

# **EXPLANATORY STATEMENT**

## **Select Legislative Instrument 2011 No. 284**

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

#### **Federal Court (Bankruptcy) Amendment Rules 2011 (No. 1)**

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 amend the *Federal Court (Bankruptcy) Rules 2005* by

1. making changes consequential upon the amendment in 2010 to the Bankruptcy Act and Regulations, including:
  - (a) making more accurate the rules about entering orders (rules 4.08(2)(b), 4.09(2)(a), 10.05 and 11.04) and the entering or stamping of orders (rules 4.08(c) and 4.09(2)(b)); and
  - (b) removing references to Bankruptcy Districts (rules 8.02(3)(b), 9.03(b), 9.05(b) and 10.03(c)).
2. replacing references to the former Federal Court Rules and forms in the Bankruptcy Rules and forms with references to the *Federal Court Rules 2011* (FCR 2011), including:
3. deleting the words ‘or a Judge’ from the term ‘the Court or a Judge’ as the FCR 2011 uses the term ‘the Court’ on all occasions (Rules 2.02, 2.03(1) and the note in Form 7);
4. replacing the words ‘motion on notice’ with ‘interlocutory application’ as the FCR 2011 uses the latter term (Rules 2.03 and note in Form 7);

5. changing the term 'legal practitioner' to 'lawyer' as a consequence of the insertion in 2010 of this latter term into the Federal Court of Australia Act;
6. amending the format of the prescribed Form 1 – Title so it is similar to that used in the forms approved under the FCR 2011. This also amends the footer in Form 1 which affects Forms 2-15.

The Amendment Rules are of a minor nature, consequential upon the introduction of the:

- amendments to the *Bankruptcy Act 1966* (Bankruptcy Act) and Bankruptcy Regulations 1996 (Bankruptcy Regulations) made in 2010 by the *Bankruptcy Legislation Amendment Act 2010* and *Bankruptcy Amendment Regulations 2010 (No 1)*; and
- FCR 2011 on 1 August 2011.

The amendments were considered by the Harmonised Bankruptcy Rules Monitoring Committee (the Committee). The Committee consists of representatives from the three federal courts and the legal profession. The changes flowing from the 2010 amendments to the Bankruptcy Act were developed through discussions with the Insolvency and Trustees Service Australia (ITSA). The legal profession was extensively consulted over a number of years prior to implementation of the FCR 2011.

Details of the Rules are in the Attachment.

The Rules commence on 1 January 2012.

**Federal Court (Bankruptcy) Amendment Rules 2011 (No 1)**

**RULE 1      Name of rules**

This rule provides that the Rules are to be cited as the *Federal Court (Bankruptcy) Amendment Rules 2011 (No. 1)*.

**RULE 2      Commencement**

This rule provides that these Rules commence on 1 January 2012.

**RULE 3      Amendment of *Federal Court (Bankruptcy) Rules 2005***

This rule provides that the *Federal Court (Bankruptcy) Rules 2005* (the Bankruptcy Rules) are amended as set out in Schedule 1.

**SCHEDULE 1**

[1]      Subrule 1.04 (2)

Rule 1.04 sets out the meaning of various term used in these Rules.

Subrule 1.04 (2) states that unless the contrary intention appears, an expression used in these Rules and in Order 1, rule 4 of the Federal Court Rules has the same meaning in these Rules as it has in that rule.

The amendment is consequential upon the enactment of the FCR 2011 on 1 August 2011 and substitutes the reference in these Rules to the interpretation rules in the former Federal Court Rules with a reference to Schedule 1 of the FCR 2011. Schedule 1 of the FCR 2011 is the Dictionary which is the equivalent provision in the new rules.

[2]      Rule 1.05, note

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

The Note to this Rule lists the expressions defined in subsection 5(1) of the Bankruptcy Act. The list includes the expression ‘District’ which was repealed from this subsection by the *Bankruptcy Legislation Amendment Act 2010 (No 106)* on 15 July 2010 when the concept of Bankruptcy District was abolished.

The amendment omits the expression ‘District’ from the list.

[3] Rule 2.02

[4] Subrule 2.03 (1)

[5] Subrule 2.03 (1)

Rule 2.02 provides for the exercise of powers by Registrars, stating that for the purposes of paragraph 35A(1)(h) of the Federal Court of Australia Act, if the Court or a Judge so directs, a Registrar may exercise a power of the Court under a provision of the Bankruptcy Act mentioned in Schedule 2.

Subrule 2.03 (1) provides that subject to any direction of the Court or a Judge to the contrary, an application under subsection 35A(5) of the Act for review of the exercise of a power of the Court by a Registrar under subsection 35A(1) of the Act must be made by notice of motion.

