

# Federal Court Rules (Amendment) 1993 No. 137

## EXPLANATORY STATEMENT

### Statutory Rules 1993 No. 137

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

#### AMENDMENT OF THE RULES OF THE FEDERAL COURT OF AUSTRALIA

Section 59 of the *Federal Court of Australia Act 1976* (the Act) empowers the Judges of the Court (of whom there are thirty four (34) including the Chief Justice) or a majority of them to make Rules of the Court, not inconsistent with the Act, making provision for or in relation to the practice and procedure to be followed in the Court, and for and in relation to 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. Subsection 59(3) of the Act provides that Rules of Court made under s59 have effect subject to any provision made by another Act, or by rules or regulations under another Act, with respect to practice and procedure in particular matters. Section 59(4) of the Act provides that sections 48, 48A, 48B, 49 and 50 of the *Acts Interpretation Act 1901* apply in relation to these Rules of Court made under section 59 of the Act as if references in those sections of *Acts Interpretation Act* to regulations were references to Rules of Court.

The present Federal Court Rules came into operation on 1 August 1979. They have been reviewed regularly since then.

Subsection 60(1) of the Corporations Act 1989, as amended, (Corporations Act) provides that the power to make Rules of Court conferred under s59 of the Act extends to making rules of court, not inconsistent with the Corporations Law of the Capital Territory, with respect to proceedings and the practice and procedure of the Federal Court under the Corporations Law of the Capital Territory; with respect to matters required or permitted to be prescribed by rules under the Corporations Law of the Capital Territory, or which it is necessary or convenient be prescribed by rules for carrying out or giving effect to Corporations Law; and with respect to costs and rules as to meeting ordered by the Court.

Subsection 60(2) of the Corporations Act provides that the Court must apply the rules of court made under s60(1), with such alterations as are necessary, when the Court exercises jurisdiction with respect to matters arising under the Corporations Law of a State or Territory which is conferred on the Court by a law of the State or Territory corresponding to Division 1 of Part 9 of the Corporations Act of the Capital Territory. Order 71 of the Federal Court Rules has been amended because of amendments to the Corporations Law contained in the *Corporate Law Reform Act 1992*, parts of which commence on 23 June 1993.

#### **Rule 1**

Provides that the Rules now made come into operation on 23 June 1993

#### **Rule 2**

Provides that the Federal Court Rules are amended as set out in the Rules as made.

#### **Rule 3**

Inserts a new paragraph subrule (3) in Order 4 Rule 12 which provides that alterations of a date for hearing on documentation does not apply to Order 71 documents which require public notice or advertisement of the date for hearing.

#### **Rule 4**

Inserts a new subrule (3) in Order 22 Rule 2 which provides that an application for a winding up order under certain sections of the Corporations Law may be discontinued without leave of the Court.

#### **Rule 5**

##### **Order 71, rule 2 (Interpretation)**

The existing paragraph 2(1)(c), the definition of "prescribed information", is omitted and a new paragraph (c) inserted which requires a company to include "a statement of the address of the company's registered office as determined by a search of records maintained by the Commission made not earlier than 7 days before the application was filed".

A definition of "controller" which means a controller of property of a company is also inserted.

#### **Rule 6**

##### **Order 71, rule 4 (Form of documents)**

Subrule 4(4) provides that if applicable the words, "(in liquidation)", "(receiver appointed)", "(receiver and manager appointed)", "(under official management)" or "(administrator appointed)" must be added to the name of a corporation that is a party to proceedings.

#### **Rule 7**

##### **Order 71, rule 6 (Commencement of proceedings by a person aggrieved-ss 350, 574, 777, 1082, 1140 and 1323),**

Subrule 6(1A) provides that certain persons are to be included as respondents to applications under sections 350, 574, 777, 1082, 1140 and 1323.

Subrule 6(3) provides that the words "the applicant" have been omitted. This is for clarity of drafting.

#### **Rule 8**

##### **Order 71, rule 7 (Powers of Registrars)**

In paragraph 7(1)(a) the word "and" replaces the word "or" for clarity of drafting.

Subrules 7(4) and (5) have been omitted and new subrule (4) substituted which combines the power to review a Registrar in one subrule for clarity.

#### **Rules 9, 10, 11, 12, 13, 15 and 16**

##### **Order 71, rules 12, 13, 14, 16, 17, 18 and 19**

Subrules 12(4), 13(3), 14(18), 16(4), 17(3), 18(3), 19(3) omit the words "the applicant" where it appears after the words "of filing" for clarity of drafting.

## **Rule 17**

### **Order 71, new rule 19A (Order sanctioning non-compliance with part 3.2A-s 2432D)**

Part 3.2A restricts the circumstances in which a public company may give a financial benefit to a related party, subject to certain exceptions and a procedure for shareholder approval. A public company or a child entity of a public company may obtain shareholder approval for the provision of a financial benefit to a related party of the public company by following procedures set out in Part 3.2A Div 5. A failure to comply with any of the conditions prescribed in Part 3.2A Div 5 will render the giving of the financial benefit a contravention of Part 3.2A, even if the other requirements of the Division had been satisfied. On an application by an interested person, the Court may declare that a specified condition has been satisfied in relation to a resolution of the company if it finds that it has been substantially complied with in relation to that resolution: s243ZD(1).

Rule 19A provides for service of the application on the other parties to the transaction to which the application relates and on the company (if it is not the applicant) and authorises the Court to adjourn the matter to allow advertisement of the application if the Court sees fit.

## **Rule 18**

### **Order 71, subrule 20(4) (Application for orders in cases of oppression or injustice-s 260)**

Provides a minor drafting change.

### **Order 71, subrule 20(5)**

Introduces a system of nomination of liquidator under s 260 of the Corporations Law similar to the system available in subrules 36(5) and 37(7) which deal with nomination of liquidators in winding up. A nomination must be filed with the application under s 260 and be served on the company within 14 days.

### **Order 71, subrule 20(6) (Advertising of application-s 260)**

Subrule 20(6) requires that an advertisement of an application under s260 be published not later than 7 days before the date appointed for directions. The rule formerly required publication not later than 5 days before that date.

## **Rule 19**

Omits existing heading to Division 6 and substitutes new heading as required by the amending Act.

## **Rule 20**

### **Order 71, new rule 27A (Declaration as to validity of controller's appointment-s 418A)**

A controller, company or any of a company's creditors may apply to the Court for a declaration concerning the validity of the controller's appointment: s418A.

Subrule 27A(1) requires that a person (other than a controller) who intends to file an application for a declaration under s418A to give advance notice of that application by letter to the controller. That letter must be delivered to, or posted by express post addressed to, the controller not later than the day before the application is filed. A copy of that letter must be annexed to the affidavit filed with the application. This requirement ensures that a controller has notice of such an application, so that he or she may consider whether to cease dealing with the property of the company pending the determination of the application.

Subrule 27A(2) requires that an application under s418A to be served on the controller and the company concerned.

Subrule 27A(3) provides that the Court may direct that notice of an application be given to such persons or classes of persons as the Court directs and to adjourn the application for that purpose.

## **Rule 21**

### **Order 71, new rules 28A, 28B and 28C (Application for relief of controller from liability-s 419A(7))**

A controller of a company (defined in s9 to mean a receiver or any other person who has control of property under a charge, such as a mortgagee in possession) is liable for rent or other amounts payable under a relevant agreement from the seventh day after the controller is appointed or enters into possession of the property of the company of which someone else is owner or lessor. The controller will be liable only in relation to third party property that is actually used or occupied or is in the possession of the controller. The Court may excuse the controller from liability: s419A(7).

Rule 28A requires that an affidavit be filed in support of an application under s419A(7) identifying the persons to whom the controller may be liable for rent or other payments. The application and affidavit must be served on the person to whom the rent or other payments are due within 7 days after being filed.

