

# EXPLANATORY STATEMENT

## **Issued by authority of the Attorney-General**

*Bankruptcy Act 1966*

*Insolvency Practice Rules (Bankruptcy) Amendment (Minor Amendments) Rules 2017*

Section 105-1 of Schedule 2 to the *Bankruptcy Act 1966* (the Act) provides that the Minister may make rules prescribing matters required or permitted by Schedule 2 to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Schedule. Schedule 2 (the Insolvency Practice Schedule (Bankruptcy) referred to as Schedule 2) was inserted into the Bankruptcy Act by the *Insolvency Law Reform Act 2016* (the Amending Act).

The Amending Act was introduced to implement the Australian Government's insolvency reforms. It is aimed to amend and streamline the Act and other legislation, namely the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*. A number of legislative instruments, including the *Insolvency Practice Rules (Bankruptcy) 2016* (the Rules) were made as part of the reforms.

The Rules were made by the Attorney-General on 19 December 2016. Parts 1, 2 and 4 of the Rules commenced immediately after the commencement of Schedule 2 to the Amending Act (on 1 March 2017), and part 3 of the Rules will commence on 1 September 2017. The *Insolvency Practice (Bankruptcy) Amendment (Minor Amendments) Rules 2017* (the Instrument) makes minor technical amendments to clarify the operation of the Rules and incorporates various provisions from the Act and the *Bankruptcy Regulations 1966* (the Regulations) that are repealed by the Amending Act. It was intended that specific repealed provisions from the Act and the Regulations be moved to the Rules.

### **Overview of the Instrument**

The Instrument makes a number of minor technical amendments to Parts 2 and 3 of the Rules to clarify their operation.

The Instrument amends the Rules to:

- require a trustee's employees to comply with standards for trustees
- require regulated debtors<sup>1</sup> to respond to questions put to them by relevant parties
- specify a number of requirements for obtaining and disclosing information about regulated debtors, and

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<sup>1</sup> A 'regulated debtor' is defined in the Amending Act as being a person who is a bankrupt; whose property is subject to control under Division 2 of Part X of the Amending Act; a debtor under a personal insolvency agreement; or a deceased person whose estate is being administered under Part XI of the Amending Act.

- clarify the operation of some provisions.

Details of the Instrument are set out in Attachment A.

The amendments have been informed by consultation with the Australian Financial Security Authority (AFSA).

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Sections 1 to 4 and items 1 to 5 of Schedule 1 of the Instrument will commence the day after the Instrument is registered. Items 6 to 49 of Schedule 1 of the Instrument will commence on the day that Part 3 of Schedule 2 of the Act commences (1 September 2017).

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the Instrument.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Insolvency Practice (Bankruptcy) Amendment (Minor Amendments) Rules 2017***

The Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the Legislative Instrument**

This Instrument corrects minor technical errors in the existing Rules and implements solutions to other issues identified by stakeholders.

This Instrument also incorporates various provisions in the Act that are repealed on 1 September 2017 when the second tranche of the Amending Act comes into effect.<sup>2</sup> These provisions include: requiring a trustee's employees to comply with standards for trustees; requiring debtors to respond to questions put to them by relevant parties, and a number of requirements for obtaining and disclosing information about debtors.

### **Human rights implications**

The impact of this Instrument on the following human rights has been considered:

- the right to privacy and reputation, and
- civil penalty provisions.

#### *The right to privacy and reputation*

Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)* provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The right to privacy may be engaged if the Instrument involves the collection, security, use, disclosure or publication of personal information.

Item 24 of the Instrument inserts new subsection 75-65(7) which obliges the regulated debtor (or the legal personal representative of a deceased regulated debtor) to answer any questions put to him or her to the best of his or her knowledge and ability at a meeting of the creditors. This amendment strengthens the rights of creditors to obtain relevant information regarding the regulated debtor's estate. This facilitates the just and fair administration of the estate.

The Instrument also contains a number of provisions that protect the privacy of the regulated debtor. For example, subsection 70-30(2A) and section 42-215 of the Instrument ensures that the trustee must withhold certain information about a

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<sup>2</sup> The *Insolvency Law Reform (Transitional Provisions) Regulation 2016* is the legislative instrument that delays until 1 September 2017 the commencement of the provisions of the Insolvency Practice Schedule (Bankruptcy) in tranche 2.

regulated debtor, such as their address or occupation, where the Inspector-General has decided not to enter that information on the National Personal Insolvency Index. This usually occurs in accordance with an application made by the regulated debtor, under the *Bankruptcy Regulations 1996* (the Regulations), where the regulated debtor fears for their personal safety if their address is made publically searchable.

The Instrument also contains provisions which prevent a trustee from providing or tabling information, including certain information in a regulated debtor's statement of affairs, to creditors in circumstances where that particular information will not be made available to the public (see subsections 75-55(2), 75-180(4) and subparagraphs 75-52(2)(2A), 75-60(2)(2A), and 75-175(2)(2A) of the Instrument). These provisions advance the right to privacy by limiting the situations where a trustee may publish certain sensitive information about a regulated debtor.

### *Civil Penalties*

Item 49 of the Instrument inserts new section 90-85 which creates an offence where a former trustee fails to notify the Official Receiver that they have been reinstated as trustee (by court order) within two business days of an order being granted. The maximum penalty is \$210.00 (1 penalty unit).<sup>3</sup>

The Parliamentary Joint Committee on Human Rights Guidance Note 2 notes that civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a 'criminal' penalty for the purposes of the ICCPR.

