

EXPLANATORY STATEMENT

Select Legislative Instrument 2005 No. 341

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

Federal Court (Bankruptcy) Rules 2005

Section 59 of the *Federal Court of Australia Act 1976* permits the Judges of the Court or a majority of them, to make rules of Court not inconsistent with the Act. These rules may provide for the practice and procedure to be followed in the Court and in Registries of the Court. They may extend to all matters incidental to any such practice or procedure that are necessary or convenient to be prescribed for the conduct of any business of the Court.

Under sub-section 59 (4) of the *Federal Court of Australia Act 1976*, the *Legislative Instruments Act 2003* (other than sections 5, 6, 7, 10, 11 and 16 of that Act) applies in relation to rules of court made by the Court under the *Federal Court of Australia Act 1976* or another Act:

- (a) as if a reference to a legislative instrument were a reference to a rule of court; and
- (b) as if a reference to a rule-maker were a reference to the Chief Justice acting on behalf of the Judges of the Court; and
- (c) subject to such further modifications or adaptations as are provided for in regulations made under section 59A of the *Federal Court of Australia Act 1976*.

The Judges have agreed to adopt the *Federal Court (Bankruptcy) Rules 2005* ('the Rules') in order to implement a harmonised set of rules for proceedings under the *Bankruptcy Act 1966* (Cth) in the Federal Court and the Federal Magistrates Court.

The Rules have been the subject of consultation with the Insolvency and Trustee Service Australia, the Law Council of Australia, the legal professional bodies in each State and Territory and a range of insolvency practitioners.

Details of the Rules are in the **Attachment**.

The Rules commence on 6 February 2006.

Federal Court (Bankruptcy) Rules 2005

Part 1 – Preliminary

Part 1 deals with preliminary matters.

Rule 1.01 provides that the Rules are to be cited as the *Federal Court (Bankruptcy) Rules 2005*.

Rule 1.02 provides that the Rules will commence on 6 February 2006.

Rule 1.03 provides that the Rules apply to a proceeding to which the Bankruptcy Act applies, and that the other rules of the Court apply (so far as they are not inconsistent with these Rules) to such a proceeding.

Rule 1.04 defines a number of expressions used in the Rules.

Rule 1.05 provides that, unless the contrary intention appears, an expression used in the these Rules and in the Bankruptcy Act is to have the same meaning in these Rules as it has in the Bankruptcy Act.

Rule 1.06 provides that:

- a reference to a form followed by a number is a reference to the form so numbered in Schedule 1 to these Rules;
- it is sufficient compliance with these Rules if a document which must be in accordance with a form in Schedule 1 is substantially in accordance with that form, or only has such variations as the nature of the case requires; and
- if these Rules do not prescribe a form for a particular purpose and a form for that purpose is prescribed in the Federal Court Rules, that form may be used for that purpose with the title of the form to be in accordance with Form 1.

Part 2 – General

Part 2 contains rules dealing with:

- the form and content of an application to commence a proceeding and of an interim application in a proceeding that has been commenced (rule 2.01);
- the powers of the Court that may be exercised by a Registrar pursuant to a direction by the Court or a Judge under paragraph 35A (1) (h) of the *Federal Court of Australia Act 1976* (rule 2.02);
- the review by the Court of a decision, direction or act of a Registrar (rule 2.03);
- the Court's power to grant leave, including conditional leave, to be heard in a proceeding to a person who is not a party to the proceeding (rule 2.04);

- the need for a person who intends to appear at the hearing of an application or petition, or take part in an examination, to file a notice of appearance in accordance with Form 4 (subrule 2.05 (1));
- the inapplicability of the Federal Court Rules Order 4 rules 12 and 13 (alteration of hearing date) to the hearing date fixed for a creditor's petition;
- the need for a person who intends to oppose an application or petition to file a notice of appearance in accordance with Form 4, a notice stating the grounds of opposition in accordance with Form 5 and an affidavit in support and file the notices and affidavit on the applicant, at least 3 days before the date fixed for the hearing (rule 2.06).

Part 3 – Bankruptcy notices

Part 3 deals with bankruptcy notices.

Rule 3.01 provides that a copy of the bankruptcy notice and an affidavit stating the grounds in support of the application must accompany an application for an order for substituted service of a bankruptcy notice.

Rule 3.02 lists the documents that must accompany an application to set aside a bankruptcy notice. These include:

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

These documents must be served on the creditor within 3 days after the application is filed.

