

# Inspector-General Practice Direction 17

IGPD 17 – Guidelines relating to administrator’s duty to notify creditors of 3-month arrears default

## 1. Introduction

1.1 The purpose of this document is to outline the Inspector-General in Bankruptcy’s ~~regulatory role, in regard to the principles on which expectations in relation to~~ a debt agreement administrator’s (DAA) ~~has a~~ duty to notify creditors that a three month arrears default has occurred. ~~It provides details of the expectations of the Inspector-General, in respect of this duty~~ including best practice principles. ~~It is complemented by practical and examples.~~

1.2 The *Bankruptcy Act 1966* (the Act) sets out the legislative framework for an administrator’s DAA’s duty to notify creditors of a three month arrears default, in particular. ~~This framework provides a specific duty for an administrator to notify creditors in accordance with~~ section 185LB and clauses ~~3.382.7.12 to 2.7.13 of the~~ Guidelines<sup>1</sup>.

## 2. Practical meaning and elements of duty

### What constitutes a three month arrears default?

2.1 A three month arrears default occurs when:

- i. A debtor defaults on one or more payments due by the debtor under the debt agreement;
- ii. The debtor does not rectify the arrears when a subsequent payment is due. This will trigger the three month “test time”.
- iii. A three month arrears default will then occur if throughout the three month “test time”, the debtor remained in arrears. The threshold value of the arrears that will trigger a three month arrears notification will depend on when the debt agreement came into force. This is discussed below.

2.2 The three months arrears default occurs on the day immediately after the expiration of the three month period ~~ie~~i.e. ~~three~~three months and one day. See practical examples below.

### How to measure three months?

2.3 The three month time period is not to be measured or converted to days or weeks. The three month period is only to be measured in calendar months. See practical examples.

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<sup>1</sup> ~~Guidelines Relating to the Registration and Cancellation of~~ Registration of a Debt Agreement Administrator under the *Bankruptcy Act 1966*.

2.4 In cases where the last day for making all arrears payments in the three calendar months falls on a Saturday, Sunday or a public holiday the three calendar month period is extended to the next workingbusiness day.

## Notifying creditors

2.5 The expectation of AFSA Regulation and Enforcement (R&E) is for DAAs to keep creditors informed of all material developments with respect to the debtor's affairs and any event that may impinge on the ability of the debt agreement to continue. The debtor has the option when they fall into arrears to propose a variation and inform creditors of their circumstances and why they should be given more time to pay. There may be valid reasons such as a period of unemployment between jobs or expenses associated with the birth of a child. It is expected that DAAs will take a leading role in workingbusiness with debtors and creditors in times of default so all parties are aware of the various alternatives to address the situation.

2.6 To meet the spirit of the legislation, creditors should be kept informed of all material developments with respect to an administration. In essence, DAAs are facilitating the contract between the debtor and creditors and must not show bias to either party or their own interests.

### Debt agreements commencing before 27 June 2019

~~2.75 Administrators~~ The following is applicable for debt agreements that come into force before 27 June 2019. are required to notify creditors within 10 working days of the default occurring. There is no prescribed form that administrators must use in notifying creditors.

~~2.86 Administrators~~ DAAs are required to notify creditors within 10 workingbusiness days of the default occurring. Notifications to are required to only notify creditors are only required at most once every three months. If there is more than one missed payment in one three month period (i.e. 'overlapping'), an administrator-DAA is not required to notify creditors on the occasion of every missed payment within the three month period. It is the time period, not the number of missed payments, which is important.

2.9 It is the time period, not the number of missed payments, which is important. This means that there does not have to be three months' worth of overdue payments. A default may be as little as \$1 if that is the amount of the arrears three months after the payments was due. DAAs are to take the quantumtotal value of the arrears and circumstances of the debtor into account when preparing the content of their default notice to creditors.

2.107 The clock starts ticking for the three month period when the first default occurs. However, if there is a missed payment that is also made good in the three month period and the **total arrears is nil** at the end of the three month period, the administrator-DAA is not required to notify creditors. The question to be asked is whether the debtor was in arrears for the **entire time** in a three month period.

2.811 In assessing whether an administrator's DAA's duty to notify creditors has been invoked each ~~three~~3 month test period must be reviewed in isolation. In effect each ~~three~~3 month period stands on its own. If there have been no missed payments in a particular ~~three~~3 month period the administrator-DAA is not required to report. Where a payment has been missed that triggers the commencement of the three month test period and if that payment or other missed ~~payments~~ payments during the period have not been made up by the end of the period, it is expected the administrator-DAA will not only report on the amount of arrears for that ~~three~~3 month period but also the cumulative total of arrears to that point.

