

# Inspector-General Practice Direction 3

## IGPD 3 - Expenses that an Administrator can recover in a debt agreement

### 1. Introduction

This document outlines the Inspector-General in Bankruptcy's role in regulating expenses recovered by a Debt Agreement Administrator (Administrator).

#### 1.1 The Bankruptcy Act

The *Bankruptcy Act 1966* (the Act) outlines an Administrator's right to recover expenses in a debt agreement.

Subsection 185C(2) of the Act states in part:

*"A debt agreement proposal must:*  
*(a) identify the debtor's property that is to be dealt with under the agreement;*  
*and*  
*(b) specify how the property is to be dealt with; ..."*

Section 185LA of the Act states in part:

*"The duties of an administrator of a debt agreement include:*  
*(c) dealing with the debtor's property in the manner specified in the debt agreement; ..."*

For a debt agreement proposal (proposal) given to the Official Receiver on or after 27 June 2019, the following two provisions also apply.

Subsection 185C(3B) of the Act states:

*"A debt agreement proposal may also provide for the proposed administrator to be reimbursed expenses of a kind specified in the proposal that are incurred by the proposed administrator in administering any debt agreement resulting from the acceptance of the proposal"*

Subsection 185LA(2) states:

*"An administrator of a debt agreement has a duty not to be reimbursed for expenses the administrator incurred in administering the debt agreement unless those expenses are of a kind specified in the relevant debt agreement proposal as mentioned in subsection 185C(3B)"*

The Administrator can only deal with the property of the debtor, that is the payments received (in the vast majority of matters), in the manner prescribed by the agreement. The administrator must open a separate bank account for each agreement (the single account). The Administrator must not pay any money out of the single account for any other purpose (unless in accordance with the Act, or at the direction of the Court). From 27 June 2019, an Administrator who fails to only pay

money out of the single account for the administration of the debt agreement, commits an offence of strict liability.

## 1.2 The Guidelines

The legislative framework is supported by the:

- approved debt agreement forms
- *Guidelines relating to the registration and cancellation of a debt agreement administrator* (the Guidelines). The Guidelines summarise the Administrator's duties in relation to expenses.

## 2. Expenses

The Administrator can only recover expenses that are:

- incurred directly for that particular debt agreement (i.e. not associated with part of the recovery of general business overhead expenses)
- incurred by the Administrator (i.e. not by a third party)

The Administrator must clearly list in the proposal (or variation) all expenses they intend to recover. By voting to accept the proposal (or variation), creditors also approve the recovery of all the expenses listed. Recovery of any expense not included in the proposal (or variation) is an unauthorised payment.

### 2.1 What is an expense?

#### 2.1.1 Incurred directly for that particular debt agreement

Only expenses related to a specific debt agreement can be included in the proposal. Some common examples include:

- dishonour fees incurred if the debtor defaults on a payment
- stop cheque fees incurred if dividend cheques need to be reissued
- expenses incurred in certification of a proposal under section 185C(2D) of the Act (e.g. valuation of an asset and searches to verify debtor eligibility).

The Administrator cannot include general business expenses associated with running their business in the proposal.

#### 2.1.2 Incurred by the Administrator

The Administrator must incur the expense for it to be included in the proposal. An expense incurred by a third party (such as a broker) cannot be included. If money is owed to a third party when a debt agreement is proposed, the third party should be listed as an unsecured creditor.

For a proposal given to the Official Receiver on or after 27 June 2019, the Administrator must record any previous or expected payments from/to a broker in the

certificate accompanied with the proposal as required under sections 185C(2D)(f) of the Act.

### **2.1.3 Dishonour fees**

Dishonour fees imposed by financial institutions are common in a debt agreement administration. The Administrator usually pays the dishonour fees if the fees were not listed as an expense in the proposal.