The amendment mentioned in items [3] and [4] omits the phrase ‘or a Judge’ which appears after the first instances of ‘the Court’ to reflect the usage throughout the FCR 2011 of the term ‘the Court’ rather than the phrase ‘the Court or a Judge’.

The amendment mentioned in item [5] replaces the term ‘notice of motion’ with the term ‘interlocutory application’ to reflect the usage throughout the FCR 2011 of the term ‘interlocutory application’ rather than the term ‘notice of motion’.

[6] Subrule 2.05 (2)

Rule 2.05 sets out the provisions for appearing at an application or examination. Subrule 2.05 (2) states that Rules 12 and 13 of Order 4 of the Federal Court Rules (alteration of hearing date) do not apply to the hearing date fixed for a creditor’s petition.

The amendment is consequential upon the enactment of the FCR 2011 on 1 August 2011 and substitutes the reference in these Rules to Rules 12 and 13 of Order 4 rules in the former Federal Court Rules with a reference to Rule 8.07 (changing a return date) of the FCR 2011.

[7] Rules 4.08 and 4.09

The changes to the Bankruptcy Act in 2010 included an amendment to ss 52(1A) of that Act. The amendment inserted a time limit for providing a copy of the sequestration order to the Official Receiver and a penalty for failing to comply with this requirement. Consequently, subsection 52(1A) now provides if the Court makes a sequestration order, the creditor who obtained the order must give a copy of it to the Official Receiver before the end of the period of 2 days beginning on the day the order was made.

Rule 4.08 currently provides for the notification and entry of a sequestration order. It states that if the Court makes a sequestration order the creditor must, on the same day as the order is made, notify the trustee, in writing, of the appointment and, unless the order is entered in Court at the time it is made, enter the order within 1 day after it is made, by filing an order in accordance with Form 7.

Rule 4.08 is amended as a consequence of the amendment in 2010 to ss 52(1A) of the Bankruptcy Act. The amendment to the Rules inserts a note at the foot of the Rule setting out the provisions of subsection 52(1A).

The amendment re-formats the rule in order to clarify the requirements. Subrule (1) requires the sequestration order be in accordance with Form 7. Subrule (2) states that if the Court makes a sequestration order against the estate of a debtor, the applicant creditor must:

- (a) on the same day as the order is made, notify the trustee, in writing, of the appointment; and
- (b) within 2 days after the order is made, give a copy of the sequestration order to any person who consented to act as a trustee.

Paragraph (b) complements ss 52(1A) of the Bankruptcy Act, which includes this requirement in relation to the Official Receiver, so that any person who has consented to act as a trustee who is not the Official Receiver is also given a copy of the sequestration order.

Subrule (3) provides that if the order is not entered at the time the order is made, the applicant creditor must, as soon as practicable, request entry of the order in accordance with Division 39.4 of the FCR 2011. Division 39.4 deals with the entry of judgments and orders.

Rule 4.09 provides for the entry of an order for the dismissal of a creditor's petition. Subrule 4.09 (1) states that this rule applies if the Court makes an order dismissing a creditor's petition or an order giving leave for a creditor's petition to be withdrawn or an order under subsection 52(5) of the Bankruptcy Act. Subrule 4.09 (2) currently states that the applicant creditor must, unless the order is entered in the Court at the time it is made, enter the order within 1 day after it is made.

Subrule 4.09 (2) is amended as a consequence of the 2010 changes to the Bankruptcy Act as mentioned above and now states that the applicant creditor must:

- (a) if the order is not entered at the time the order is made, request the entry of the order in accordance with Division 39.4 of the FCR 2011 as soon as practicable; and
- (b) within two days after the order is made, give a copy of the order to the Official Receiver.

[8] Paragraph 7.05 (b)

[9] Paragraph 8.02 (3) (b)

[10] Paragraph 9.03 (b)

[11] Paragraph 9.05 (b)

[12] Paragraph 10.03 (c)

These amendments remove references to the District from the Bankruptcy Rules.

As indicated in item [2] above, the concept of Bankruptcy District was abolished in 2010 by an amendment to the Bankruptcy Act.

[13] Rule 10.05

Rule 10.05 sets out the requirements for the entry of an order for personal insolvency agreements. The Rule states that if the Court makes an order under this Part the applicant must, unless the order is entered in the Court at the time it is made, enter the order within 1 day after it is made and within 2 days after the entry is stamped, give a copy of the order to the Official Receiver for the District in which the order is made.

The amendment removes the reference to the District, consequential upon the amendments to the Bankruptcy Act in 2010. The amendment also:

- removes from the heading the words ‘and service’ as this rules only deals with the entry of orders and not service of orders;
- includes a reference to Division 39.4 of the FCR 2011, which is the division that deals with the entry of judgments and orders, in place of the details of the time frames.