The civil penalty provision at item 49 of the Instrument (section 90-85) should not be considered 'criminal' for the purposes of human rights law. While a criminal penalty is deterrent or punitive, this provision is regulatory and disciplinary. Further, the provision does not apply to the general public, but to a sector or class of people who should reasonably be aware of their obligations under the Rules (e.g. trustees). Imposing the civil penalty will enable an effective disciplinary response to non-compliance. Finally, the civil penalty is for a small amount (1 penalty unit), with no sanction of imprisonment for non-payment of the penalty.

Based on the above factors, the cumulative effect and the nature and severity of the civil penalty in the Instrument is unlikely to be considered 'criminal' for the purposes of human rights law.

### **Conclusion**

The Instrument is compatible with human rights.

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<sup>3</sup> <https://www.legislation.gov.au/Details/C2017A00035>

**Details of the *Insolvency Practice (Bankruptcy) Amendment (Minor Amendments) Rules 2017***

This Attachment sets out further details of the *Insolvency Practice (Bankruptcy) Amendment (Minor Amendments) Rules 2017* (the Instrument). All references to a section should be taken as a reference to a section of the Instrument unless otherwise stated.

**Section 1 – Name**

This section provides that the title of the Instrument is the *Insolvency Practice (Bankruptcy) Amendment (Minor Amendments) Rules 2017*.

**Section 2 – Commencement**

This section provides that sections 1 to 4 and items 1 to 5 of Schedule 1 of the Instrument will commence the day after the Instrument is registered. This section also provides that items 6 to 49 of Schedule 1 of the Instrument will commence on 1 September 2017. This date has been selected to ensure that the Instrument commences on the same day that Part 3 of Schedule 2 of the *Bankruptcy Act 1966* commences, which is 1 September 2017.

**Section 3 – Authority**

This section provides that the Instrument is made under the *Bankruptcy Act 1966*.

**Section 4 – Schedules**

This section provides that each instrument that is specified in a Schedule to this Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Instrument has effect according to its terms.

**Schedule 1 – Amendments**

Schedule 1 of the Instrument sets out amendments to the Instrument as follows:

*Item 1 - Before Section 42-1*

Item 1 of Schedule 1 inserts the heading ‘Subdivision AA—Introduction’ to ensure consistency of style within the Instrument.

*Item 2 - After section 42-4*

Item 2 of Schedule 1 inserts section 42-4A into the new ‘Subdivision AA—Introduction’. This section obliges a registered trustee to ensure that his or her employees comply with Division 42 of the Rules. Previously this obligation existed in section 42-25 of the Rules which limited the application of employees’ obligations to

Subdivision A of Division 42. Subdivision A outlines general standards for trustees including the requirement to act honestly and impartially and to notify creditors of, and take steps to avoid, conflicts of interest. By inserting section 42-4A into the new Subdivision AA of Division 42, trustee's employees will now be required to comply with the entirety of Division 42.

*Item 3 - Section 42-25*

Item 3 of Schedule 1 repeals section 42-25 of the Rules. This section contained the obligation that a trustee ensures that his or her employees comply with Subdivision A. This obligation will now exist under the new 'Subdivision AA—Introduction', and will extend the employee obligation to the whole of Division 42.

*Item 4 - Section 42-215*

Item 4 of Schedule 1 inserts a subsection (1) at the beginning of the text in section 42-215 of the Rules. The existing text contained in section 42-215 will become subsection 42-215(1). This will allow other subsections to be inserted in section 42-215.

*Item 5 - At the end of section 42-215*

Section 42-215 of the Rules requires a notice of the administration of a regulated debtor to be given to the creditors by a trustee. The notice must include the regulated debtor's name, date of birth, address and occupation.

Item 5 of Schedule 1 inserts subsection 42-215(2), which contains an obligation that a notice must not include the regulated debtor's address or occupation if there has been an application under the Regulations to suppress that information, and the Inspector-General has decided to not enter that information on the National Personal Insolvency Index. This ensures the privacy of the bankrupt is maintained when a suppression application is in operation.

*Item 6 - Section 60-25 (heading)*

Item 6 of Schedule 1 repeals the current heading of section 60-25 of the Rules and inserts a new heading that removes the reference to 'administrator'. This corrects a technical error in the current heading which refers to a trustee as a 'trustee administrator'. The correct reference should be 'trustee' only.

*Item 7 - At the end of section 70-17*

Section 70-17 of the Rules is made for the purposes of section 70-56 of Schedule 2 of the Act.

Section 70-56 of Schedule 2 confers a right on the regulated debtor to obtain certain information from the trustee. Section 70-56 also provides that the trustee must comply with the request for information unless the information is not relevant to the administration of the regulated debtor's estate; providing the information would breach the trustee's duties in relation to the administration of the regulated debtor's

estate, or it would not be reasonable for the trustee to comply with the request. Section 70-56 also provides that the Rules may prescribe circumstances where it would not be reasonable for a trustee to comply with a request for information. Section 70-17 of the Rules provides instruction to trustees in situations where it would be unreasonable for information to be provided. Examples include where providing the information would prejudice the interests of one or more creditors or a third party and that prejudice outweighs the benefits of complying with the request, or where the request is vexatious.

Item 7 of Schedule 1 inserts new subsections (6), (7) and (8) into section 70-17 of the Rules. These sections clarify, that for the purposes of section 70-56 of Schedule 2 to the Act, if the regulated debtor is deceased, the legal personal representative of the deceased debtor may request the same information contemplated by section 70-56.