Under subrule 3.02 (2), where the application is based on the ground that the debtor has a counter-claim, set-off or cross demand mentioned in paragraph 40 (1) (g) of the Bankruptcy Act, the affidavit must also include:

- full details of the counter-claim, set-off or cross-demand;
- the amount of the counter-claim, set-off or cross-demand and the amount by which it exceeds the amount claimed in the bankruptcy notice;
- why the counter-claim, set-off or cross-demand was not raised in the proceeding that resulted in the judgment or order.

Rule 3.03 deals with an application for an extension of time for compliance with a bankruptcy notice. An application must be accompanied by:

- a copy of the bankruptcy notice;
- an affidavit stating the grounds in support of the application and the date when the bankruptcy notice was served on the applicant;
- a copy of any application to set aside the judgment or order in relation to which the notice was issued and any material in support of that application (subrule 3.03 (1)).

The application may be made in the absence of another party (subrule 3.03 (2)), and need be heard in open court only if it is for an extension of time to a date after the first directions hearing (subrule 3.03 (4)). If an order extending the time for compliance is made, the application, the order and any supporting documents must be served on the respondent within 3 days after the order is made (subrule 3.03 (3)).

Part 4 – Creditors’ petitions

Part 4 applies in relation to a creditors’ petition seeking a sequestration order against the estate of a debtor.

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

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

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

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

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

Rule 4.07 provides that, if it is not practical for the applicant creditor to file the original of an affidavit mentioned in rule 4.06, a fax copy of the affidavit may be filed and the original of that affidavit must be filed within 2 days after the hearing at which the fax copy is used.

Rule 4.08 sets out the times within which the applicant creditor must notify the trustee of, and enter, a sequestration order against the estate of the debtor.

Rule 4.09 sets out the time within which the applicant creditor must enter an order dismissing a creditor’s petition, giving leave for a petition to be withdrawn, or made under subsection 52 (5) of the Bankruptcy Act (being an order to extend the time before the petition will lapse).

Rule 4.10 provides that the applicant creditor must serve an order that is entered under rule 4.08 or 4.09 on any person who has consented to act as trustee under section 156A of the Bankruptcy Act and the Official Receiver for the District in which the order was made within 2 days after the entry is stamped.

Part 5 – Debtor’s petitions

Part 5 deals with debtor’s petitions.

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

- the referral must be in accordance with Form 8;
- the Registrar must fix a time, date and place for the hearing of the referral;
- the Official Receiver must, at least 3 days before the date fixed, serve a sealed copy of the referral and a notice in accordance with Form 8 of the time, date and place fixed for hearing on all relevant debtors and creditors and, if subsection 56C (4) of the Bankruptcy Act applies, the person administering the relevant proclaimed law.

Part 6 – Examinations

Part 6 sets out the rules in relation to an examination of a debtor, examinable person or relevant person.

Rule 6.01 defines *relevant person* as a relevant person within the meaning of section 81 of the Bankruptcy Act.

Division 6.2 deals with an application to examine a debtor or examinable person.

Rule 6.02 provides that an application for a debtor, or examinable person in relation to the debtor, to be summoned for an examination under section 50 of the Bankruptcy Act must be accompanied by an affidavit which:

- identifies the person to be examined and, if that person is an examinable person in relation to a debtor, the debtor in relation to whom the examination is to be conducted (subrule 6.02 (2));
- identifies any books that are to be produced and the grounds on which the person is required to produce the books (subrule 6.02 (3));
- states whether the applicant has made any inquiries about the issues to be dealt with at the examination and, if so, sets out any requests to the person to be examined to provide information or produce books, the compliance with those requests and, if no request has been made, the reason (subrule 6.02 (4)).

Rule 6.03 specifies that an application for a summons may be heard in the absence of a party or in closed court.

Rule 6.04 provides that:

- a summons must be in accordance with Form 9 (subrule 6.04 (1));
- a Registrar must sign and affix the stamp of the Court to the summons and give it to the applicant for service (subrule 6.04 (2));
- the summons must identify any books that are to be produced pursuant to the summons (subrule 6.04 (3)).

Rule 6.05 provides that the applicant must, at least 8 days before the date fixed for the examination:

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

Rule 6.06 specifies the form and content of an application by a debtor or examinable person to discharge a summons. It provides that the application must be made by filing and serving an interim application in accordance with Form 3 and a supporting affidavit in the proceeding in which the summons was issued.

Division 6.3 deals with an application to examine a relevant person.