### **Order 71, new rule 28B (Court's power to authorise managing controller to dispose of property despite prior charge-s 420B)**

The Court may authorise the managing controller of a company (defined in s9 to mean a receiver or other person in possession of company property or their agents who have a management function) to sell or dispose of specified property of a property even though that property is subject to a prior charge. The pre-conditions for the making of such an order are set out in s420B(2) and are that the controller has the power to sell or dispose of the property apart from the existence of the prior charge; the controller has taken all reasonable steps to obtain the consent of the holder of the prior charge to the sale or disposal; the sale or disposal is, in the Court's view, in the best interests of the body of the company's creditors and of the company itself; and the Court considers that the sale or disposal will not unreasonably prejudice the rights and interests of the holder of the prior charge.

The Court has regard to the need to protect adequately the rights and interests of the holder of the prior charge: s420B(3). If the controller is seeking to sell the business of the company as a going concern, the Court is authorised to have regard to the likely effect on the net proceeds from the sale or disposition of the business if the relevant property is not included in that sale or disposition: s420B(4). Under section 420B(6) the Court may make an order, subject to conditions, including a condition that the net proceeds of sale or as specified as part of those net proceeds be applied in payment and specified amounts secured by the prior charge, or a

condition that the controller apply a specified amount in payment of specified amounts secured by the prior charge: s420B(6).

Rule 28B deals with applications under s420B, and requires that the applicant file an affidavit setting out the nature of the property; a summary of the terms of the sale or disposition of the property; the identity of the purchaser or donee; the identity of the person who has a prior charge over the property and the nature of the charge; the steps taken by the managing controller to obtain the consent of the holder of the prior charge to the sale or disposal; and the identity of other persons who have interests in the property. An application for such an order must be served on a person who has the benefit of the prior charge, any other person interested in the property and on the company concerned, within 7 days after it is filed.

### **Order 71, new rule 28C (Receiver's power to carry on a corporation's business during the winding up-s 420C)**

A receiver of property of a corporation which is being wound up may, with the written approval of the liquidator of the corporation or with the approval of the Court, carry on the corporation's business either generally or as specified in the approval: s420C(1).

Rule 28C provides that an application for approval under s420C to be served on the liquidator.

### **Rule 22**

### **Order 71, rule 29 (Inquiry as to conduct of a controller-s 423)**

Section s423 now refers to a "controller" and not "receiver of property of a corporation". Defined in s9 to include a mortgagee in possession and its agent in addition to a receiver.

Rule 29 is amended to reflect this change.

### **Rule 23**

### **Order 71, rule 30 (Application by controller for directions-s 424)**

Section s424 now refers to a "controller" and not "receiver of property of a corporation".

Rule 30 is amended to reflect this change.

### **Rule 24**

### **Order 71, new rules 30A, 30B and 30C (Court's power to fix receiver's remuneration-s 425)**

Section 425 of the Corporations Law provides that an order for the remuneration of a receiver may be made, varied or amended on the application of a liquidator of the corporation, an administrator of the corporation, an administrator of a deed of company arrangement executed by the corporation, or the Australian Securities Commission. An order for the remuneration of the receiver may be varied or amended on the application of the receiver concerned.

Rule 30A provides for service of an application under s425 on the other persons with standing to bring the application.

### **Order 71, new rule 30B (Court's power to remove controller for misconduct-s 434A)**

Section 434A provides that the Court may order a controller to cease to act as receiver or give up possession or control of property of a corporation if, on the application of the corporation, the Court is satisfied that the controller of property of the corporation has been guilty of misconduct in connection with performing or exercising any of the controller's functions and powers: s434A.

Rule 30B provides that affidavit evidence in support of an application for removal of the administrator under s434A be filed and requires service on the controller within 7 days after it is filed.

### **Order 71, new rule 30C (Removal of redundant controller-s 434B)**

The Court may order a controller of property of a corporation to cease to act in relation to the whole or specified property of the corporation, if the Court is satisfied that the controller has achieved the objectives for which he or she was appointed: ss434B(1) and (2). The factors to which the Court must have regard in deciding whether to make such an order include the company's interests; the interests of the holder of the relevant charge; the interests of the other creditors of the company and any other relevant matter: s434B(3). Such an order may only be made on the application of the liquidator: s434B(4).

An order made under s434B may also prohibit the holder of the charge from appointing a person as receiver of property of the corporation under a power contained in an instrument relating to the charge; entering into possession, or taking control, of such property for the purpose of enforcing the charge; appointing a person to enter into possession or take control, whether as agent for the chargee or for the corporation: s434B(5).

Rule 30C provides that such an application to be supported by an affidavit setting out the nature of the property in relation to which the controller is appointed; the identity of the holder of the charge under which the controller was appointed; and the grounds on which it is said that the controller is redundant. Such an application is to be served upon the controller and the holder of the relevant charge, within 7 days after it is filed.

### **Rule 25**

#### **Order 71, rule 31 (Stay of proceedings where company is under official management-s444)**

Inserts new subrule 31(4) which provides that existing Rule 31 applies only to companies placed in official management before 23 June 1993.

### **Rule 26**

#### **Order 71, rule 32 (Inquiry as to conduct of official manager-s 452(4))**

Inserts new subrule 32(6) which provides that existing Rule 32 applies only to companies placed in official management before 23 June 1993.

### **Rule 27**

#### **Order 71, rule 33 (Application for variation or cancellation of resolution to place company under official management-s 454)**

Inserts new subrule 33(8) which provides that existing Rule 33 applies only to companies placed in official management before 23 June 1993.

### **Rule 28**

## **Order 71, rule 34 (Release of official manager-s 456)**

Inserts new subrule 34(2) which provides that existing Rule 34 applies only to companies placed in official management before 23 June 1993.

## **Rule 29**

### **Order 71, rule 34A (Applications under Part 5.3A - Administration of a Company's Affairs)**

Where an administrator has been appointed, a charge on property of the company is generally unenforceable except with the administrator's written consent or leave of the Court: s440B.

The owner or lessor of property used or occupied by or in the possession of the company cannot take possession of the property or otherwise recover it except with the administrator's written consent or with the leave of the Court: s440C. During the administration, court proceedings cannot be begun or proceeded with against the company except the written consent of the administrator or with the leave of the Court and in accordance with such terms as the Court imposes: s440D.

During the administration of a company, no enforcement process in relation to property of the company can be begun or proceeded with except with the leave of the Court and in accordance with such terms (if any) as the Court imposes: s440F.

During an administration, a court officer cannot take action to sell property of the company or make certain payments, except to the administrator: s440G(2). The Court may permit the court officer to take action or to make a payment which will be prevented under s440G(2) if it is satisfied that it is appropriate to do so: s440G(7).

During the administration of a company, a guarantee of a liability of the company cannot be enforced against a director of the company who is a natural person or a spouse, de facto spouse or relative of such a director, and a proceeding in relation to such a guarantee cannot be begun against such a director, spouse, de facto spouse or relative, except with the leave of the Court and in accordance with such terms (if any) as the Court imposes: s440J(1). While a creditor is prevented from enforcing a guarantee or beginning a proceeding in relation to such a guarantee, s1323 applies to authorise the Court to make orders to preserve assets of the director: s440J(2).

The Court is authorised to order a chargee, receiver or other person who is exercising powers under s441B(1) to refrain from performing specified functions or exercising specified powers, provided the administrator is able to put before the Court a plan of action which the Court is satisfied will adequately protect the chargee's interests: s441D.

The owner or lessor of property used by a company is not prevented from enforcing its right to take possession of property if it had commenced to do so before the appointment of an administrator: s441F. However, if a company is under administration and the owner or lessor of property enters into possession or assumes control of the property or exercises any other power in relation to the property, the Court may order the person not to perform specified functions or exercise specified powers in relation to the property, except as permitted by the order: s441H(1)-(2).