The Administrator cannot reliably estimate dishonour fees when they submit the proposal. The proposal and explanatory statement form includes an automatic provision to reimburse dishonour fees. The current proposal states:

*"Dishonour charges incurred in the administration of the agreement with an authorised deposit-taking institution, such as a bank, will be recovered from the debtor's payments".*

This does not apply to debt agreements based on previous versions of the proposal form. The previous versions did not include a provision for dishonour fees to be reimbursed.

The Administrator should tell creditors if there are multiple dishonour fees that will have a material effect on dividends (generally a change of 10% – see Part 4 below). The Administrator should explain to creditors the effect on the dividend rate.

## **2.2 What is not an expense?**

### **2.2.1 Expenses of running the Administrator's business**

Business expenses that are not related to a particular debt agreement cannot be included in a proposal. Some common examples include:

- rent
- interest
- rates
- electricity
- depreciation
- wages.

The Administrator can recover these expenses in the form of remuneration which has been approved by the creditors. This means the Administrator can charge a fixed amount across all administrations periodically.

The Administrator may have small expenses which are inefficient to trace to a particular debt agreement. These should be treated as an overhead cost of running the business and should not be included in a proposal.

### **2.2.2 Costs of performing the duties of an Administrator**

The Administrator cannot claim the cost of performing their duties as an expense in a debt agreement. These expenses are recovered through the remuneration approved by creditors. Some common examples include:

- processing dishonoured transactions
- dealing with the assignment of debts

Payments to third parties for performing the duties of an Administrator cannot be included in the proposal.

### 3. Forms

Expenses must be listed on the proposal or variation form. The online form includes fields for expenses such as:

- Bank fees (including dishonour fees)
- Expenses for determining asset values
- Expenses for determining debtor eligibility.

The Administrator must enter the estimated total expenses that will be incurred before the debt agreement starts. The online form then converts and prefills the form with the percentage amount.

### 4. Materiality

The Administrator can notify creditors and/or submit a variation if expenses change and the change is material. This may happen when a new expense is incurred, or there is change in an existing expense.

If the change in the expense is not material, it can be paid without further approval. This is only the case if creditors approved the initial expense.

#### 4.1 What is material?

As a general guide, an increase of 10% or more of the original expense is considered material.

*EXAMPLE: if the initial approved expense was \$140, an increase of \$14 or more would be material variation. It would need creditors' approval through a variation before the additional expense could be recovered. If the increase in expense was less than \$14, the additional expense could be paid without further approval.*

### 5. AFSA roles

#### 5.1 Debt agreement team (DAT)

The DAT conducts compliance checks to make sure expenses in the proposal are related to that debt agreement. For example, it is **not acceptable** for the Administrator to state on the proposal that:

*“A flat fee of \$50 per month will be taken in expenses for the life of the debt agreement.”*

The Official Receiver may reject the proposal or cancel it during voting if the DAT believes the expenses are not legitimate. The DAT will notify AFSA Regulation and Enforcement (R&E) and give feedback to the Administrator.

## **5.2 Regulation and Enforcement (R&E)**

Staff in R&E (as delegates of the Inspector-General) have the power to conduct investigations under Section 12 of the Act. R&E will examine expenses claimed (including the amount and validity) if they suspect non-compliance. This may occur if the DAT raises an issue, or if a complaint is received.

For any expense included in the proposal, the Administrator must be able to show:

- (a) how it is directly related to the debt agreement;
- (b) how it is of the same kind as that specified in the original proposal, and
- (c) how the actual expense was calculated

If the law (including the Guidelines) is breached or record keeping is inadequate, the Administrator will need to change their practice or take other remedial action. This could lead to counselling or, in serious or systemic cases, to litigation or disciplinary action. This may include placing conditions on the Administrator's registration.

During inspections, R&E will examine the Administrator's systems and controls for calculating and recovering expenses. This includes examining:

- documented practices, checklists and delegations
- practices for supervising and training employees, agents or brokers who perform tasks on behalf of the Administrator

AFSA will continue to develop guidance material as needed to clarify particular types of recoverable expenses.