The request made by the legal personal representative is to be treated in the same manner as if the request had been made by the regulated debtor, in that the trustee should comply with the request unless the general exceptions apply (subsection 70-56(2) of Schedule 2 of the Act or 70-17 of the Rules).

New subsection 70-17(8) also provides that it is reasonable for the trustee to comply with a request from a legal personal representative if the legal personal representative agrees to bear the costs and, if the trustee requests, for security for costs to be provided to the trustee prior to the request being executed.

Item 7 of Schedule 1 relies on the necessary and convenient power in paragraph 105-1(1)(b) of Schedule 2 of the Act. This power outlines that the Minister may, by legislative instrument, make rules for matters that are necessary or convenient to be provided in order to carry out or give effect to the Act.

The Act and Schedule 2 of that Act are generally intended to apply to the administration of regulated debtors who are deceased. Section 246 of the Act confers a role on the legal personal representative in this process. Given that the legal personal representative of a regulated debtor who is deceased is the only person that can act for the regulated debtor, it is necessary and convenient for the legal personal representative of the deceased debtor to have equivalent powers for requesting information from the trustee in the same way that a regulated debtor would. This aligns with and complements the broad intention of the Act regarding deceased regulated debtors. These new subsections in section 70-17 remove doubt that the legal personal representative can request information from the trustee.

*Item 8 - Paragraph 70-30(2)(a)*

Paragraph 70-30(2)(a) requires a trustee to provide the regulated debtor's name, date of birth, address and occupation information to as many creditors as practicable.

Item 8 of Schedule 1 makes this paragraph subject to subsection 70-30(2A). This new subsection creates an obligation for trustees not to disclose suppressed information in certain circumstances where there has been an application under the Regulations to suppress information, and the Inspector-General has decided to not enter that information on the National Personal Insolvency Index. This ensures the privacy of the bankrupt is maintained when a suppression application is in operation.

*Item 9 - After subsection 70-30(2)*

Paragraph 70-30(2)(a) of the Rules requires a trustee to provide information about the regulated debtor to as many creditors as practicable including the regulated debtor's name, date of birth, address and occupation.

Item 9 of Schedule 1 inserts subsection 70-30(2A), which contains an obligation that the trustee must not include the regulated debtor's address or occupation in information provided to creditors if there has been an application under the Regulations to suppress information, and the Inspector-General has decided to not enter that information on the National Personal Insolvency Index. This will ensure the privacy of the bankrupt is maintained when a suppression application is in operation.

*Item 10 - Subsection 75-27(1)*

Section 188 of the Act provides that a debtor may authorise a trustee or a solicitor to be a controlling trustee and to call a meeting of the debtor's creditors and to take control of the debtor's property.

Subsection 75-27(1) of the Rules currently requires a meeting of creditors referred to in section 188 of the Act be held not more than 20 business days after the relevant consent or approval was given for the meeting to be held.

Item 10 of Schedule 1 extends the 20 business day time limit to 30 business days. The extension will provide a trustee with a more appropriate time limit to prepare and provide to creditors the documents required for the meeting pursuant to subsection 75-27(2) of the Rules.

*Item 11 - Paragraph 75-27(2)(a)*

Paragraph 75-27(2)(a) of the Rules requires a trustee provide a copy of the regulated debtor's statement of affairs at a section 188 meeting (section 188 of the Act).

Item 11 of Schedule 1 makes this paragraph subject to subsection 75-27(2A). This subsection creates an obligation for trustees not to disclose information in the regulated debtor's statement of affairs to creditors which must not be made available to the public.



*Item 12 - After subsection 75-27(2)*

Paragraph 75-27(2)(a) of the Rules requires a trustee provide a copy of the regulated debtor's statement of affairs to creditors when giving notice to creditors of a section 188 meeting (section 188 of the Act).

Item 12 of Schedule 1 inserts subsection 75-27(2A) which contains an obligation for trustees not to give creditors information (when notifying of a section 188 meeting) which must not be made available to the public, as indicated in the approved form of a regulated debtor's statement of affairs. This will ensure the privacy of the regulated debtor is maintained.

Item 12 of Schedule 1 also inserts subsection 75-27(2B). This subsection will require the regulated debtor to attend the section 188 meeting. This obligation was contained within section 195 of the Act and repealed on the ground that it would be included in the Rules. Item 12 reinstates this obligation for debtors to attend meetings unless prevented by illness or other sufficient cause, and clarifies that failure of the debtor to attend meetings does not affect the validity of resolutions passed at the meetings.

*Item 13 - Section 75-40 (heading)*

Item 13 of Schedule 1 repeals the current heading of section 75-40 of the Rules and inserts a new heading that replaces 'meetings' with 'first meeting'. This removes the burden being placed on trustees to lodge a notice every time there is a meeting called under section 73 or Part X of the Act.

*Item 14 - Subsection 75-40(1)*

Subsection 75-40(1) of the Rules currently applies section 75-40 obligations to a meeting of creditors called under section 73 or Part X of the Act.

Item 14 of Schedule 1 replaces 'a meeting of creditors' with 'the first meeting of creditors of a regulated debtor's estate'. This removes the burden being placed on trustees to lodge a notice in an approved form every time there is a meeting called under section 73 or Part X of the Act. It ensures that the trustee's obligations to lodge a notice only apply for the first meeting of creditors in relation to the regulated debtor's estate.

*Item 15 - Subsection 75-40(2)*

Subsection 75-40(2) of the Rules requires that a trustee must lodge a notice of meeting in the approved form. Item 15 of Schedule 1 corrects a technical error in the text of the Rules where 'of a regulated debtor's estate' should be 'of the regulated debtor's estate'.