Property subject to a charge, or which is in the possession of the company and which is owned by or leased by another party to the company, cannot be disposed of by an administrator other than in the ordinary course of business, except with the written consent of the chargee, owner or lessor or with the leave of the court: s442C(2).

An administrator is personally liable for debts, liabilities and obligations which he incurs as administrator: s443A(1). If the company is renting property at the time the administrator is appointed, the administrator becomes personally liable for rent payments for the period commencing more than 7 days after the administration began, if the company continues to use, occupy or possess the property during the course of the administration: s443B(2)(a). The Court may make an order that the administrator is not liable for rental payments, although such an order does not effect the liability of the company: s443B(8).

If a deed of company arrangement is prepared under s444A, the company must execute that deed within 21 days from the end of the meeting of creditors which resolved that the company execute the deed, or such further period as the Court allows on application made within those 21 days: s444B(2).

If a meeting of a company's creditors resolves that the company execute a deed of arrangement, a person who would be bound by a deed of company arrangement if it had already been executed is not permitted to do anything which will be inconsistent with that deed in the period when the deed is executed by the company and the administrators or the period in which the deed is required to be executed under s444B(1) ends, except with the leave of the Court: s444C.

If a deed of company arrangement is in place, all persons bound by the deed are prevented from applying for the company to be wound up; or proceeding with such an application made before the deed became binding on that person. Such persons are also prevented from bringing or continuing a proceeding against the company or its property, or attempting to levy execution or other enforcement process; but may do so with the leave of the Court and in accordance with such terms (if any) as the Court imposes: s444E.

A deed of company arrangement may be varied by resolution of creditors: s445A. If a deed of company arrangement is varied by creditors under s445A, a creditor of the company may apply to the court for an order cancelling the variation: s445B.

The Court may make an order terminating a deed of company arrangement under s445D.

The Court is empowered to make such order as it thinks appropriate about how Part 5.3A is to operate in relation to a particular company: s447A. The Court has power to order that the administration of a company should end, either because the company is solvent; or because provisions of Part 5.3A are being abused; or for some other reason: s447A(2). Such an order may be made on the application of the company; a creditor of the company; the administrator of the company, in the case of a company under administration; the administrator of a deed of company arrangement; the Australian Securities Commission; or any other interested person.

Subrules 34A(1) and 34A(2) provide for the form of applications under Part 5.3A. generally and authorise the Court to direct the publication of notice of such applications. Subrule 34A(3) provides the persons on whom the application is to be served.

#### **Order 71, rule 34B (Court's power to limit rights of secured creditor or owner or lessor of property-s 444F)**

A deed of company arrangement does not prevent a secured creditor from realising or dealing with the security, unless the secured creditor voted in favour of the resolution of ' creditors by reason of which the company executed the deed, or the court makes an order under s444F(2): s444D(2). A deed of company arrangement also does not bind an owner or lessor of property unless it voted in favour of the resolution of creditors by reason of which the court executed the deed of company arrangement, or the court makes an order under s444F(4): s444D(3).



The court may order a secured creditor of the company not to realise or otherwise deal with the security: s444F(2).

The court may also order the owner or lessor of property that is used by or occupied by or is in the possession of a company not to take possession of the property or otherwise recover it: s444F(4).

Rule 34B provides that an application under s444F to be supported by an affidavit annexing the deed of company arrangement or proposed deed of company arrangement, identifying the secured creditor or owner or lessor of property whose interests are affected by the order and setting out the nature of the security; and to be served on the secured creditor or owner or lessor of the property.

### **Order 71, rule 34C (Application to avoid or validate a deed of company arrangements 445G)**

If a company enters a deed of company arrangement in circumstances which do not comply with Part 5.3A, the administrator of the deed, a member or creditor of the company or the Australian Securities Commission may apply to the Court for an order declaring the deed or a provision of it to be void, or alternatively not to be void, on the grounds specified in the application or some other ground: s445G(2). The Court may declare the deed, or a provision of it, to be valid despite a contravention of a provision of Part 5.3A if the Court is satisfied that the provision was substantially complied with and that no injustice would result or anyone bound by the deed if the contravention was disregarded: s445G(3). If the Court declares a provision of a deed of company arrangement to be void, the Court may vary the deed with the consent of the administrator of the deed: s445G(4).

Subrule 34C(1) provides that a person who intends to file an application to avoid a deed of company arrangement under s445G to give advance notice of the application by letter to the administrator of the deed. of company arrangement, which must be delivered to the administrator or posted by express post addressed to the administrator not later than the day before the application is filed. A copy of that letter must be annexed to an affidavit filed together with the application. This requirement is intended to allow the administrator the opportunity to consider whether to refrain from taking further steps in the administration pending the determination of the application. Subrule 34C(2) provides that an application under s445G to be accompanied by an affidavit setting out any material facts on which the applicant relies in support of the application, and identifying the grounds on which it is said that the Court should make the order. That application must be served on the administrator, if the administrator is not the applicant, and on the Australian Securities Commission.

### **Order 71, rule 34D (Application by administrator for directions-s 447D)**

The administrator of a company under administration or of a deed of company arrangement may apply to the court for directions about a matter arising in connection with the performance or exercise of his or her functions and powers: s447D(1). The administrator of a deed of company arrangement may also apply to the court for directions about a matter arising in connection with the operation of or giving effect to the deed: s447D(2).

Rule 34D provides that an application to the Court under s447D to indicate the matter in respect of which the administrator seeks directions from the Court. Such an application must be accompanied by an affidavit setting out any matters known to the applicant and material to the application.

### **Order 71, rule 34E (Supervision of administrator of company or deed of company arrangement-s 447E)**

The Court is authorised to make such order as it thinks just if it is satisfied that the administrator of a company or of a deed of company arrangement has managed or is managing the company's business, property or affairs in a way that is prejudicial to the interests of some or all of the company's creditors or members or has acted in a way that would be prejudicial to such interests: s447E(1). Orders may also be made where there is a vacancy in the office of the administrator s447E(2). Such orders may be made on the application of the Australian Securities Commission or of a creditor or member of the company: s447E(3).

Rule 34E provides that an application under s447E be served on the administrator and on the Commission, if it is not the applicant. The application is to be supported by an affidavit stating any material facts relied on by the applicant in support of the application, and identifying the grounds on which it is said the Court should make an order under that section. Subrule 34A(2) provides that the Court may direct that notice of an application under s447E be given by advertisement or otherwise to such persons or classes of persons as the Court determines, and may adjourn the application for that purpose.

#### **Order 71, rule 34F (Removal of administrator-s 449B)**

The appointment of an administrator cannot be revoked, except by order of the Court under s449B. That section provides that, on the application of the Australian Securities Commission or of a creditor of the company concerned, the Court may remove the administrator of a company under administration or of a deed of company arrangement from office and appoint someone else as administrator of the company or deed.

Rule 34F provides that evidence brought by the applicant in support of the application for removal of the administrator to include an affidavit stating any material facts relied upon by the applicant in support of the application and identifying the grounds on which it is said that the administrator should be removed. That application must be served on the administrator and on the Australian Securities Commission.

#### **Order 71, rule 34G (Vacancy in office of administrator of a company or of administrator of a deed of company arrangement-ss 449C - 449D)**

If the administrator of a company dies; becomes prohibited from acting as administrator of the company; or resigns by notice in writing given to his or her appointor and to the company, his or her appointor may appoint someone else as administrator of the company. If the administrator was appointed by the Court under s449B or under s449C(6), the Court is authorised to appoint someone else as administrator of the company. Section 449C(6) authorises the Court to appoint a person as administrator on the application of the Australian Securities Commission or of an officer, member or creditor of the company if the company is under administration but no administrator is acting.