~~2.9 Whilst having regard to the level and severity of arrears administrators are expected to provide creditors with concise detail. Administrators may choose to develop precedents in accordance with whether they consider which allocate the default as major or minor.~~

~~— **Major** — creditors are advised that the debtor is in arrears and administrators may recommend creditors take appropriate action. eg. dDebtor was made redundant then skipped without a trace and administrator has learned the debtor has changed bank accounts.~~

~~i. **Minor** — creditors are advised that the debtor is largely compliant with payments, is only slightly in arrears and administrators may recommend to creditors that no action be taken. eg. dDebtor has unexpected car repairs that has meant he has missed one week of payments. All other payments have been made on time and the one week of payments is slowly being made up with extra payments.~~

~~2.10 If Administrators would like AFSA Regulation and Enforcement to review their three month arrears default notice precedents they are welcome to provide them to their Regional Regulation Director or Regulation's Assistant Director - Practice.~~

### Debt agreements commencing on or after 27 June 2019

2.12 The following is applicable for debt agreements that come into force on or after 27 June 2019.

2.13 A DAA is only required to notify creditors of a default when the amount of arrears is significant, having regard to the value of the payments due and the cost of notifying creditors. The three month arrears default occurs if throughout the three month test period, the amount of arrears is over a threshold, either:

- The total amount that the debtor was in arrears exceeds \$300, or 20% of the total of all of the due payments at the beginning of the three month period – whichever is higher; or
- If the total of all of the due payments was \$300 or less, **no** payment was made in that period to reduce any of the due payments

2.14 Where the arrears over the three month period is over the threshold, but is rectified by the end of the three month period, the DAA is not required to notify

creditors. The question to be asked is whether the debtor was in arrears over the threshold for the **entire time** in a three month period.

2.15 Notifications to creditors must be sent within 10 ~~working~~**business** days of the default occurring. Notifications to creditors are only required at **most** once every three months. Where the arrears **exceeds** the threshold more than once in **a** three month period, a DAA is not required to notify creditors on the occasion of every missed payment within the three month period.

2.16 In assessing whether a DAA's duty to notify creditors has been invoked, each three month test period must be reviewed in isolation. In effect each three month period stands on its own. If there have been no missed payments in a particular three month period the DAA is not required to report.

### Reporting systems for three month arrears defaults

2.17 The Act requires a DAA to run two different three month arrears notification systems depending on whether a debt agreement is in force before or after 27 June 2019. To ensure no unnecessary regulatory burden is imposed, DAAs may use one notification system for all debt agreements so long as it meets the three month arrears notice requirements of *both* pre and post 27 June 2018 debt agreements.

2.18 To meet *both* three month arrears notification requirements, a DAA **would send** an arrears notification when **n** a debtor has:

- **Defaulted on one or more payments and did not rectify the arrears by the next due payment; and**
- **Throughout the three month period was in arrears **to any value**; and**
- **Remained so at the end of the three month period.**

This is regardless of when the debt agreement commenced.

The notification letter sent should then clearly state:

- i. **The date the debt agreement commenced**
- ii. **The date of defaulting payment**
- iii. **The amount of arrears at the **end** of the three month period following the **defaulting payment****
- iv. **20% of due payments for the three month period**
- v. **Total due payments **for the three** month period**
- vi. **The arrears at the end of the three month period**
- vii. **The cumulative total of arrears up to the date of the letter**
- viii. **Information about whether or not the notification letter is considered a formal notice under section 185LB of the Act, for example:**

*"If the debt agreement commenced **prior** to 27 June 2019, then this message is to be treated as a 3-month arrears default notice under s185LB of the Bankruptcy Act 1966.*

*If the debt agreement commenced **on or after** 27 June 2019:*

- In the event that the total arrears in the 3 months since the defaulting payment is greater than \$300, or exceeds 20% of the due payments for the three month period; or
- In the event that the total due payments at the beginning of the three month period was \$300 or less, and no payment was made in that period to reduce any of the due payments, then this message is to be taken as a 3-month arrears default notice under s185LB of the Bankruptcy Act 1966.”

2.2019 Further information that a DAA may also refer to in the notification letter include the last payment made by the debtor and any arrangements in place, or to be put in place, for rectifying the arrears.

### Major and minor defaults

2.2010 Whilst having regard to the level and severity of arrears, DAAs are expected to provide creditors with concise information. DAAs may choose to develop precedents which allocate the default as major or minor.