Rule 6.07 provides that an application for a relevant person to be summoned for examination under section 81 of the Bankruptcy Act must be in accordance with Form 10 and must be accompanied by an affidavit which:

- identifies the relevant person to be examined (subparagraph 6.07 (2) (b) (i));
- identifies the books that are to be produced, if the person is being summoned to produce books (subparagraph 6.07 (2) (b) (ii)).

Rule 6.08 provides that an application for examination summons may be heard in the absence of a party or in closed court.

Rule 6.09 provides that:

- a summons must be in accordance with Form 9 (subrule 6.09 (1));
- a Registrar must sign and affix the stamp of the Court to the summons and give it to the applicant for service (subrule 6.09 (2));
- the summons must identify any books that are to be produced pursuant to the summons (subrule 6.09 (3)).

Rule 6.10 provides that the applicant must, at least 8 days before the date fixed for the examination:

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

Rule 6.11 gives the Court or Registrar the power to either adjourn an examination or discharge the summons if the relevant person does not appear for the examination.

Rule 6.12 specifies the form and content of an application by a relevant person to discharge a summons. It provides that the application must be made by filing and serving an interim application in accordance with Form 3 and a supporting affidavit in the proceeding in which the summons was issued.

Division 6.4 deals with an application to examine an examinable person.

Subrule 6.13 (1) provides that an application for an examinable person to be summoned for examination under section 81 of the Bankruptcy Act must be in accordance with Form 10. A single application may be made for the summons of 2 or more examinable persons in relation to a relevant person's bankruptcy (subrule 6.13 (2)). The application must be accompanied by a draft of each summons applied for and an affidavit which:

- identifies whether the applicant is a creditor, trustee or Official Receiver (paragraph 6.13 (4) (a));
- states the facts relied on by the applicant to establish that each person is examinable (paragraph 6.13 (4) (b));
- identifies any books that are to be produced (subparagraph 6.13 (4) (c) (i));
- provides details of any inquiry made by the applicant about any books to be produced and any refusal by the examinable person to comply (subparagraph 6.13 (4) (c) (ii)); and
- may be filed in a sealed and marked envelope (subrule 6.13 (5)) which cannot be made available for public inspection (subrule 6.13 (6)).

Rule 6.14 specifies that an application for an examination summons may be heard in the absence of a party or in closed court.

Rule 6.15 provides that:

- a summons must be in accordance with Form 9 (subrule 6.15 (1));
- a Registrar must sign and affix the stamp of the Court to the summons and give it to the applicant for service (subrule 6.15 (2));
- the summons must identify any books that are to be produced pursuant to the summons (subrule 6.15 (3)).

Rule 6.16 provides that the applicant must, at least 8 days before the date fixed for the examination:

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

Rule 6.17 specifies the form and content of an application by an examinable person to discharge a summons. It provides that the application must be made by filing and serving an interim application in accordance with Form 3 and a supporting affidavit in the proceeding in which the summons was issued.

Rule 6.18 deals with conduct money and witness expenses in relation to a person (other than a relevant person) who attends an examination in accordance with a summons. It provides that the applicant for the summons must, within a reasonable time before the examination, pay to the person:

- enough conduct money to cover the reasonable expense of travelling to and from the place where the person lives and any reasonable accommodation expenses (subrule 6.18 (1) (a)); and
- reasonable expenses for the person's attendance as a witness (subrule 6.18 (1) (b)).

Part 7 – Annulment or review of bankruptcy

Part 7 deals with the annulment or review of bankruptcy.

Division 7.1 deals with the annulment of a bankruptcy.

Rule 7.01 provides that the Division applies to applications:

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

Rule 7.02 provides that an application under the Division must:

- set out the grounds on which the annulment is sought (subrule 7.02 (1)); and
- be served on the trustee at least 28 days before the hearing date fixed for the application (subrule 7.02 (2)).

Rule 7.03 provides that the applicant must serve a notice in accordance with Form 11 on each known creditor of the bankrupt or of the estate of the deceased person at least 14 days before the date fixed for the application.

Rule 7.04 deals with the report that a trustee must prepare for the periods before and after the bankruptcy or the administration of the estate of a deceased person. It provides that the report must:

- if the report is in relation to a bankrupt – include information about the conduct, examinable affairs and administration of the estate of the bankrupt (subrule 7.04 (2));
- if the report is in relation to the estate of a deceased person – include information about the administration of the deceased person's estate (subrule 7.04 (3));
- be in the form of an affidavit (paragraph 7.04 (3) (a)); and
- be filed at least 5 days before the date fixed for hearing for the application (paragraph 7.04 (3) (b)).