If the administrator of a deed of company arrangement dies; becomes prohibited from acting as administrator of the deed; or resigns by notice in writing given to the company, the Court may appoint someone else as administrator of the deed: s449D(1). Where a deed of company arrangement has not yet terminated, but no administrator of the deed is acting, the Court may appoint a person as administrator of the deed: s449D(2). Such an appointment may be made on the application of the Commission or of an officer, member or creditor of the company: s449D(3).

Rule 34G provides that a person who applies to the Court for an order that a vacancy in the office of the administrator be filled to publish a notice of intention to apply for that order in the manner prescribed by Rule 104 not later than 7 days before the date on which the application is to be heard. A provision for the applicant to nominate a person who will be appointed as administrator, unless the Court is satisfied that some other person is appointed, is included in the Rule. The applicant is required to obtain an acknowledgment from the person nominated for

appointment as administrator, and to file that acknowledgment within 14 days of filing the application.

### **Rule 30**

#### **Order 71, rule 35 (Address for service in winding up applications-ss 459P and 462)**

Rule 35 replaces ss460, 461 with ss459P, 462 as appropriate.

### **Rule 31**

#### **Order 71, rule 36 (Application for a winding up order-s 462)**

Rule 36 has been omitted and a new Rule 36 has been made. The Rule is restricted to applications under s462 being various grounds for the winding up of a company other than for a failure to comply with statutory demand.

Subrule 36(1) provides that the Rule applies on or after 23 June 1993.

Subrule 36(2) provides that on filing and serving an application, the applicant must file and serve an affidavit in Form 128 setting out the prescribed information and an affidavit setting out any other material facts and grounds set out in s461.

Subrule 36(3) provides that if an application is made under s461(a) the affidavit in support must include a statement of solvency and annex the most recent accounts of the company lodged with the Australian Securities Commission.

Subrule 36(4) provides that the affidavit referred to in subrule 36(2) setting out the material facts must be made by a person who can depose of his or her own knowledge to at least some of the grounds relied on.

Subrule 36(5) provides that the applicant may at the time of filing lodge a nomination of liquidator in accordance with Form 88 who will be appointed by the Court unless it is satisfied that another liquidator should be appointed. This procedure corresponds with that in subrules 20(5) and 37(7).

Subrule 36(6) provides that subrule 35(5) applies to a voluntary winding up if for the purposes of the winding up the affairs and distributing the property of the company the person has been nominated to be a liquidator by the company or creditors at a meeting.

Subrule 36(7) provides that as soon as practicable after filing (and in any event not later than 14 days) the application and affidavit in support must be served on the company.

Subrules 36(8) and (9) reproduce the former subrules 36(5) and 36(7) which provide for time limits for publication and appointment of a directions hearing.

Subrule 36(10) provides that if the debtor company intends to appear and oppose the application it must file a notice of appearance (Form 79) and an affidavit in support (Form 93A) and serve a copy on the applicant.

Subrule 36(11) provides that a person who intends to appear at a directions hearing to file a notice of appearance in Form 79 specifying the grounds and/or opposition to the application and service on the applicant. This corresponds to subrule 37(12).

Subrule 36(12) reproduces the former subrule 36(9) which requires the filing of a list of names and addresses of those persons intending to appear.

Subrule 36(13) reproduces the former subrule 36(10) which provides for the inspection of documents in the Registry.

Subrule 36(14) provides for the Court to appoint more than one liquidator. This corresponds to subrule 37(16).

Subrule 36(15) provides that an application may not be discontinued without the leave of the Court. This corresponds to subrule 37(15).

## **Rule 32**

### **Order 71, rule 36A (Form of affidavit in support of statutory demand-s 459E)**

A statutory demand may be served on a company relating to a debt or debts that is or are due and payable whose total amount is at least the statutory minimum: s459E(1). The statutory minimum is defined in s9 to be \$2,000, or such other amount as is prescribed. The demand must specify the amount of the debt or debts; must require the company to pay the amount of the debt or to secure or compound for that amount to the creditor's reasonable satisfaction within 21 days after the demand is served on the company; must be in writing; must be in the prescribed form, if any; and must be signed by or on behalf of the creditor: s459E(2).

Unless the debt is a judgment debt, the demand must be accompanied by an affidavit that verifies that the debt is due and payable by the company and which complies with the Rules: s459E(3).

Rule 36A provides that such an affidavit must be in Form 93B, containing a statement that the affidavit has not been filed in the Federal Court; that no proceedings have been commenced in respect of the debt to which the affidavit relates; and that any questions relating to the affidavit or the debt to which it relates should be directed either to the person named as applicant or the applicant's solicitors and not to the Court. The Rule provides that no proceedings number is to be stated in such an affidavit. An affidavit made under this rule may not be filed with the Court unless winding up proceedings are commenced in the matter to which the affidavit relates.

### **Order 71, rule 36B (Application to set aside statutory demand-s 459G)**

The company may apply to the Court for an order setting aside a statutory demand served on the company: s459G(1). That application may only be made within 21 days after the demand is served.. s459G(2). An affidavit supporting the application must be filed with the Court and a copy of the application, and a copy of the supporting affidavit, served on the person who served the demand on the company within that 21 day period: s459G(3).

If an application has been made under A and the Court is satisfied either that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates, or that the company has an offsetting claim, the Court is required to calculate the "substantiated amount" of the demand by deducting any offsetting claim or claims or any disputed amounts from the admitted amount of the debt, being that part of the debt as to which no genuine dispute exists: s459H(2). The offsetting amount is the amount of any claim or claims that the company has against the person who served the statutory demand by way of counter-claim, set-off or cross demand, whether or not that amount arises out of the same transaction or circumstances as the debt to which the demand relates. The Court is required to set aside the demand if the substantiated amount is less than the statutory minimum: s459H(3). If the substantiated amount is at least as great as the statutory minimum, the Court may make

an order varying the demand as specified in the order and declaring the demand to have had effect, as so varied, as from when the demand was served on the company: s459H(4).

Where a company applies to the court under s459G for an order setting aside a statutory demand served on the company, the Court may make an order setting aside the demand if it is satisfied that substantial injustice will be caused unless the demand is set aside, because of a defect in the demand; or that there is some other reason why the demand should be set aside: s459J(1). Subject to those provisions, the Court is not permitted to set aside a statutory demand merely because of a defect: s459J(2).

Once an order has been made setting aside the demand under s459J, the statutory demand has no effect: s459K.

Rule 36B provides that an application under s459G(1) to be made in Form 5 and to be accompanied by an affidavit stating any material facts relied upon by the applicant in support of the application and identifying the grounds on which it is said that the Court should make an order under setting aside the demand under section 459H.

### **Order 71, rule 36C (Application for leave to bring a winding up applications 459P(2))**

The Court may order that an insolvent company be wound up in insolvency on an application under s459P. Persons who may apply for a company to be wound up in insolvency are the company; a creditor, even if the creditor is a secured creditor or is only a contingent or prospective creditor; a contributory; a director; a liquidator or provisional liquidator of the company; the Australian Securities Commission or a prescribed agency: s459P(1). An application made by a person who is a creditor only because of a contingent or prospective debt; a contributory; a director or the Commission may only be made with leave of the Court: s459P(2). The Court may only give leave to such persons if satisfied there is a prima facie case that the company is insolvent: s459P(3).

The Court may also order the winding up of a company on insolvency in an application under s260, s462 or 464, if the Court is satisfied that the company is insolvent: s459B. Section 260 authorises the making of a winding-up order if the Court is of the opinion that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial or in a manner that is contrary to the interests of a member or members of the company. Section 462 provides for a winding-up order in insolvency even if an application for winding-up has been brought on other grounds. Section 464 provides for a winding-up order in connection with an investigation under the Australian Securities Commission Law, if the Commission concludes that a company is insolvent.

