSIS

The Office of Impact Analysis was consulted on the measures. It advised that the measures were unlikely to have more than a regulatory impact, therefor a Policy Impact Statement was not required (OIA reference number 24-08648).

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 (Electronic Service) Regulations 2024* (the Regulations) is made under paragraph 315(2)(g) of 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 to clarify that electronic service of bankruptcy documents can occur without the need for a party to seek consent from the recipient. It will address scrutiny concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation that section 102 of the Bankruptcy Regulations used delegated legislation, rather than primary legislation, to provide an exemption from requirements in the ETA.

In order to clarify the drafting and address the Committee's concerns, the Regulations repeal and replace section 102 to provide that it clearly operates within the exemption already provided by subsection 9(3) of the ETA.

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.

Details of the proposed *Bankruptcy Amendment (Electronic Service) Regulations 2024*

Section 1 – Name of Regulations

This section would provide that the title of the Regulations is the *Bankruptcy Amendment (Electronic Service) Regulations 2024*.

Section 2 – Commencement

This section would provide for the Regulations to commence the day after the instrument is registered.

Section 3 – Authority

This section would provide that the *Bankruptcy Amendment (Electronic Service) Regulations 2024* is made under the *Bankruptcy Act 1966*.

Section 4 – Schedules

This section would provide 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

Bankruptcy Regulations 2021

Item [1] – Section 4

This item would insert a definition for electronic communication by reference to paragraph (a) of the definition in subsection 5(1) of the *Electronic Transactions Act 1999* (Electronic Transactions Act). The definition in paragraph (a) of the Electronic Transactions Act provides that electronic communication means a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy.

This definition is inserted to assist with the use of the term in section 102 which allows service to be made by electronic communication.

Item [2] – Section 22 (note)

Item 2 would omit reference to section 28A of the *Acts Interpretation Act 1901* (Acts Interpretation Act) as this is now included in section 102.

Item [3] – Section 43 (note)

Item 3 would omit reference to section 28A of the Acts Interpretation Act as this is now included in section 102.

Item [4] – Section 102

This item would repeal and replace section 102.

Section 102 mirrors the repealed and replaced section with some amendments to make clear that the section makes provision for particular information to be given in accordance with technology requirements, therefore falls within the exemption provided for in subsection 9(3) of the Electronic Transactions Act.

The section is being repealed and replaced in its entirety for drafting efficacy.

Subsection 102(1) would provide that, unless the contrary intention appears, if a document is required or permitted by the Act or Regulations to be given to, sent to or served on a person, the document may be:

- sent by courier to the person's last known address; or
- marked with the person's name and any document exchange number and left at a document exchange where the person maintains a document exchange facility; or
- given in accordance with the methods of service under section 28A of the *Acts Interpretation Act 1901*, this includes personal service, service by post and service by electronic communication; or
- sent by a kind of electronic communication—as defined in paragraph 5(1)(a) of the *Electronic Transactions Act 1999*—in accordance with the prescribed information technology requirements at new subsection 102(3).

Subsection 102(2) would continue to specify that, in the absence of evidence to the contrary, the document is taken to have been received by, or served on the person when the document would be delivered to that address or document exchange.

The substantive amendments made to section 102 are as follows:

Acts Interpretation Act

Section 28A of the Acts Interpretation Act provides for the manner in which documents may be served, given or sent, for the purposes of any Act that requires or permits documents to be served on a person. Further, section 28A does not affect the operation of any other law of the Commonwealth that authorises the service of documents other than by the methods provided for in that section. Section 28A also notes that the Electronic Transactions Act deals with the provision of information in electronic form.

Reference to section 28A of the Acts Interpretation Act has been included in section 102 to make explicit that section 102 is not intended to limit the application of the service of documents provisions in section 28A.

Clear engagement of the exemption provided by subsection 9(3) of the Electronic Transactions Act

Paragraph 102(d), in conjunction with subsection 102(3), of the proposed regulations will make clear electronic service engages the exemption provided by subsection 9(3) of the Electronic Transaction Act.

Section 9 of the Electronic Transactions Act provides that where there is a requirement to give information in writing under a law of the Commonwealth, this information may be given using electronic means. Paragraphs 9(1)(d) and 9(2)(d) require a person to consent to information being given by way of electronic communication. Subsection 9(3) of the Electronic Transactions Act provides an exemption from the requirements in paragraphs 9(1)(d) and 9(2)(d) for any law of the Commonwealth that makes provision for or in relation

to requiring or permitting information to be given in accordance with particular information technology requirements.

The note beneath subparagraph 102(1)(d)(ii) would clarify that paragraph (d) of subsection 102(1) is clearly intended to operate within the exemption provided by subsection 9(3) of the Electronic Transactions Act.

Subsection 102(3) would prescribe the information technology requirements where 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. The subsection provides that documents must be sent in a particular form (listed in paragraph 102(3)(b)), be similar to those formats, or readily convertible into those formats.

Item [5] – At the end of Part 17

This item would insert a new section at the end of Part 17 to provide for the transitional provisions for section 102, as substituted by Schedule 1 to the *Bankruptcy Amendment (Electronic Service) Regulations 2024*. The instrument applies to documents given, sent or served on a person after the commencement of this instrument.