[14] Rule 11.04

Rule 11.04 sets out the requirements for the entry of an order for the administration of estates of deceased persons. The Rules states that if the Court makes an order under this Part the applicant must, unless the order is entered in the Court at the time it is made, enter the order within 1 day after it is made and within 2 days after the entry is stamped, give a copy of the order to the Official Receiver for the District in which the order is made.

It is a mirror provision of Rule 10.05. Consequently, the same amendment, as mentioned in item [13] above, is made to Rule 11.04 as has been made to Rule 10.05, to remove the reference to the District.

In addition, a note is included at the foot of Rule 11.04 to include the provisions of subsection 247 (3) of the Bankruptcy Act which provides that the person administering the estate of the deceased person must, before the end of the period of 2 days beginning on the day the order was made, give a copy of the order to the Official Receiver. This is consequential upon the amendment to subsection 247 (3) of the Bankruptcy Act requiring the applicant to give a copy of the Court order to the Official Receiver with in 2 days of the order being made.

[15] Subrule 13.01 (1)

[16] Subrule 13.01 (3)

[17] Subrule 13.03 (1)

[18] Subrule 13.03 (2)

[19] Paragraph 13.03 (3) (a)

[20] Subrule 13.03 (4)

Part 13 of the Bankruptcy Rules deals with costs. In Rule 13.01 there are references to Order 62 of the former Federal Court Rules and in Rule 13.03 there are references to items in Schedule 2 of the former Federal Court Rules. Order 62 dealt with costs and Schedule 2 dealt with costs applicable for work done and services performed in the

Federal Court. In the FCR 2011, these provisions are replaced with Part 40 and relevant items of Schedule 3 respectively.

The amendments in items [15], [16] and [20] replace in subrules 13.01 (1) and (3) and 13.03 (4) the reference to Order 62 of the former Rules with a reference to Part 40 of the FCR 2011.

The amendments in items [17] and [18] replace in subrules 13.03 (1) and (2) the reference to items 43B and 43C respectively of Schedule 2 to the former Rules with items 14.1 and 14.2 respectively of Schedule 3 to the FCR 2011.

The amendment in item [19] replaces in paragraph 13.03 (3) (a) the reference to items 36 and 37 of Schedule 2 to the former Rules with item 1 of Schedule 3 to the FCR 2011.

These amendments are consequential upon the implementation of the FCR 2011 on 1 August 2011.

[21] Schedule 1, Form 1

Form 1 of the Bankruptcy forms is the prescribed form for a document title.

This amendment replaces Form 1 with a new Form 1. The effect of the amendment is to make the format of this form similar to that used in the forms approved under the FCR 2011 and is consequential upon the implementation of the FCR 2011 on 1 August 2011. As these forms are harmonised forms, the name of the Federal Court of Australia has not been included instead the following appears: ‘IN THE [*name of Court*]’.

[22] Schedule 1, Form 2

Form 2 is the prescribed form for an Application.

This amendment replaces the footer in the form with a footer similar to that used in the forms approved under the FCR 2011 and is consequential upon the implementation of the FCR 2011 on 1 August 2011.

[23] Schedule 1, Forms 3 to 6

This amendment replaces the footer in forms 3 to 6 with a footer similar to that used in the forms approved under the FCR 2011 and is consequential upon the implementation of the FCR 2011 on 1 August 2011.

[24] Schedule 1, Form 6, Part 2, note 1

Form 6 is the prescribed form for a Creditor’s Petition.

This amendment replaces in Note 1 which appears in Part 2, Affidavit verifying creditor’s petition, the reference to Form 20 of the former Federal Court Rules with a reference to

Form 59 of the FCR 2011. Form 59 of the FCR 2011 is the equivalent form to Form 20 of the former Federal Court Rules.

These amendments are consequential upon the implementation of the FCR 2011 on 1 August 2011.

[25] Schedule 1, Form 7

Form 7 is the prescribed form for a Sequestration Order.

This amendment replaces:

- the footer in the form with a footer similar to that used in the forms approved under the FCR 2011;
- the term which appears in the notes at the bottom of the form ‘motion on notice’ with the term ‘interlocutory application’ consequential upon the use of this latter term in the FCR 2011;
- the reference to Order 1, rule 8 of the former Federal Court Rules with the equivalent reference in the FCR 2011, rule 1.34.

These amendments are consequential upon the implementation of the FCR 2011 on 1 August 2011.

[26] Schedule 1, Forms 8 to 15

This amendment replaces the footer in forms 8 to 15 with a footer similar to that used in the forms approved under the FCR 2011 and is consequential upon the implementation of the FCR 2011 on 1 August 2011.