Rule 36C deals with applications for leave to seek an order that a company be wound up in insolvency under s459P(2), and provides that such an application be made in Form 5 and served on the company. An affidavit in support of the application must specify the material facts on which the applicant relies to establish a prima facie case that the company is insolvent for the purposes of s459P(3). If leave to bring the winding up application is granted, a winding up application in Form 93C may be filed in the proceedings in which leave was granted, without the applicant incurring a further filing fee. Rule 37C otherwise applies to the conduct of that application.

### **Rule 33**

#### **Order 71, rule 37 (Winding up of a company in insolvency-s 459P)**

If an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the application must set out particulars of service of the

demand on the company and of the failure to comply with the demand: s459Q. That application must have attached to it a copy of the demand and, if the demand has been varied by an order under s459H(4), a copy of the order. Unless the debt or each of the debts to which the demand relates is a judgment debt, the application must be accompanied by an affidavit that verifies that the debt, or the total of the amounts of the debt, is due and payable by the company and which complies with the rules.

If an application for winding up on insolvency relies on a failure to comply with a statutory demand, the company may not, without the leave of the court, oppose the application on the ground that the company relied on or could have relied on for the purposes of the application to set aside the demand: s459S(1). The court is not permitted to grant leave under s459S(1) unless it is satisfied that the ground is material to providing that the company is solvent: s459Q(2).

Rule 37 has been omitted and a new Rule 37 has been made and is restricted to applications under s459P. Form 93C prescribes a form of application under s459P. Subrule 37(1) provides that the Rule applies on or after 23 June 1993. Subrule 37(2) provides for the contents of an affidavit verifying the debt on which a notice of statutory demand is based, and Form 94 prescribes the form of such an affidavit. An affidavit verifying the debt is to be required only in the case of debts other than judgment debts, as s459Q contemplates that the application be accompanied by an affidavit which complies with the Rules unless the relevant debt is a judgment debt.

Subrule 37(3) provides that an application for a company to be wound up in insolvency under s459P, which does not rely on a failure by the company to comply with a statutory demand under s459Q, may also be made in Form 93C. Such an application must specify the grounds on which the applicant relies to allege that the company is insolvent. The requirement in subrule 37(2) for the filing of an affidavit in Form 94 does not apply to such an application.

Subrule 37(4) provides that an affidavit must be filed with an application setting out the prescribed information in accordance with Form 128 and an affidavit in Form 94 if the debt is not a judgment debt.

Subrule 37(5) provides for the filing of an affidavit in support of the application in subrule (3).

Subrule 37(6) provides for the filing of an affidavit by a person who has knowledge of the indebtedness.

Subrule 37(7) provides also for the nomination of a liquidator in Form 88 corresponding with subrules 20(5) and 36(5) earlier mentioned.

Subrule 37(8) continues to provide for service within 14 days, which is also the time permitted for service of the application under s465A.

Subrule 37(9) reproduces the former subrule 37(5) which deals with publication in Form 93.

Subrule 37(10) reproduces the former subrule 37(7) which deals with the appointment of a directions hearing.

Subrule 37(11) provides for the filing of a notice of appearance by a company which intends to appear and/or oppose an application. An affidavit must be filed and served also. This corresponds to subrule 36(10).

Subrule 37(12) provides that a person intending to appear at a directions hearing must file a notice of appearance, Form 79, specify the grounds of opposition and serve a copy on the applicant. This corresponds with subrule 36(11).

Subrule 37(13) provides for the filing of a list of names and addresses of persons who intend to appear in the proceedings.

Subrule 37(14) provides for inspection of documents in the Registry.

Subrule 37(15) provides that an application may not be discontinued without leave of the Court.

Subrule 37(16) provides the Court may appoint more than one liquidator.

## **Rule 34**

### **Order 71, rule 38 (Filing in Court of documents in support of an application-s 459P or s 462)**

**Omits the existing subrule and substitutes new rule 38 headed "Filing in Court of documents in support of an application under section 459P or 462"** providing for a procedure for the filing of affidavits in a winding up application in Court. This will ease the time constraints on the filing of documents previously in rule 38.

## **Rule 35**

### **Order 71, new rule 39A (Court's power to extend time within which application for a company to be wound up in insolvency is to be determined-s 459R)**

An application for a company to be wound up in insolvency is to be determined within 6 months after it is made: s459R(1). The Court may extend the period within which the application must be determined, if the court is satisfied that special circumstances exist which justify the extension and the order is made within the prescribed period, as extended: s459R(2). Where the application is not determined within that time limit, it is to be dismissed: s459R(3).

Rule 39A provides that an application for extension of time for determination of the winding up application may be made by notice of motion in the application filed under s459R, and is to be supported by an affidavit setting out the material grounds on which the applicant relies in support of the application. The application and affidavit in support are to be served on the company within 14 days of filing.

## **Rule 36**

### **Order 71, rule 41 (Substituted applicant in winding up application-ss 460, 461)**

This rule is omitted and a new rule 41 headed "Substituted applicant in winding up application-section 465B" inserted.

Section 465B provides for substitution of applicants on a winding up. The Court may only make such an order if it thinks appropriate to do so because the application is not being proceeded with diligently enough or for some other reasons: s465B(2). The rule provides for the forms and publication of applications where a person wishes to be substituted as an applicant.

## **Rule 37**

### **Order 71, rule 42 (Notice of appointment of liquidator)**

Rule 42 is amended to provide for delivery of a notice of appointment of a liquidator on the registered office of a company, with service by post being retained as an alternative.

## **Rule 38**

### **Order 71, rule 43 (Short form bills for winding up applications-s 466(2))**

Rule 43 has been omitted and a new Rule 43 has been made. Rule 43 provides a procedure for submission of a short form bill of costs and disbursements in a winding up application, as an alternative to taxation of the bill under Order 62 which provides for taxation of bill of costs and disbursements. The Second Schedule of the Federal Court Rules has been amended to allow recovery, on taxation of a short form bill, of \$1,750 as the costs of obtaining a winding up order up to and including entry and service of the order under s470 of the Corporations Law and the obtaining of a certificate of taxation for the purposes of s466(2) of the Corporations Law. Additional amounts will be allowable in respect of any adjournment for which costs have been reserved by the Court.

A short form bill need not include an itemised account of the work or services performed. The applicant, the liquidator and their solicitors do not attend on taxation of the bill under this Rule, unless directed to do so by a taxing officer, reducing the costs incurred on taxation of the bill.

## **Rule 39**

### **Order 71, rule 46 (Applications for leave to commence or continue proceedings against a company-s 471B)**

The effect of a winding up order on proceedings against the company in relation to its property is dealt with in s471B. A person cannot begin or proceed with a matter against the company or in relation to property of the company, or with enforcement process in relation to that property, except with the leave of the Court and on such terms as the Court imposes: s471B.

Existing Rule 46 has been omitted and new Rule 46 substituted. This Rule provides that applications under s471B may be made by notice of motion either where the proceedings have already commenced or a person seeks to begin a proceeding.

## **Rule 40**

### **Order 71, rule 47: Transitional provisions for winding up applications**

Section 1383 of the Corporations Law, introduced by the Corporate Law Reform Act 1992, has the effect that Parts 5.4, 5.5 and 5.6 of the Corporations Law (as in force before the commencement of s57 of the Corporate Law Reform Act 1992) ("old winding up law") continue to apply in a winding up which was ordered by the Court before the commencement of s57 of the Corporate Law Reform Act ("the commencement"). The old winding up law also applies, if a winding up application was made before the commencement, for the purposes of determining or otherwise disposing of the application and of winding up the company under an order of the Court made on that application. The old winding up law also applies, if a demand was served on a company under s460(2)(a) of the Corporations Law (as in force before the commencement), for the purposes of making a winding up application in reliance on the demand on a ground provided under s460(1); determining or disposing of such an application; and winding up the company under an order of the Court made on such an application.

