

# **EXPLANATORY STATEMENT**

## **Select Legislative Instrument No. 51, 2015**

### **Issued by the authority of the Chief Justice of the Federal Court of Australia on behalf of the Judges of the Court**

#### **Federal Court (Bankruptcy) Amendment (Examination Summons and Other Measures) Rules 2015**

Section 59 of the *Federal Court of Australia Act 1976* permits the Judges of the Federal Court of Australia (Federal 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. amending rule 6.13 to facilitate the transition from paper based files to electronic court files by replicating, in an electronic environment, the requirement that an affidavit supporting an application for the issue of a summons for the examination of an examinable person under Section 81 of the *Bankruptcy Act 1966*, be filed in a sealed envelope; and
2. replacing the reference in paragraph 5 of Form 6 to the executive agency formerly known as the “Insolvency and Trustee Service Australia” with its new name “Australian Financial Security Authority”.

The Amendment Rules are of a minor nature and were considered by the Harmonised Bankruptcy Rules Monitoring Committee (the Committee). The Committee consists of representatives from the three federal courts (Federal Court, Family Court of Australia and Federal Circuit Court of Australia) and the legal profession. Similar amendments

were made by the Judges of the Federal Circuit Court of Australia to the harmonised Federal Circuit Court (Bankruptcy) Rules 2006 with effect from 29 November 2014 by the Federal Circuit Court (Bankruptcy) Amendment (Examination Summons and Other Measures) Rules 2014 (SLI 2014 No. 186).

Section 9 of the *Legislative Instruments Act 2003* provides that Rules of Court made for the Federal Court are not legislative instruments for the purposes of that Act. As a result the *Human Rights (Parliamentary Scrutiny) Act 2011* does not apply to any such Rules of Court and no statement of compatibility for the purposes of that latter Act is included in this Explanatory Statement.

Details of the Rules are in the Attachment.

The Rules commence on the day after they are registered.

**Federal Court (Bankruptcy) Amendment  
(Examination Summons and Other Measures) Rules 2015**

**RULE 1        Name of rules**

This rule provides that the Rules are to be cited as the *Federal Court (Bankruptcy) Amendment (Examination Summons and Other Measures) Rules 2015*.

**RULE 2        Commencement**

This rule provides that these Rules commence on the day after registration.

**RULE 3        Authority**

This rule provides that these Rules are made under the *Federal Court of Australia Act 1976*.

**RULE 4        Schedules**

This rule provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms. Accordingly, the *Federal Court (Bankruptcy) Rules 2005* are amended as set out in Schedule 1.

**SCHEDULE 1**

[1]        Subrules 6.13(5) and (6)

Section 81 of the *Bankruptcy Act 1966* permits a creditor of a bankrupt, a trustee of a bankrupt's estate or the Official Receiver to apply to the Court or a Registrar for the issue of a summons requiring that the bankrupt or another examinable person attend before the Court, a Registrar or a magistrate at a specified place and time to be examined on oath.

Rule 6.13 sets out the procedural requirements for making such an application. Subrule 6.13(5) allows the applicant for such a summons to file the supporting affidavit in a sealed envelope and subrule 6.13(6) provides that the Registrar must not make any affidavit filed in a sealed envelope in accordance with subrule 6.13(5) available for public inspection.

The Federal Court is in the process of transition from paper based files to electronic court files and, during this period, must support both the existing paper based files and the new electronic court files.

This amendment repeals subrules 6.13(5) and (6) and replaces them with new subrules 6.13(5), (6) and (7) which allow the applicant for such a summons to file the supporting

affidavit, if paper based, in a sealed envelope or, if sent to a Registry of the Court for filing by electronic communication, to mark that affidavit “Confidential” and accompany it with a statement that it is a “confidential affidavit supporting an application for summons for examination under subsection 81(1) of the *Bankruptcy Act 1966*” and requiring that, in either such case, the Registrar must not make such an affidavit available for public inspection.

[2] Schedule 1 (Form 6, Part 1, paragraph 5)

Form 6 is the prescribed form in which any Creditor’s Petition seeking a sequestration order against the estate of a debtor must be prepared for filing in the Court.

Reference is made in paragraph 5 in Part 1 of Form 6 to the Insolvency and Trustee Service Australia. This was the name of the executive agency in the Attorney-General’s Portfolio established under section 65 of the *Public Service Act 1999* with responsibility for the administration and regulation of the personal insolvency system in Australia. With effect from 15 August 2013 that agency was renamed the Australian Financial Security Authority (Commonwealth of Australia, Government Notices Gazette C2013G01212, 8 August 2013).

This amendment replaces in that paragraph the old agency name, “Insolvency and Trustee Service Australia” with its current title, “Australian Financial Security Authority”.