*Item 16 - Paragraph 75-40(3)(d)*

Paragraph 75-40(3)(d) of the Rules currently requires a notice of a meeting to creditors to state the time and date by which proofs of debt and proxies must be submitted.

Item 16 of Schedule 1 repeals paragraph 75-40(3)(d) and replaces it with the obligation to provide ‘the time and date by which particulars of the creditor’s debt or claim, and proxies for the meeting, are to be submitted’. This removes the requirement to provide the proofs of debt before the meeting, and instead introduces the requirement to provide particulars of the creditor’s debt or claim, which may be in the form of a statement of claim. The trustee may seek information to prove a debt on the day of the meeting, therefore this change more accurately represents the information required before the meeting.

*Item 17 - Subsection 75-40(4)*

Subsection 75-40(4) of the Rules requires a notice of the meeting of creditors to be published on a website maintained by the Inspector-General. Item 17 of Schedule 1 will require only ‘details from the notice’ to be published, rather than the entire notice. It is unnecessary and impracticable to publish the entire notice in the format required. This item will decrease the administrative burden of AFSA.

*Item 18 - At the end of section 75-40*

Item 18 of Schedule 1 inserts subsection 75-40(5) which provides that the Inspector-General may include other information regarding the meeting on the website, if the Inspector-General considers it is appropriate to do so. This will give the Inspector-General the discretion to include relevant information, for example, whether electronic attendance is possible, and means for creditors to obtain further information about the meeting.

*Item 19 - Section 75-55*

Item 19 of Schedule 1 inserts a subsection (1) at the beginning of the text under section 75-55 of the Rules. The existing text contained in section 75-55 will become subsection 75-55(1). This will allow other subsections to be inserted in section 75-55.

*Item 20 - At the end of section 75-55*

Paragraph 75-55(d) of the Rules requires that the agenda for a meeting of creditors must include, if the meeting is the first meeting, the tabling of the regulated debtor’s statement of affairs.

Item 20 of Schedule 1 inserts subsection 75-55(2) which contains the obligation for trustees not to table information which must not be made available to the public if this is indicated in the approved form of a statement of affairs. This will ensure the privacy of the regulated debtor is maintained.

*Item 21 - At the end of subsection 75-60(1)*

Subsection 75-60(1) of the Rules requires that at a first meeting of creditors the trustee is to table a copy of a regulated debtor’s proposal if the regulated debtor has lodged a proposal under section 73 of the Act.

Item 21 of Schedule 1 inserts a Note at the end of subsection 75-60(1) to notify the reader that the obligation exists for other documents to be tabled under section 75-180 of the Rules.

*Item 22 - Paragraph 75-60(2)(a)*

Paragraph 75-60(2)(a) of the Rules requires the trustee of the regulated debtor's estate to table the statement of affairs at a meeting called under section 188 of the Act.

Item 22 of Schedule 1 makes this paragraph subject to subsection 70-60(2A). This new subsection 70-60 (2A) creates an obligation for trustees not to table information in the statement of affairs which must not be made available to the public.

*Item 23 - After subsection 75-60(2)*

Paragraph 75-60(2)(a) of the Rules requires the trustee of the regulated debtor's estate to table the statement of affairs at a meeting called under section 188 of the Act.

Item 23 of Schedule 1 inserts subsection 75-27(2A) which contains an obligation for trustees not to table particular information in a statement of affairs that must not be made available to the public if this is indicated in the approved form of a statement of affairs. This will ensure the privacy of the regulated debtor is maintained.

*Item 24 - At the end of section 75-65*

Section 75-65 of the Rules specifies requirements of a trustee (or their representative) in the conduct of a creditors' meeting. Subsection 75-65(5) of the Rules provides that attendees participating and entitled to vote at the meeting can ask questions of the trustee and the regulated debtor (if present).

Item 24 of Schedule 1 inserts subsection 76-65(6) to place an obligation on a trustee, at meetings of a deceased debtor, to invite the persons participating and entitled to vote at the meeting to ask questions of the debtor's legal personal representative. Item 24 also inserts subsection 76-65(7) to place an obligation on the regulated debtor or legal personal representative of a deceased regulated debtor, to assist with any inquires at these meetings by answering questions to the best of his or her knowledge and ability. This will ensure that in circumstances where a debtor is deceased, creditors will be invited to direct questions about the deceased debtor's estate to the debtor's legal personal representative. It will also ensure that creditors have access to relevant information by requiring regulated debtors and legal representatives of deceased debtors to answer those questions put to them.

*Item 25 - Section 75-90*

Prior to or at the meeting of creditors, creditors will give the trustee a 'statement of claim' outlining the debt they claim is owed to them by the debtor. Section 75-90 of the Rules currently contains an obligation that a registered trustee must ensure that each creditor's claim or proof of debt bears evidence of:

- its admission or rejection

- the reason for its admission or rejection, and
- the amount for which the claim or proof of debt has been admitted.

Item 25 of Schedule 1 deletes the reference to ‘registered’ to correct a technical error where ‘registered trustee’ should simply be ‘trustee’. Removal of this reference to ‘registered’ will ensure that section 75-90 of the Rules applies to the Official Trustee and to registered trustees.