Rule 47 provides for a fourth schedule to the Rules which contains transitional provisions by reference to former Rules eg. 36, 37 and 41 in winding up applications. Those rules have been amended to permit the applicant to nominate an official liquidator for appointment as liquidator, which is the new procedure provided for in substituted Rules 36 and 37.

## **Rule 41**



### **Order 71, rule 48 (Appointment of provisional liquidator-s 472)**

Subrule 48(2)(b) introduces a system of nomination of provisional liquidators consistent with the practice of nominating liquidators. Form 89 has been omitted as unnecessary.

### **Rule 42**

### **Order 71, rule 49 (Notice of appointment of provisional liquidator)**

Subrule 49(1) omits exemption from service of a notice of appointment of a provisional liquidator previously available to the Australian Securities Commission. Service at the registered office of the company as an alternative to service by post is also provided in paragraph 49(1)(c).

### **Rule 43**

### **Order 71, rule 50 (Service of order appointing a provisional liquidator)**

Omits the exemption from service of a sealed order of the Court of a provisional liquidator previously available to the Australian Securities Commission.

### **Rule 44**

### **Order 71, rule 51 (Power of provisional liquidator-s 472)**

Section 472 is amended by adding s472(4), s472(5) and s472(6). Sections 472(4)-(5) provides that a provisional liquidator has power to carry on the company's business and has the powers that a liquidator of a company would have under s477(1)(d), s477(2) (except s477(2)(n)) and s477(3) if the company were being wound up in insolvency or by the Court. The exercise of the powers conferred by s472(4) by a provisional liquidator is subject to the control of the Court, and a creditor or contributory, or the Australian Securities Commission, may apply to the Court in relation to the exercise or proposed exercise of any of those powers.

Subrule 51(1) has been omitted, as the powers of provisional liquidators are now outlined in s472(4). Subrule 51(3) is amended to provide that an application under s472(6) in relation to the exercise or proposed exercise of the powers of a provisional liquidator may be made by notice of motion in the proceedings for the winding up order.

### **Rule 45 Order 71, rule 52 (Remuneration of provisional liquidator-ss 473(2))**

Subrule 52(1) and (2) are amended to provide that an application under s473(2) for remuneration may be made to a Judge sitting in chambers. Subrule 52(3) is amended to confirm that the Court may direct that notice of an application under s473(2) be given by advertisement or otherwise to such persons or classes of persons as the Court or a Judge determines.

### **Rule 46**

### **Order 71, rule 55 (Report as to company's affairs-s 475)**

The term "liquidators" in ss 475 and 536-540 is defined to include a provisional liquidator. Rule 55 is amended accordingly.

### **Rule 47**

### **Order 71, rule 56 (Settlement of fists of contributories-s 478)**

Following the amendments, the requirement in the former Rule 56 for filing of lists of contributories in the Registry has been omitted.

#### **Rule 48**

##### **Order 71, rule 60 (Liquidator's power to require payment of money or transfer of property-s 483)**

Omits existing rule 60 and substitutes a new rule 60. Section 477(2) has been amended to permit a liquidator appointed by the Court to exercise the Court's power under s483(3) to make calls on contributories, except the Court's power under s483(3)(b) to make an order for payment of any calls.

The new rule 60 simply provides that an application under s.483 may be made by notice of motion.

#### **Rule 49**

##### **Order 71, rule 61 (Calls upon contributories with the sanction of a committee of inspection-ss 483 and 488)**

Rule 61 has been omitted and Rule 64A is introduced.

#### **Rule 50**

##### **Order 71, rule 62 (Calls upon contributories by leave of the Court-ss 483 and 488)**

Rule 62 has been omitted and Rule 64A is introduced.

#### **Rule 51**

##### **Order 71, rule 64 (Powers delegated to liquidator by the Court-s 488)**

Subrule 64(1) omits the words "the making of calls and" for clarity of drafting.

#### **Rule 52**

##### **Order 71, new rule 64A (Distribution of surplus-ss 488(2))**

Subrule 64A(1) provides that this rule applies to an application for leave to distribute a surplus.

Subrule 64A(2) provides that an application for an order of the Court for special leave to distribute a surplus pursuant to s448(2) must be supported by an affidavit specifying manner surplus is to be distributed, including names and addresses of recipients.

Subrule 64A(3) provides that notice of the application must be published in Form 116A not later than 14 days before hearing.

Subrule 64A(4) requires a person who intends to appear at hearing to file a notice in Form 79 with any affidavit and serve them on liquidator not later than 2 days before hearing.

Subrule 64A(5) provides that the court may direct a liquidator to prepare and file a list in Form 80 of the names and addresses of persons giving notice of intention to appear.

## **Rule 53**

### **Order 71, rule 65 (Appointment of temporary joint liquidator)**

Subrule 65(1) has been amended to provide for the appointment of a number of temporary joint liquidators.

## **Rule 54**

### **Order 71, rule 73 (Supervision of liquidators by the Court-s 536)**

Subrule 73(6) has been amended to provide that "liquidator" includes a "provisional liquidator".

## **Rule 55**

### **Order 71, rule 74 (Meetings of creditors or contributories-s 547)**

Rule 74 is omitted as the procedure for meetings of creditors is dealt with in the regulations and therefore the rule is unnecessary.

## **Rule 56**

### **Order 71, new rule 76A (Determination of value of debts and claims of uncertain value in liquidation--s 554A)**

If a liquidator admits a debt or claim that does not have a certain value in the winding up of the company, the liquidator is required either to make an estimate of the value of the debt or claim or to refer the question of the value of the debt or claim to the Court: s554A(2). A person who is aggrieved by the liquidator's estimate of the value of the debt or claim may appeal against that estimate to the Court: s554A(3). If the liquidator refers the question of the value of the debt or claim to the Court, or a person appeals to the Court against the liquidator's estimate of the value of the debt or claim, the Court must make an estimate of the value of the debt or claim or determine a method to be applied by the liquidator in working out the value of the debt or claim: s554A(5). If the Court determines the method to be applied by the liquidator in working out the value of the debt or claim and any person is aggrieved by the way in which that method is applied by the liquidator, that person may appeal to the Court against the way in which that method was applied in accordance with the Regulations: s554A(6). If a person appeals to the Court against the way the liquidator applied the method and the Court is satisfied the liquidator did not correctly apply the method, the Court must itself work out the value of the debt or claim in accordance with the method: s554A(7).

A new Rule 76A provides that an application under s554A and an appeal from the decision of the liquidator under s554A to be made by application in Form 5. This is because such an application will involve issues which are distinct from those arising in the winding up application. However, the Rule permits a liquidator appointed on a winding up application to refer the question of the value of the debt or claim to the Court, pursuant to s554A(2), by filing a notice of motion in the winding up proceedings. In this case, the reduced filing fee applicable to notices of motion will benefit creditors of the company generally.

Rule 76A provides that a person who brings an application appealing against a liquidator's estimate of value to file an affidavit specifying the value which that person says should be attributed to the debt or claim and the means by which that value is derived. If a person appeals to the Court against the way in which the method was applied by the liquidator, that person is required to file an affidavit specifying his or her complaint as to the method applied by the liquidator, specifying the way in which that person says the liquidator should have applied the

method, and specifying what the result of application of the method in that way would have been.