Rule 7.05 provides that:

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

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

Rule 7.06 provides that:

- an application for review of a decision by a Registrar to make a sequestration order against the estate of a debtor (the ‘bankrupt’) must be served on the trustee at least 28 days before the hearing date fixed for the application (subrule 7.06 (2));
- the applicant must give notice (in accordance with Form 12) of the application to each person known to the applicant to be a creditor of the bankrupt (subrules 7.06 (3) and (4));
- the applicant must serve the notice on each creditor at least 14 days before the hearing date fixed for the application (subrule 7.06 (5)); and
- the trustee, if directed by the Court, must prepare a report in relation to the bankrupt in accordance with rule 7.04 (subrule 7.06 (6)).

Part 8 – Trustees

Part 8 deals with the appointment and removal of trustees.

Rule 8.01 specifies the procedure to be followed in making an application objecting to the appointment of a trustee under subsection 157 (6) of the Bankruptcy Act. It provides that:

- an application must be accompanied by an affidavit stating the grounds in support (subrule 8.01 (1));
- the application and supporting affidavit must be served on the trustee and any petitioning creditor at least 28 days before the hearing date (subrule 8.01 (2));
- the application and supporting affidavit must be served on all known creditors at least 14 days before the hearing date (subrule 8.01 (3)).

Rule 8.02 deals with an application for acceptance of the resignation or release of a trustee under sections 180 and 183 of the Bankruptcy Act. It provides that:

- the application must be accompanied by a supporting affidavit (paragraph 8.02 (1) (a));
- an application for release must also be accompanied by a statement of details of the realisation of the bankrupt’s property and the distribution of the estate by the trustee and a copy of the most recent account (paragraph 8.02 (1) (b));
- the application must be served on the Official Receiver, the bankrupt and anyone else ordered by the Court (subrule 8.02 (2));
- any order must be entered within 1 day after it is made, if not entered at the time of making (paragraph 8.02 (3) (a));
- a copy of an order must be given to the Official Receiver within 2 days after the entry is stamped (paragraph 8.02 (3) (b)).

Part 9 – Debt agreements

Part 9 deals with setting aside debt agreements.

Rule 9.01 provides that Part 9 applies to:

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

Rule 9.02 provides that:

- a creditor who is also seeking a sequestration order must state as much in the application (subrule 9.02 (1));
- an application must be accompanied by a copy of the debt agreement (paragraph 9.02 (2) (a));
- if an application is for an order either terminating a debt agreement or declaring it, or part of it, void then the application must be accompanied by an affidavit stating the facts relied on to support the application (paragraphs 9.02 (2) (b) and (c)).

Rule 9.03 provides that an application and supporting documents must be served on both the debtor and the Official Receiver of the District (if different from the applicant) at least 5 days before the hearing date.

Rule 9.04 provides that the applicant must serve a written notice in accordance with Form 13, of the time, date and place fixed for the hearing on each known creditor at least 5 days before the hearing date.

Rule 9.05 provides that where the Court makes an order under the Part:

- the order must be entered within one day after it is made, if not entered at the time of making (paragraph 9.05 (a));
- a copy of the order must be given to the Official Receiver for the District within 2 days after the entry is stamped (paragraph 9.05 (b)).

Part 10 – Personal insolvency agreements

Part 10 deals with applications to set aside or terminate personal insolvency agreements and compositions or schemes of arrangement.

Rule 10.01 lists the relevant sections of the Bankruptcy Act to which the Part applies, namely sections 76B, 222 and 222C.

Rule 10.02 provides that an application must:

- state that the trustee or creditor also seeks a sequestration order if that is the case (subrule 10.02 (1));
- be accompanied by an affidavit stating the facts relied on to support the application (subrule 10.02 (2)).

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

Rule 10.04 provides that the applicant must serve a written notice in accordance with Form 13 of the time, date and place fixed for the hearing on each creditor named in the debtor's statement of affairs at least 5 days before the hearing date.

Rule 10.05 provides that where the Court makes an order under the Part:

- the order must be entered within 1 day after it is made, if not entered at the time of making (paragraph 10.05 (a));
- a copy of the order must be given to the Official Receiver for the District within 2 days after the entry is stamped (paragraph 10.05 (b)).

Part 11 – Administration of estates of deceased persons

Part 11 deals with petitions in relation to the administration of estates of deceased persons.

Rule 11.01 deals with a creditor's petition under section 244 of the Bankruptcy Act and provides that the petition must be:

- in accordance with Form 14 (paragraph 11.01 (a)); and
- accompanied by the affidavit verifying the petition required by subsection 244 (5) of the Bankruptcy Act (paragraph 11.01 (b));

Rule 11.02 sets out the additional affidavits that the applicant creditor must file before the hearing of a creditor's petition.