*Item 26 - Subsections 75-95(1), (2) and (3)*

Prior to or at a meeting of creditors, creditors will give the trustee a ‘statement of claim’ outlining the debt they claim is owed to them by the regulated debtor. Where a trustee is not satisfied that the creditor has provided sufficient information to substantiate the debt, the trustee can seek further information, which is then considered by the trustee in determining whether the creditor has the right to vote at the meeting and, if so, what value should be placed on the debt. Subsections 75-95(1), (2) and (3) of the Rules currently provide that if a registered trustee deems it necessary to obtain proof about a debt claimed by a creditor, he or she must ask the creditor to give evidence in writing in order to establish the liability of the regulated debtor for the debt. The registered trustee must have regard to the cost and benefit of seeking further evidence from the creditor, in the event that the original information provided by the creditor is insufficient, and must assess whether seeking this additional evidence is pertinent. A registered trustee is required to retain any evidence provided by the creditor which is relied on in deciding whether to accept or reject a claim by the creditor and/or which is used for voting or distributing dividends.

Item 26 of Schedule 1 deletes the reference to ‘registered’ to correct a technical error where ‘registered trustee’ should simply be ‘trustee’. Removal of this reference to ‘registered’ will ensure that subsections 75-95(1), (2) and (3) of the Rules apply to the Official Trustee and to registered trustees.

*Item 27 - Subsection 75-100(2)*

Subsection 75-100(2) of the Rules requires a registered trustee to have regard to the merits of a creditors claim when deciding whether a creditor is entitled to vote at a meeting of creditors. At all times, the registered trustee must act impartially and independently in relation to such claims.

Item 27 of Schedule 1 deletes the reference to ‘registered’ to correct a technical error where ‘registered trustee’ should simply be ‘trustee’. Removal of this reference to ‘registered’ will ensure that subsection 75-100 (2) of the Rules applies to the Official Trustee and to registered trustees.

*Item 28 - Subsection 75-130(2)*

Subsection 75-130(2) of the Rules provides that a proposal put to creditors, by giving notice under section 75-40 of Schedule 2 of the Act, is taken to be passed as a resolution in circumstances where a majority of creditors responded to the trustee with a Yes vote; these responses were received by the trustee in the specified time; and no more than 25% of responding creditors objected to the proposal.

Item 28 of Schedule 1 inserts a reference to ‘at a meeting of creditors’ before the word ‘if’ in subsection 75-130(2) of the Rules to clarify that if the proposal is supported by the required majority of creditors responding to the trustee, it is taken to be a resolution passed at a meeting of creditors.

*Item 29 - Paragraph 75-130(4)(a)*

Section 75-130 of the Rules provides that when considering proposals for resolutions, only those creditors who respond to the notice of the proposal are taken into account when ascertaining whether a proposal has been passed as a resolution. Paragraph 75-130(4)(a) currently provides that a creditor can only be classified as a responding creditor if he or she has submitted particulars of a debt or claim to the trustee on or before replying to the notice.

Item 29 of Schedule 1 inserts the words ‘the day’ after the words ‘on or before’ in paragraph 75-130(4)(a) of the Rules. This amendment clarifies that the time for a creditor to submit those particulars of a debt or claim to the trustee is on or before the day that the creditor replies to the notice.

*Item 30 - Paragraph 75-132(1)(a)*

Section 75-132 of the Rules provides that a special resolution is passed at a meeting of creditors when 50% of creditors voting at the meeting vote in favour of the proposed resolution and 75% in value of the creditors vote in favour of the proposed resolution. In any other case, the special resolution is not passed.

Item 30 of Schedule 1 deletes the reference to ‘50% of’ in paragraph 75-132(1)(a) and replaces it with ‘a majority of’ to ensure that the requisite threshold is any number of voters amounting to more than half of the voters at a meeting. If the requirement remained at 50% of the number of creditors to vote in favour, no clear majority could be achieved and a requisite of 50% would only be satisfied in circumstances where exactly 50% and no more voted in the affirmative.

*Item 31 - Paragraph 75-132(1)(b)*

Section 75-132 of the Rules provides that a special resolution is passed at a meeting of creditors when 50% of creditors voting at the meeting vote in favour of the proposed resolution and 75% in value of the creditors vote in favour of the proposed resolution. In any other case, the special resolution is not passed.

Item 31 of Schedule 1 deletes the reference to ‘75% in value’ in paragraph 75-132(1)(b) and replaces it with ‘at least 75% in value’ to ensure the percentage referenced in that subsection is a minimum amount. This will ensure that when calculating the value component of the Yes votes, provided the total dollar value is at least 75% of the sum total of all monies owed to the creditors voting (in favour or not) at the meeting, this threshold will be met.

*Item 32 - Subsection 75-137(2)*

Section 75-40 of Schedule 2 of the Act provides that the trustee of a regulated debtor's estate may at any time put a proposal to the creditors by giving notice to them in writing.

Paragraphs 75-40(5)(a) and (b) of Schedule 2 to the Act provide that the Rules may determine the circumstances in which a proposal is taken to be passed and whether a proposal is taken to be passed as a resolution or special resolution.

Pursuant to these paragraphs, subsection 75-137(2) of the Rules provides requirements that must be met for a special resolution to be passed by a proposal. This will allow a special resolution to be passed without a meeting of creditors.

Item 32 of Schedule 1 deletes the reference to 'passed as a special resolution if' and replaces it with 'taken to have been passed as a special resolution at a meeting of creditors if' in subsection 75-137(2). This will ensure that subsection 75-137(2) expressly provides that the standing of these resolutions is the same as those passed at meetings of creditors.

*Item 33 - Paragraph 75-137(2)(a)*

Section 75-40 of Schedule 2 of the Act provides that the trustee of a regulated debtor's estate may at any time put a proposal to the creditors by giving notice.