- i. Major – creditors are advised that the debtor is in arrears and DAAs may recommend creditors take appropriate action e.g. debtor was made redundant then skipped without a trace and the DAA has learned the debtor has changed bank accounts.
- ii. Minor – creditors are advised that the debtor is largely compliant with payments, is only slightly in arrears and DAAs may recommend to creditors that no action be taken e.g. debtor has unexpected car repairs that has meant he has missed one week of payments. All other payments have been made on time and the one week of payments is slowly being made up with extra payments.

## Practical examples

### Example 1 – 'Major default'

2.421 4 Mrs Mrs A's debt agreement commenced on 34 September 2017. She has agreed to pay \$200 per week over 3 years. Her first payment was due 110 September 2017. Mrs A paid her \$200 weekly payments for the first month of her debt agreement but then stopped paying towards the end of in mid October 2017. The administrator DAA referred to his-their records to discover that the last payment made by Mrs A was on 232 October 2017. Therefore the last payment that was due but that remained unpaid was on 3029 October 2017. The last day Mrs A has to pay all accrued arrears and to prevent the three month arrears default occurring is 3029 January 2018.

The three month arrears default occurred on 301 January 2018. The administrator DAA carried out his-their duty to notify creditors of this occurrence within ten working business days of 301 January 2018 – this was done on 5 February 2018. The administrator DAA advised creditors that the agreement was \$2,800 in arrears and that the debtor has skipped without a a trace and to his-their knowledge it was unlikely that the debtor will bring the arrears up to date. Armed with

~~the knowledge~~Informed of the debtor's affairs and the considerable amount of arrears, ~~the~~ creditors~~s~~ resolved to terminate the debt agreement.

Note the relevant dates in this example are:

Date	Event
<del>34</del> September 20 <del>0</del> 17	Mrs A's debt agreement commences. \$200 per week to be paid over 3 years.
<del>10</del> 1 September 20 <del>0</del> 17	Date first payment due and paid by Mrs A
<del>22</del> 3 October 20 <del>0</del> 17	Mrs A makes her last payment
<del>29</del> 30 January 20 <del>0</del> 18 <sup>1</sup>	The last day Mrs A has to pay all accrued arrears to prevent the three month arrears default occurring
<del>30</del> 1 January 20 <del>0</del> 18	3 month arrears default occurs
5 February 20 <del>0</del> 18	<del>R</del> DAA notifies creditors of 3 month default within 10 <del>working</del> business days

1 - Note this date is not to be calculated from reference to days ~~ege.g.~~ 3 months x 30 days in a month = 90 days after 29 October 20~~0~~17 nor from reference to weeks ~~ege.g.~~ 4.3 weeks in a month x 3 months = 13 weeks

## ~~What constitutes a 3-month arrears default?~~

### Example 2 – Minor default

2.~~4222~~ Mr B's debt agreement commenced on **23 April 20~~08~~16**. He is required to pay \$100 per week over ~~four~~4 years. Mr B's first payment was due **30 April 20~~08~~16**. Mr B regularly pays his instalments but is paying \$95 per week rather than the \$100 required. It wasn't until **29 May 20~~08~~16** that the ~~administrator~~-DAA discovered that Mr B was making the incorrect payment amount. ~~Af~~ter~~t~~ being notified, Mr B immediately switched payments to \$100 per week and has maintained these since. Despite maintaining the \$100 per week payment Mr B has not paid the accrued arrears of \$25 from the first five weeks of the debt agreement. The last day Mr B has to pay the accrued arrears of \$25 is **30 July 20~~08~~16**.

On **31 July 20~~08~~16** the ~~three~~3 month arrears default occurs. The ~~DAA~~ administrator has a duty to report this ~~three~~3 month arrears default to creditors and did so within 10 ~~working~~business days—~~she~~ the DAA did this on **7 August 20~~08~~16**. The ~~administrator~~-DAA advised creditors that the agreement was \$25 in arrears and that the debtor had inadvertently paid the wrong amount for the first ~~five~~5 weeks but has since paid the correct amount and has agreed to make good the arrears. ~~Armed with the knowledge~~Informed of the debtor's affairs and the small amount of arrears that were since brought up to date, creditors resolved to allow the debt agreement continue.