Rule 11.03 provides that an administrator's petition for an order for the administration of a deceased person's estate must be in accordance with Form 15.

Rule 11.04 provides that where the Court makes an order under this Part the applicant must:

- enter the order within 1 day after it is made, if not entered at the time of making (paragraph 11.04 (a)); and
- a copy of the order must be given to the Official Receiver for the District within 2 days after the entry is stamped (paragraph 11.04 (b)).

Part 12 – Warrants

Part 12 deals with warrants to arrest a bankrupt and apprehend persons failing to attend Court.

Rule 12.01 provides that:

- an application for the issue of a warrant for the arrest of a debtor or bankrupt person under section 78 of the Bankruptcy Act must state the grounds for the issue of the warrant (subrule 12.01 (1)); and
- the application must be accompanied by a supporting affidavit (subrule 12.01 (2));
- the warrant must be in accordance with Form 16 (subrule 12.01 (3)); and

- the person who carries out an arrest pursuant to the warrant must immediately give notice of the arrest to the Registrar of the relevant Registry (subrule 12.01 (4)).

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

- must be in accordance with Form 17 (subrule 12.02 (1));
- may be kept in the Registry for a stated time and on any conditions which the Court or Registrar thinks appropriate (subrule 12.02 (2));
- upon being used, must comply with subrule 12.02 (3) whereupon immediate notice is given to the Registrar of the relevant Registry.

Part 13 – Costs

Part 13 deals with costs in proceedings under the Bankruptcy Act.

Division 13.1 deals with orders for costs.

Rule 13.01 provides that, subject to Division 13.2:

- a person who is entitled to costs in a proceeding to which the Bankruptcy Act applies is entitled to costs in accordance with Order 62 of the Federal Court Rules unless the Court otherwise orders (subrule 13.01 (1));
- the Court may fix the amount of costs when making an order (subrule 13.01 (2)); and
- if the Court fixes the amount of costs, Order 62 does not apply to a bill of costs submitted, except for the issue of a certificate of taxation (subrule 13.01 (3)).

Division 13.2 deals with the short form of bills of costs.

Rule 13.02 states that Division 13.2 provides for the costs that may be charged by a legal practitioner for work done in relation to a creditor's petition against the estate of a debtor under section 40 (1) (g) of the Bankruptcy Act, but not in cases where the Court fixes the amount of costs.

Rule 13.03 provides that:

- where the Court makes a sequestration order against the debtor's estate, the legal practitioner may charge for costs the amount, applying on the date when the petition was presented, stated in item 43B of Schedule 2 to the Federal Court Rules (subrule 13.03 (1));
- where the petition is dismissed, and the creditor obtains an order for costs, the legal practitioner may charge for costs the amount, applying on the date when the petition was presented, stated in item 43C of Schedule 2 to the Federal Court Rules (subrule 13.03 (2));
- where adjournment costs are reserved or awarded on a day, the legal practitioner may also charge the amount stated in item 36 or 37 of Schedule 2 to the Federal Court Rules (paragraph 13.03 (3) (a));

- the legal practitioner may also charge proper disbursements incurred (paragraph 13.03 (3) (b));

Where costs are charged pursuant to subrules 13.03 (1) or (2), Order 62 of the Federal Court Rules does not apply to a bill of costs submitted except for the issue of a certificate of taxation(subrule 13.03 (4)).

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

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

Schedule 1 – Forms

Schedule 1 sets out the following forms:

Form 1	Title
Form 2	Application
Form 3	Interim application
Form 4	Notice of appearance
Form 5	Notice stating grounds of opposition to application, interim application or petition
Form 6	Creditor's petition
Form 7	Sequestration order
Form 8	Referral of debtor's petition
Form 9	Summons for examination
Form 10	Application for summons to examine relevant person or examinable person
Form 11	Notice to creditors of annulment application
Form 12	Notice to creditors of application for review of Registrar's decision to make sequestration order
Form 13	Notice to creditors
Form 14	Applicant creditor's petition for administration of deceased person's estate
Form 15	Administrator's petition
Form 16	Arrest warrant
Form 17	Apprehension warrant

Schedule 2 – Powers of the Court that may be exercised by a Registrar

This schedule sets out the powers of the Court under the Bankruptcy Act that may be exercised by a Registrar.

Schedule 3 – Notes to these Rules

This schedule sets out the suggested form for a search warrant mentioned in the note to rule 12.01.