Paragraphs 75-40(5)(a) and (b) of Schedule 2 of the Act provide that the Rules may determine the circumstances in which a proposal is taken to be passed and whether a proposal is taken to be passed as a resolution or special resolution.

Pursuant to these paragraphs, subsection 75-137(2) of the Rules provides requirements that must be met for a special resolution to be passed by a proposal. This allows a special resolution to be passed without a meeting of creditors. Pursuant to paragraph 75-137(2)(a), one of the requirements for a special resolution to be passed by a proposal is for 50% of creditors that respond to the notice in the specified time to vote Yes.

Item 33 of Schedule 1 deletes the reference to '50% of' in paragraph 75-137(2)(a) and replaces it with 'a majority of' to ensure that the requisite threshold is any number of creditors that amounts to more than half of the creditors responding to a notice in the specified time voting Yes. The purpose of this amendment is to ensure that there is a clear majority of Yes votes required from creditors for a proposal to be passed as a special resolution pursuant to section 75-137 of the Rules.

If the requirement remained 50% of the number of creditors to vote in favour, no clear majority could be achieved and a requisite of 50% would only be satisfied in circumstances where exactly 50% and no more voted in the affirmative.

*Item 34 - Paragraph 75-137(2)(b)*

Section 75-40 of Schedule 2 of the Act provides that the trustee of a regulated debtor's estate may at any time put a proposal to the creditors by giving notice.

Paragraphs 75-40(5)(a) and (b) of Schedule 2 of the Act provide that the Rules may determine the circumstances in which a proposal is taken to be passed and whether a proposal is taken to be passed as a resolution or special resolution.

Pursuant to these paragraphs, subsection 75-137(2) of the Rules provides requirements that must be met for a special resolution to be passed by a proposal. This allows a special resolution to be passed without a meeting of creditors. Pursuant to paragraph 75-137(2)(b), one of the requirements for a special resolution to be passed by a proposal is for 75% in value of creditors that respond to the notice to vote Yes.

Item 34 of Schedule 1 deletes the reference to '75% in value' and replaces it with 'at least 75% in value' to ensure the percentage referenced in that subsection is a minimum requirement. This will ensure that when calculating the value component of the Yes votes, provided the total dollar value is at least 75% of the sum total of all monies owed to creditors voting (in favour or not) at the meeting, this threshold will be met.

*Item 35 - Paragraph 75-137(2)(c)*

Section 75-40 of Schedule 2 of the Act provides that the trustee of a regulated debtor's estate may, at any time, put a proposal to the creditors by giving notice.

Paragraphs 75-40(5)(a) and (b) of Schedule 2 of the Act provide that the Rules may determine the circumstances in which a proposal is taken to be passed and whether a proposal is taken to be passed as a resolution or special resolution.

Pursuant to these paragraphs, subsection 75-137(2) of the Rules provides requirements that must be met for a special resolution to be passed by a proposal. Pursuant to paragraph 75-137(2)(c) one of the requirements for a special resolution to be passed by a proposal is that not more than 25% in value of creditors responding to the notice vote No.

The amendment to paragraph 75-137(2)(b) by item 35 of Schedule 1, that at least 75% in value of responding creditors vote Yes nullifies the possibility that not more than 25% in value of responding creditors could vote No. Item 35 of Schedule 1 repeals the paragraph in its entirety as it is now redundant due to amendments made to paragraph 75-137(2)(b).

*Item 36 - Section 75-170 (heading)*

Section 75-170 of the Rules currently provides that for creditors' meetings in joint bankruptcies (as listed in paragraphs (a) to (d) of 75-170(1)) the trustee must explain to creditors and their representatives the likely effect of section 110 of the Act on the distribution of dividends. Section 110 relates to how payments will be applied to joint and separate estates.

Subsection 75-170(2) of the Rules provides that, where applicable, the trustee must also explain the likely effect of section 141 of the Act on the distribution of dividends. Section 141 of the Act provides that a creditor indebted jointly with more than one partner of a firm will not receive a dividend out of a bankrupt's separate property until all the separate creditors have received the full amount of their respective debts.

Section 75-170 of the Rules refers to joint bankruptcies but does not take into account the modification to the provision it replaces (section 64ZE of the Act) arising from items 2 and 16 of Part 2 of Schedule 6 to the Regulations. These items extend the operation of section 64ZE to certain joint section 188 authorities and joint personal insolvency agreements (section 188 of the Act). Thus the section applies more broadly.

Item 36 of Schedule 1 repeals the heading 'Joint bankruptcies' and replaces it with 'Joint administrations' to take into account that this section of the Rules has changed and applies to other insolvency arrangements in addition to bankruptcy.

*Item 37 - Subparagraph 75-170(1)*

Subsection 75-170(1) of the Rules provides a list of the kinds of bankruptcies that will require a trustee to explain, at a meeting of creditors of those bankruptcies, the effect of section 110 of the Act. The Instrument inserts a new subsection 75-170(e), adding a further category to this list which is not a bankruptcy but an administration.

Accordingly, item 37 of Schedule 1 removes the reference to 'kinds of bankruptcy' in 75-170(1) and replaces it with 'kinds of administration'. The purpose of this amendment is to expand the obligation of trustees to explain certain sections of the Act to creditors to cover joint section 188 authorities and personal insolvency agreements.

*Item 38 - Subsection 75-170(1)*

Subsection 75-170(1) of the Rules provides a list of the kinds of bankruptcies that will require a trustee to explain, at a meeting of creditors of those bankruptcies, the effect of section 110 of the Act.