In February 20~~09~~17, Mr B missed one weekly payment due to personal issues. He missed the payment that was due on **18 February 20~~09~~17** but then made good these arrears on top of his normal payment on **4 March 20~~09~~17**. All other payments were maintained for the rest of the ~~3~~-~~three~~ month period which began on 18

February 2009~~17~~. On **19 May 2009~~17~~** (i.e. ~~three~~ months and ~~one~~ day after 18 February 2009~~17~~) the ~~administrator-DAA~~ is not required to report to creditors as the arrears have been rectified within the ~~three~~ month period.

On **16 June 20~~18~~** Mr B paid \$50 rather than the required \$100 and did not repay this shortfall. The three month arrears default occurs on **17 September 20~~18~~** and ~~administrators-DAA~~s are to report to creditors within 10 ~~workingbusiness~~ days of this date. The ~~administrator-DAA~~ contacted the debtor and the debtor immediately paid the \$50 arrears amount into the ~~administrator's-DAA's~~ trust bank account. In ~~her-the~~ notification to creditors sent on **19 September 20~~18~~**, the ~~administrator-DAA~~ advised that although the ~~three~~ month arrears default had occurred, the amount was only \$50 and this amount had since been paid by Mr B. It was the ~~administrator's-DAA's~~ recommendation that the administration continue.

Note the relevant dates in this example are:

Date	Event
23 April 2008 <del>16</del>	Mr B's debt agreement commences. \$100 per week to be paid over <del>four</del> years.
30 April 2008 <del>16</del>	Date first payment due by Mr B
30 July 2008 <del>16</del> <sup>2</sup>	Last day Mr B has to pay the accrued arrears of \$25
31 July 2008 <del>16</del>	Three month arrears default occurs
7 August 2008 <del>16</del>	RDAA notifies creditors of <del>three</del> month arrears default within 10 <del>workingbusiness</del> days
16 June 20 <del>18</del>	Mr B pays \$50 rather than the required \$100 and is therefore \$50 in arrears
17 September 20 <del>18</del>	Three month arrears default occurs
19 September 20 <del>18</del>	RDAA notifies creditors of <del>three</del> month arrears default within 10 <del>workingbusiness</del> days

2 - Note this date is not to be calculated from reference to days ~~ege.g.~~ 3 months x 30 days in a month = 90 days after 30 July 20~~16~~ nor from reference to weeks ~~ege.g.~~ 4.3 weeks in a month x 3 months = 13 weeks

### Example 3 – Post 27 June 2019 debt agreement

2.23 Ms C's debt agreement commenced on 24 September 2019. She is required to pay \$120 per week over three years. Although Ms C begins the agreement paying \$120 per week, from 22 October 2019, Ms C regularly pays \$95 per week instead. Despite the DAA informing her that she was accruing arrears, Ms C continues to pay \$95 per week. Therefore, the last payment that was due but that remained unpaid would be 22 October 2019. The last day that Ms C has to pay all accrued arrears and to prevent a three month arrears default occurring is at 22 January 2020. Ms C only enters a payment arrangement to rectify her arrears on 28 January 2020, by increasing her payments to \$125 per week.

The three month arrears default occurs on **23 January 2020 only** if the arrears is the higher of either \$300 or 20% of the total of all due payments since the beginning of the three month period.

For the three months preceding the default, the total due payments during this period was \$1,680. 20% of this amount would be \$336, which would be the applicable threshold as it is over \$300.

The total arrears during the three month period was \$350. This exceeds the threshold and results in a three month arrears default occurring on **23 January 2020**.

The DAA has a duty to report this three month arrears default to creditors and does so within 10 **business** days—the DAA did this on **30 January 2020**. The DAA advised creditors of the arrears and that a payment arrangement was in place. The creditors resolve to allow the debt agreement to continue.

Note the relevant dates in this example are:

<u>Date</u>	<u>Event</u>
<u>24 September 2019</u>	<u>Ms C's debt agreement commences. \$120 per week to be paid over <b>three</b> years.</u>
<u>1 October 2019</u>	<u>Date first payment due and paid by Ms C</u>
<u>22 October 2019</u>	<u>Ms C makes payments of \$95 per week</u>
<u>22 January 2020<sup>3</sup></u>	<u>Last day Ms C has to pay the accrued arrears</u>
<u>23 January 2020</u>	<u>Date three month arrears default occurs</u>
<u>30 January 2020</u>	<u>DAA notifies creditors of three month arrears default within 10 <b>business</b> days</u>

3 - Note this date is not to be calculated from reference to days e.g. 3 months x 30 days in a month = 90 days after 19 October 2019 nor from reference to weeks e.g. 4.3 weeks in a month x 3 months = 13 weeks

#### Example 4 – Post 27 June 2019 debt agreement

2.24 Using the same example above, if Ms C decided to regularly pay \$100 per week from **22 October 2019** instead of \$95, the total arrears during the three month period would have been \$280. Since this amount does not exceed the threshold (i.e. \$336), the DAA would **not** have a duty to report a three month arrears default.