## **Rule 56**

### **Order 71, new rule 76B (Amendment of valuation of security in ~ of debt by secured creditor-s 554G)**

If a secured creditor has lodged a proof of debt in respect of a balance due, after deducting its estimate of the value of security, the creditor may at any time apply to the liquidator or the Court for permission to amend the proof of debt by altering the estimated value: s554G(1). The Court may permit a creditor to amend a proof of debt if it is satisfied either that the valuation of the security was made in good faith on a mistaken basis or that the value of the security has changed since the estimate was made: s554G(2).

Rule 76B provides that an application for amendment of valuation of a security to be made in Form 5 and to be supported by an affidavit setting out the basis on which an amendment of the value of the security is sought and stating the value which the applicant seeks to attribute to that security. That application and affidavit in support are required to be served on the liquidator.

## **Rule 57**

### **Order 71, rule 77 (Disclaimer of contracts-s 568)**

Section 568 is substantially amended by the Corporate Law Reform Act 1992. Section 568(1) permits a liquidator to disclaim land burdened with onerous covenants; shares; property that is unsaleable or not readily saleable; property that may give rise to a liability to pay money or some other onerous obligation; property where it is reasonable to expect that the costs of realising the property would exceed the proceeds of realising the property; and contracts. The liquidator cannot disclaim a contract (other than an unprofitable contract or a lease of land) except with the leave of the Court: s568(1A). On an application for leave under s568(1A), the Court may grant leave subject to such conditions and may make such orders in connection with matters arising under or relating to the contract as the Court considers just and equitable: s568(1B). Sections 568(2), (3), (4), (5), (6), (7) and 11-12 are omitted.

Rule 77 provides that a liquidator who applies to the Court for leave to disclaim a contract under s568(1A) to file and serve an affidavit stating the persons interested in the contract and the nature of their interests and the reasons why it is said to be just to grant leave to disclaim. An affidavit filed under that rule must be served on any person interested in the contract.

### **Order 71, rule 77A (Application to set aside disclaimer before it takes effect-s 568B)**

A liquidator is required to lodge notice of a disclaimer with the Australian Securities Commission and to give notice of the disclaimer to each person who appears to the liquidator to have, or claim to have, an interest in the property: s568A(1). Publication of a notice may also be required under s568A(2).

A person who has an interest in disclaimed property, or claims to have such an interest, may apply to the Court for an order setting aside the disclaimer before it takes effect: s568B(1). The application must be made within 14 days after notice of the disclaimer is given to that person by the liquidator, or notice of the disclaimer is published under s568A(2), or the liquidator lodges a notice of disclaimer with the Australian Securities Commission. The Court may set aside the disclaimer and, if the disclaimer is set aside, make such order as it thinks appropriate: s568B(2). The Court may only set aside the disclaimer if it is satisfied that the prejudice to persons who

have an interest in the property, as a result of the disclaimer, is grossly out of proportion to the prejudice caused to the company's creditors by setting aside the disclaimer: s568B(3).

Rule 77A provides that an application to set aside a disclaimer to be made in Form 5 and to be supported by an affidavit setting out the nature of the interest which the applicant claims to have in the disclaimed property and the grounds on which it is said that the disclaimer should be set aside. The filing of an application in Form 5 involves the commencement of new proceedings. This approach is proposed since the issues arising from the setting aside of a disclaimer will differ from those involved in the winding up generally, and the parties to the application are likely to be the liquidator on the one hand and the person who has an interest in the disclaimed property on the other.

### **Order 71, rule 77B (Application to set aside disclaimer after it has taken effects 568E)**

A person who has, or claims to have, an interest in disclaimed property may also apply to the Court for an order setting aside the disclaimer after it has taken effect, with the leave of the Court: s5681E(1). The Court may give leave only if it is satisfied it was unreasonable in all the circumstances to expect the person to have applied for an order setting aside the disclaimer before it took effect, and may give leave subject to conditions: s568E(2)-(3). On an application under s568E(1), the Court may set aside the disclaimer and make such orders as it thinks appropriate, including orders necessary to put the company, the liquidator or any one else in the same position, as nearly as practicable, as if the disclaimer had not taken effect: s568E(4). The Court may only set aside a disclaimer if it is satisfied that the disclaimer has caused or would cause prejudice to person who have an interest in the property that is grossly out of proportion to the prejudice that would be caused to the company's creditors and persons who have changed their position in reliance on the disclaimer taking effect, if the disclaimer is set aside: s568E(5).

Rule 77B provides that an application for leave to set aside a disclaimer which has taken effect to be made in Form 5, and to be supported by an affidavit which states the nature of the person's interest in the disclaimed property and the reasons why it is said to be just to grant leave to set aside the disclaimer after it has taken effect.

### **Order 71, rule 77C (Vesting of disclaimed property by court order-s 568F)**

Section 568F, which corresponds to former 568(1), provides for vesting of disclaimed property by order of the Court. The Court may order that disclaimed property vest in or be delivered to a person entitled to the property; or a person to whom it seems to the Court appropriate that the property be vested or delivered; or a person as trustee for such a person: s568F(1). Such an order may be made on the application of a person who claims an interest in the property or is under a liability in respect of the property which has not been discharged under the Corporations Law, and after hearing such persons as the Court thinks appropriate: s568F(2).

Rule 77C provides that an application under s568F to be brought by application in Form 5, and authorises the Court to direct that notice of the application be given by advertisement or otherwise to such persons or classes of persons as the Court determines, and to adjourn the application for that purpose.

### **Rule 58**

**Omits existing rule 81 and replaces it with:**

### **Order 71, rule 81 (Examinations of persons concerned with corporations-s 597)**

**and**

**Order 71, rule 81A (Conduct of examination under part 5.9, Division 1)**

The Australian Securities Commission and any other eligible applicant may take part in an examination under Part 5.9 Div 1 and may be represented by a lawyer or agent for that purpose: s597(5A). The Court may put or allow to be put to a person being examined such questions about the corporation or any of its examinable affairs as the Court thinks appropriate: s597(5B).

The Court may direct a person to produce, at his or her examination or the examination of any other person, books in the examinee's possession that are relevant to the examination: s597(9). A person directed to produce books at an examination must not refuse or fail to comply without reasonable excuse: s597(10A).

Section 597(14A) provides that a written record under s597(13) is to be open for inspection without fee by the person who applied for the examination; an officer of the corporation; or a creditor of the corporation and is to be open for inspection on paying the prescribed fee: s597(14A).

Examinable officers (as defined in s9) may be summoned for examination by a liquidator without the requirement for a court order: s596A. The Court is required to summon a person who is or was, within the previous 2 years, an examinable officer for examination about a corporation's examinable affairs (as defined in s9) if the application for the summons is made by an eligible applicant. The class of eligible applicants is defined in s9 as the Australian Securities Commission, a liquidator or provisional liquidator, an administrator of a corporation, an administrator of a deed of company arrangement, or a person authorised by the Commission.

A summons may be issued to a person, other than an examinable officer, at the discretion of the Court, if the application for the summons is made by an eligible applicant (as defined in s9) and the Court is satisfied that the person has taken part in or may be able to give information about the examinable affairs (as defined in s9) of a corporation: s596B(1).

The applicant for a summons under s596B must file an affidavit in support of the application that complies with the requirements of the Rules: s596C(1). The affidavit will not be available for inspection unless the Court otherwise orders: s596C(2).

Subrule 81(1) provides that a summons may be issued in Form 5 supported by an affidavit which refers to the material facts outlined in subrule (2). The application may be filed in a scaled envelope in accordance with subrule (3). The procedures for issue of a summons are substantially simplified, while subrule 81(6) preserves the examinee's ability to file a notice of motion to set aside a summons issued under s596A or s596B.