Item 38 of Schedule 1 inserts another type of administration that will require, at a meeting of creditors, the trustee to explain the operation of section 110 of the Act. New paragraph 75-170(1)(e) requires the trustee to explain the effect of section 110 of the Act to debtors who, for the purposes of section 188 of the Act, provide a joint or separate authority for the administration of their joint estate.

*Item 39 - At the end of section 75-170*

Section 75-170 of the Rules provides an obligation for a trustee to explain provisions of the Act to creditors at a meeting and the likely effect that those provisions have on the distribution of dividends. For certain categories of bankruptcies listed in 75-170(1), a trustee will be required to explain to creditors the likely effect of section 110 of the Act, and for those creditors that section 141 of the Act applies (joint and



separate dividends), the trustee must explain the effect of that section on the distribution of dividends.

Item 39 of Schedule 1 inserts a new subsection 75-170(3) which ensures that the requirement of trustees to explain the operation of sections 110 and 141 of the Act only extends to the creditors of a personal insolvency agreement in circumstances where that insolvency agreement involves a joint estate, and where the agreement does not include information about how the joint estate will be distributed. This replicates a requirement currently contained in item 16 of Part 2 of Schedule 6 to the Regulations, which is repealed with effect from 1 September 2017.

*Item 40 - Section 75-175 (heading)*

Section 75-175 of the Rules currently provides that where a regulated debtor lodges a proposal under subsection 73(1) of the Act, the trustee must call a meeting and send a copy of the proposal and a report on the proposal at least five business days before the meeting. If at the meeting, the proposal is accepted by special resolution, the trustee must make the composition or scheme of arrangement available for inspection by the creditors.

The trustee may refuse to call a meeting if the proposal does not adequately account for the trustee's approved fees as accrued at the time the proposal is lodged and where those fees cannot be taken out of the regulated debtor's estate.

Item 40 of Schedule 1 repeals the heading 'Meetings in relation to compositions or arrangements' and replaces it with 'Calling a meeting in relation to compositions or arrangements' to clarify that section 75-175 relates to the 'calling' of those kinds of meetings specifically.

*Item 41 - Paragraph 75-175(2)(b)*

Item 41 of Schedule 1 repeals paragraph (b) of 75-175(2) and replaces it with a new paragraph which includes four subparagraphs listing the information to be provided to creditors five business days prior to a meeting of creditors. That information includes: the proposal and a report on the proposal; a copy of the regulated debtor's statement of affairs or a summary of that statement (if the meeting is a first meeting of creditors that is held during the administration of the estate); a copy of the declaration referred to in section 73B of the Act (if this applies in relation to the composition or scheme of arrangement); and a form for the purposes of new subsection 75-175(5) (see item 46).

These amendments replicate the requirements for the trustee to prepare and provide a report on the proposals that will be put to creditors before a meeting of creditors as required under subsection 73(2) of the Act. Section 73 of the Act is repealed on 1 September 2017. Accordingly, item 41 also removes the reference to section 73 in section 75-175 of the Rules.

Further, item 1 of Schedule 2 to the Regulations currently requires the bankrupt's statement of affairs (or a summary of it) to be attached to the notice of the meeting of creditors. As Schedule 2 is repealed on 1 September 2017, the requirement to provide

these documents has also been incorporated into paragraph 75-175(2)(b) to ensure creditors receive them before the meeting.

*Item 42 - After subsection 75-175(2)*

Item 42 of Schedule 1 inserts four new subsections, (2A)-(2D), into section 75-175 of the Rules.

Item 41 of Schedule 1 inserts subparagraph 75-175(2)(b)(ii) which requires the trustee to provide a statement of affairs to the creditors five business days before the first meeting of creditors held during an administration of the estate. New subsection 75-175(2A) contains an obligation for trustees not to give creditors information which must not be made available to the public, as indicated in the approved form of a regulated debtor's statement of affairs. This will ensure the privacy of the regulated debtor is maintained when a statement of affairs is provided under subparagraph 75-175(2)(b)(ii).

Section 73A of the Act provides the trustee with the option to require a bankrupt to lodge an amount before the meeting to cover the estimated costs of arranging and holding the meeting and the estimated remuneration that will be payable to the trustee with respect to the meeting. Subsection 73A(2) of the Act requires the trustee to refund any excess amount, paid under the section 73A requirement, back to the bankrupt.

Section 73A is repealed by the Amending Act. New subsection 75-175(2B), will replicate section 73A of the Act to ensure the trustee may still require advanced lodgement of costs and remuneration before the meeting. In the case of a registered trustee, the remuneration will ultimately have to be determined by the creditors, a committee of inspection, or the Inspector-General, pursuant to sections 60-10 or 60-11 of Schedule 2 of the Act. New subsection 75-175(2C) requires the trustee to refund any excess amount paid for the purposes of subsection 75-175(2B) back to the regulated debtor.

Previously when a meeting of creditors was called under subsection 73(2) of the Act the trustee was required to provide a copy of the proposal accompanied by a report (see item 41 of Schedule 1 which replaces this requirement by inserting subparagraph 75-175(2)(b)(i)). Subsection 73(2A) of the Act required the report on the proposal to indicate whether the proposal would benefit the bankrupt's creditors generally. Subsection 73(2AA) required that the report name each creditor who was identified as a related entity of the bankrupt in the statement of affairs. Subsections 73(2A) and (2AA) of the Act are repealed by the Amending Act. New subsection 75-175(2D) replicates subsections 73(2A) and (2AA) of the Act. This will ensure that the trustee must provide a report on the proposal referred to in subparagraph 75-175(2)(b)(i) indicating whether the proposal would benefit the regulated debtor's creditors generally and name each creditor who was identified as a related entity of the regulated debtor in the debtor's statement of affairs.