#### How to measure **three** months

2.13 ~~The practical expectation of R&E is for DAAs to keep creditors informed of all material developments with respect to the debtor's affairs and any event that may impinge on the ability of the debt agreement to continue. The debtor has the option when they fall into arrears to propose a variation and inform creditors of their circumstances and why the debtor they should be given more time to pay. There may be strong valid reasons such as a period of unemployment between jobs or~~



expenses associated with the birth of a child. It is expected that administrators will take a leading role in working with debtors and creditors in times of default so all parties are aware of these various alternatives to address the situation in the most appropriate manner.

2.14 It is in the To meet the spirit of the legislation that creditors should be kept informed of all material developments with respect to an administration. In essence, administrators are facilitating the contract between the debtor and creditors and must not show bias to either party or their own interests.

### 3. Consequences if **administrators** DAAs breach this duty

#### Debtors and creditors

3.1 An administrator ~~f~~ failing to advise creditors of a three months arrears default leads to a delays in updating-informing creditors as to the correct status of the administration. ~~thus~~ It adversely affecting-affects the integrity of the personal insolvency system. ~~It is also a likely and could be an~~ indicator that creditors are not being kept informed as to the progress of an administration~~updated~~. Creditors want to know when the three month default is occurring and have a right to be informed as expeditiously as possible.

#### AdministratorsDAAs

3.2 ~~AFSA Regulation and Enforcement~~R&E will closely monitor ~~closely~~ that this duty is carried out appropriately. We will require immediate rectification of any identified B breaches ~~identified will be required to be rectified immediately~~. Systemic breaches, especially after ~~AFSA Regulation and Enforcement~~ourR&E intervention, may lead to one of the remedial actions listed in Inspector-General Practice Statement 9 at paragraph 3.32 being undertaken. This includes disciplinary action.

### 4. AFSA roles

#### Regulation and Enforcement

4.1 Section 12 of the Act provides ~~AFSA Regulation and Enforcement~~R&E with the power to investigate where there are issues of concern either during the annual inspection programme ~~me~~ or through a complaint ~~being made~~. ~~AFSA Regulation and Enforcement~~WeR&E will examine the level and thoroughness of the three month arrears duty being performed by reference to the principles in this practice direction and the ~~L~~ legislative framework outlined in paragraph 1.2 above.

4.2 Where breaches of this duty or a lack of record keeping are identified, an administrator DAA will be asked to take appropriate remedial action, including a change in practice. This may also lead to counselling or in serious or systemic cases to either litigation or disciplinary action being initiated which could include eing conditions being placed on an administrator's DAA's registration.

4.3 During ~~annual~~ inspections, ~~AFSA Regulation and Enforcement~~R&E will examine the systems and controls an ~~administrator~~DAA has in place in respect to:

- i. the system that will enable accurate identification of three month arrears default
- ii. processes that will ensure ~~they notify~~ creditors are notified of the three month arrears default within 10 ~~working~~business days.

4.4 ~~AFSA Regulation and Enforcement~~R&E will examine documented practices and check lists, delegations and, where an ~~administrator~~DAA is relying on others to assist, how the ~~administrator~~DAA properly supervises and train their employees, agents or brokers to properly perform these duties on their behalf.

### **Debt agreement team (DAT)**

4.5 ~~DAT~~ is in regular contact with creditors through ~~the DAT telephone help line, as well as~~ the annual ~~joint~~ RDAA ~~and Major Creditor~~ forum. ~~DAT~~ will report to ~~AFSA Regulation and Enforcement~~R&E ~~any instance~~ when creditors raise concerns about whether ~~three~~3- monthly arrears reports are being sent by ~~administrators~~DAAs. Once advised by ~~DAT~~, ~~AFSA Regulation and Enforcement~~R&E will address the issues with the ~~relevant administrator~~DAA and, if necessary, ensure appropriate remedial action is undertaken.

## **5. Conclusion**

5.1 This practice direction outlines the Inspector-General's position and expectations on some of the ~~vexed~~ questions relating to an ~~administrator's~~DAA's duty to notify creditors of a three month arrears default. It will be against these principles and the legislative framework that an ~~administrator's~~DAA's performance of this duty will be assessed by ~~AFSA Regulation and Enforcement~~R&E.