The use of the words "Court or a Judge" in Rules 81(4) and 81(5) allows a Judge sitting in Chambers to exercise the powers of the Court in relation to the issue of summonses under s596A and s596B: s17(2)(c) of the Federal Court Act 1976 (Cth) and definition of "Judge" in Order 1 Rule 4 of the Federal Court Rules. An application for the issue of a summons might appropriately be heard in Chambers if there was a significant risk that a person on whom a summons for examination is to be served would seek to evade service if he or she became aware of the application for issue of the summons.

The powers of the Court in relation to the issue of summonses under s596A and s596B have been delegated to Registrars. Section 17(2) of the Federal Court Act is not sufficiently wide to authorise a Registrar to exercise those powers while sitting in Chambers. However, a Registrar exercising powers under Rule 81 would be entitled to direct the exclusion of the public from the Court, if in the presence of those persons would be contrary to the interests of justice: ss 17(4)

and 35A(3) of the Federal Court Act. Such an order may be made, for example, if the Registrar is satisfied that there is a real risk that a person on whom a summons for examination is to be served would seek to evade service if he or she became aware of the application for issue of the summons.

The conduct of the examination is provided for in rule 81A e.g. record of questions, transcripts and requests for same.

#### **Rule 59**

#### **Order 71, rule 82 (Default in relation to an examination under Part 5.9)**

Paragraphs 82(1)(a), (b), (c), (d) and (e) have been omitted and new paragraphs inserted which refer to the new section numbers introduced by the amending Act.

Subrules 82(1), (2) and (4) have been amended to substitute correct sections or divisions or words introduced by the amending Act.

#### **Rule 60**

#### **Order 71, rule 83 (Orders under section 598 or 599)**

Subrule 83(3) has a minor drafting amendment.

#### **Rule 61**

#### **Order 71, rule 84 (Proceedings under Chapter 6 or 7 of the Corporations Law )**

Rule 84 has a minor drafting amendment.

#### **Rule 62**

#### **Order 71, rule 85 (Orders in respect of agreement, payment or benefit-section 740)**

Subrule 85(2) has a minor drafting amendment.

#### **Rule 63**

#### **Order 71, rule 86 (Orders in respect of contravention by substantial shareholder section 741)**

Subrule 86(2) has a minor drafting amendment.

#### **Rule 64**

#### **Order 71, rule 87 (Application for order of Court declaring that an act, document or matter is not invalid-section 743)**

Subrule 87(2) has a minor drafting amendment.

#### **Rule 65**

#### **Order 71, rule 88 (Application for order varying an agreement with a non-licensee section 799A)**

Subrule 88(2) has a minor drafting amendment.

## **Rule 66**

### **Order 71, rule 93 (Orders relating to refusal to register transfer or transmission-section 1094)**

Subrule 93(3) has a minor drafting amendment.

## **Rule 67**

### **Order 71, rule 95 (Application for order varying agreement with a non-licensee section 1165A)**

Subrule 95(2) has a minor drafting amendment.

## **Rule 68**

### **Order 71, new rule 98A (Leave to manage a corporation where a person is subject to a civil penalty disqualification-s 1317EF)**

A person who is subject to a civil penalty disqualification must not manage a corporation except with the leave of the Court: s1317EF(1). When granting leave under s1317EF(1), the Court may impose such conditions or restrictions as it thinks appropriate: s1317EF(3). A person may only apply for leave to manage a corporation under s1317EF(1) if he or she has given the Commission at least 21 days notice of the application: s1317EF(5). On the application of the Commission, the Court may revoke leave to manage a corporation granted under s1317EF(1): s1317EF(6).

Rule 98A, which broadly corresponds to Order 71 Rule 18, provides for the requirements for filing of applications under s1317EF supported by affidavit and service on the corporation concerned and the Commission.

### **Order 71, new rule 98B (Relief from liability for contravention of civil penalty provisions-s1317JA)**

If it appears to the Court, in proceedings against a person for a contravention of civil penalty provisions (including proceedings under s588M, 588W or 1317HD), that a person has or may have contravened a civil penalty provision but that the person has acted honestly and, having regard to all the circumstances the case (including, where applicable, those connected with the person's appointment as an officer of a corporation or of a Part 5.7 body), the person ought fairly to be excused for the contravention, the Court may relieve the person either wholly or partly from a liability to which the person would otherwise be subject because of the contravention: s1317JA(2). A person may apply to the Court for relief if he or she thinks the relevant proceedings will or may be begun against him or her, and the Court may grant relief under s1317JA(2) as if those proceedings had been begun: s1317JA(4)-(5).

Rule 98B, which broadly corresponds to Order 71 Rule 99, provides for the filing of an application under s1317JA supported by an affidavit and served on the corporation concerned and the Commission.

## **Rule 69**

### **Order 71, rule 100 (Appeals from decisions of administrator, receiver, official manager, liquidator etc-s 1321)**



Rule 100 has been amended to provide for clarity of drafting.

## **Rule 70**

### **Order 71, rule 103 (Meetings ordered by the Court)**

Rule 103 omits reference to Part 3 of Chapter 5 and inserts reference to Regulations: "5.6.12 - 5.6.36A."

## **Rule 71 First Schedule (Forms)**

In this Rule there are minor amendments to various forms to reflect new wording in the amending Act. The amendments are to forms: 75, 76 78, 80, 82, 83, 85, 86, 87, 90, 91, 92, 93, 96, 97, 102 and 117.

Forms 79, 98, 99, 100, 101, 103, 115, 120, 124, 125, 126 and 128 are omitted and new forms substituted for clarity of drafting, as there were many minor amendments to the existing forms.

Other forms are necessary as follows:

Form 88 is omitted and a new form 88 substituted which provides for a nomination of a liquidator by the applicant in accordance with Order 71, subrules 20(5), 36(5) and 37(7).

Form 92A is inserted to provide for the nomination of administrator under Order 71 subrule 34(G)(2).

Form 92B is inserted to provide for the consent of the administrator under Order 71 subrule 34(G)(3).

Form 92C is inserted to provide for a notice of application to fill the office of administrator of a company or deed of company arrangement under Order 71 subrule 34(G)(4).

Form 93A is inserted to provide a form of affidavit to verify grounds of opposition to a winding up under Order 71 subrules 36(10), (11) and 37(11), (12).

Form 93B is inserted to provide for an affidavit of debt under section 459E, Order 71 rule 36A.

Form 93C is inserted to provide for an application to wind up a company under section 459P, Order 71 subrules 37(2) and (3).

Form 94 is omitted and new form 94 substituted which provides for an affidavit verifying a debt under section 459Q, Order 71 subrule 37(4).

Form 95 is omitted and new form 95 substituted which is an affidavit that a debt remains unpaid, Order 71, subrule 38(1).

Form 116A is inserted to provide for notice for application for leave to distribute a surplus, Order 71 subrule 64A(3).

Forms 119, 121 and 123 are omitted because of the amending Act and rules.

Form 122 is omitted and new form substituted to provide for a summons to attend examination, Order 71 subrule 81(4).

## **Rule 72**

### **Second Schedule (Costs allowable for work done and services performed)**

This rule provides for the introduction of a new item 43A to the Second Schedule (costs allowable in respect of work done and services performed) for costs in the amount of \$1750.00. This item is necessary as Order 71 rule 43 allows recovery on taxation of a short form bill, for the costs of obtaining a winding up order up to and including entry and service of the order.

## **Rule 73**

### **Third Schedule (Powers and functions of the Court that may be exercised by a Registrar if the Court or Judge directs)**

Omits items in the existing Third Schedule and substitutes new items and provisions referred to in the amending Act and these rules.

## **Rule 80**

### **New Schedule 4 (Corporations Law-1993 transitional provisions under Order 71 for winding up proceedings)**

This schedule sets out previous rules 36, 37 and 41 so that any applications under former sections 460 and 461 may be dealt with under the transitional provisions.