*Item 43 - Subsection 75-175(3)*

Subsection 75-175(3) provides that the trustee may refuse to call a meeting if the proposal does not make adequate provision for payment to the trustee of accrued fees.

Item 43 of Schedule 1 deletes reference to ‘payment to the trustee of accrued fees’ and replaces it with ‘payment of accrued remuneration’. The word ‘remuneration’ is the more correct terminology and is consistent with the rest of the Rules.

*Item 44 - Paragraph 75-175(3)(a)*

Item 44 of Schedule 1 deletes ‘are owing to the trustee’ and replaces the text with ‘is owing’. This amendment clarifies that the accrued remuneration includes not only amounts owing to the current trustee, but also any previous trustees (including the Official Trustee) who may be owed remuneration that they have not been able to recover from the bankrupt estate.

*Item 45 - Paragraph 75-175(3)(b)*

Item 45 of Schedule 1 repeals paragraph 75-175(3)(b) which requires remuneration owed to the trustee to have been approved by creditors. It is replaced by a provision clarifying that this applies only to a registered trustee. The remuneration of the Official Trustee is set by legislative Instrument and is not approved or determined by creditors. Unlike the Official Trustee, a registered trustee’s remuneration is approved in accordance with the Act. The methods by which a registered trustee’s remuneration can be determined are contained in sections 60-10 and 60-11 of Schedule 2 of the Act. The insertion of new paragraph 75-175(3)(b) makes this distinction clear.

*Item 46 - Subsection 75-175(4)*

Item 46 of Schedule 1 repeals the current subsection 75-175(4) and replaces it with new subsections 75-175(4), (5) and (6). New subsection (4) provides that the regulated debtor (or a deceased regulated debtor’s personal legal representative) may amend the terms of his or her proposal at a meeting of creditors. Notwithstanding, new subsection (4) does not reduce provision for payment to a trustee regarding accrued remuneration that is owing and has been approved by the creditors pursuant to section 75-175(3). New subsection (5) provides the ability for a creditor to assent or dissent to the proposal by written notice which must be provided to the trustee before the meeting. New subsection (6) provides that if a creditor has provided such written notice to the trustee, that creditor is taken to have been present at the meeting and to have voted in accordance with their assent or dissent. Item 46 of Schedule 1 replicates section 73(3) and 73C of the Act which are repealed by the Amending Act.

*Item 47 - At the end of Subdivision E of Division 75*

Item 47 of Schedule 1 inserts section 75-180 to incorporate obligations contained in the Act and Regulations that are repealed on 1 September 2017, in particular section 73C of the Act. The new section provides a list of information that is to be provided at or in advance of a creditors’ meeting for compositions or arrangements. The section provides that the trustee must table a statement of affairs at the creditors’ meeting (other than those parts of the statement of affairs that the approved from requires must not be made available to the public) and, if a debtor has been requested to prepare a statement of affairs just prior to the meeting, and this materially differs from the statement tabled, the debtor must table a document at that meeting outlining the differences. If a proposal at a meeting provides that the proposed trustee is to become

the trustee of the composition or scheme, a declaration of relationships must be tabled by the trustee at the meeting pursuant to subsection 73B(2) of the Act. The provision currently in subsection 75-175(4) of the Rules is moved to new subsection 75-180(8).

*Item 48 - Paragraph 75-265(4)(b)*

Section 75-265 of the Rules provides that the creditors can remove a trustee of a regulated debtor's estate and appoint another person in their place by passing a resolution.

Section 75-265 of the Rules is confined to the removal of a trustee and not an administrator. To correct a technical error, item 48 of Schedule 1 deletes two references to 'administrator' in 75-265(4)(b) and replaces it with 'trustee'.

*Item 49 - At the end of Division 90*

Item 49 of Schedule 1 inserts a new provision 90-85 into the Rules which requires a trustee who is removed by creditors but is subsequently reappointed as the trustee by an order of the Court to notify the Official Receiver of the reappointment. The reappointed trustee must do so within two business days of the order being made. The notification period of two business days is consistent with other notification requirements in the Act and Regulations where the event notified impacts on the National Personal Insolvency Index (NPII). Failure to comply with this requirement is an offence and will incur a penalty of one penalty unit.

Item 49 of Schedule 1 relies on the necessary and convenient power in paragraph 105-1(1)(b) of Schedule 2 of the Act. This amendment complements a similar provision that will be inserted in the Regulations (regulation 8.50) which commences on 1 September 2017, requiring a person who applies to the Court to have a trustee removed to notify the Official Receiver if the Court makes the order sought. The penalty under regulation 8.50 is also one penalty unit. These provisions are designed to ensure that the Official Receiver is notified promptly of any replacement or reappointment of a trustee so that the NPII can remain up to date. As the NPII is a publically searchable register that is implicitly relied upon, it is particularly important that it be kept up to date.

Item 49 of Schedule 1 also inserts section 90-90 into the Rules which provides that if a court appoints a trustee under section 90-15 or 90-35 of Schedule 2 of the Act, the Official Receiver must issue the trustee with a certificate of appointment. The certificate of appointment will be issued following the notification by the trustee to the Official Receiver of his or her appointment.