



Australian Government

Australian Financial Security Authority

COMMONWEALTH OF AUSTRALIA

Bankruptcy Act 1966

GUIDELINES RELATING TO THE REGISTRATION AND CANCELLATION OF
REGISTRATION OF A DEBT AGREEMENT ADMINISTRATOR ~~AND INELIGIBILITY OF~~
~~AN UNREGISTERED DEBT AGREEMENT ADMINISTRATOR~~

I, ~~Hamish McCormick~~~~David Bergman~~, ~~Acting~~ Inspector-General in Bankruptcy acting under section 186Q of the *Bankruptcy Act 1966* make the attached legislative instrument as guidelines for the purposes of subsections 186C(6), 186K(7), 186L(7) and 186M(5) of that Act.

These guidelines commence ~~2 October 2017~~27 June 2019

Dated this

~~DAVID BERGMAN~~HAMISH MCCORMICK

~~Acting~~ Inspector-General in Bankruptcy



Australian Government

Australian Financial Security Authority

**GUIDELINES RELATING TO THE REGISTRATION AND
CANCELLATION OF REGISTRATION -OF A DEBT
AGREEMENT ADMINISTRATOR ~~AND INELIGIBILITY OF
AN UNREGISTERED DEBT AGREEMENT
ADMINISTRATOR~~ UNDER THE *BANKRUPTCY ACT 1966***

Contents

1. INTRODUCTION	1
2. OVERVIEW OF CERTIFICATION AND SPECIFIC DUTIES OF ADMINISTRATORS	1
3. REGISTRATION	2
Who needs to become registered?	3
Who does not need to become registered?	3
Who can apply	4
Individuals	4
A Company	5
Partnerships	6
Fit and proper assessment	6
Insurance – corporate and individual	76
Insurance - adequate and appropriate	7
Assessment of ability to satisfactorily perform the duties of an administrator	8
(a) Duties to ensure certificate is correct and properly administer the agreement	8
(c) Ensure creditors and the Official Receiver are informed about default	11
(d) Taking Fees and Expenses	11
(e) Handling and properly accounting for money	12
(f) Inform the Official Receiver within 5 days from the end of the agreement	13
(g) Consider whether offences under the Act have occurred and refer any evidence of such offences to the Inspector-General	1413
Conditional registration	1413
Industry wide conditions	Error! Bookmark not defined.14
Mandatory qualifications	1415
4. CANCELLATION OF REGISTRATION	1415
Involuntary cancellation of an individual’s or company’s registration	15
Grounds for cancellation	1516
Voluntary cancellation of registration	17
Ineligibility of an unregistered administrator	17
Matters considered by the Inspector-General	18
Categories of breaches	18
Category A breaches	18
Category B breaches	19
Category C breaches	19

1. Introduction

1.1 These guidelines provide information on the factors that will be considered by the Inspector-General in deciding whether to approve an application for registration as a debt agreement administrator and whether to cancel an existing registration on a voluntary or involuntary basis; ~~and whether to declare a person ineligible to act as a debt agreement administrator~~, under the *Bankruptcy Act 1966* (the Act).

2. Overview of certification and specific duties of Administrators

2.1 Pursuant to sub-section 185C(2D) of the Act-, at the time the debt agreement proposal is lodged with the Official Receiver, an administrator is required to sign a certificate outlining that certify that:

- they have consented to deal with the identified property in the way specified in the proposal;
- the debtor has ~~received~~ been given the information prescribed by the regulations, including about alternative means of dealing with financial difficulty ~~as prescribed by the regulations~~;
- having regard to the circumstances in existence at the time when the debtor's statement of affairs was signed by the debtor, they have reasonable grounds to believe that the debtor is likely to be able to discharge the obligations created by the agreement as and when they fall due; ~~and~~
- they have reasonable grounds to believe that all information required to be set out in the debtor's statement of affairs and ~~proposal~~ explanatory statement, has been set out and they have a reasonable basis for believing that the debtor has properly disclosed their affairs to creditors; ~~and~~

2.2 For proposals lodged with the Official Receiver on or after 27 June 2019, the signed certificate under s185C(2D) must also include:

- where a broker referred the debtor to the proposed administrator, details of the administrator's relationship with the broker, and any payments made or to be made by to that broker in connection with the referral ; and
- where an affected creditor was a related entity of the proposed administrator, the name of the affected creditors and details about the nature of the relationship between that creditor and the administrator.

2.3 In addition, if sub-section 185C(4C) of the Act applies to the debtor, an administrator must certify that they are satisfied that the debtor is likely to be able to discharge their obligations under the agreement when they fall due.

2.4 An administrator will also be required to certify that they have reasonable grounds to believe that a debtor is likely to be able to discharge any obligations as and when they fall due where a debt agreement variation is proposed in accordance with s185M(1DB).

2.5 Division 3A of Part IX of the Act sets out duties of administrators. ~~An administrator is required to:~~

~~ensure the certification provided to the Official Receiver with the debt agreement proposal is correct;~~

~~deal with the debtor's property in the manner specified in the debt agreement;~~

~~respond in a timely manner to reasonable requests from creditors about the progress of individual agreements;~~

~~respond in a timely manner to reasonable requests from debtors for information;~~

~~ensure creditors and the Official Receiver are informed where the debtor defaults in certain circumstances;~~

~~inform the Official Receiver within 5 working days after the end of the agreement;~~

~~handle and properly account for money paying all money received from debtors under agreements to the credit of a single interest-bearing bank account keeping such accounts, books and records as are necessary to give a full and correct account of the administration of the debt agreement;~~

~~when required, answer any inquiries about the debt agreement and cooperate with any inquiry or investigation made by the Inspector General; and~~

~~take their remuneration in accordance with the Act including maintaining a separate record of money received, payments made and the balance of money held in relation to each debt agreements and at least once every 45 days, reconcile the balance held in the bank account with these records.~~

3. Registration

3.1 An individual or company may apply to the Inspector-General to be registered as a debt agreement administrator. The Inspector-General must interview an applicant as soon as practicable after receiving an application and provide a decision on whether to approve or refuse the application within 45 business days of the interview.

3.2 The Inspector-General must approve an application made by an individual if the Inspector-General is satisfied that the applicant passes the *basic eligibility test*, has the ability (including the knowledge) to immediately perform the duties of a debt agreement administrator to a satisfactory standard, has the qualifications and experience (if any) as are prescribed by the regulations, has taken out adequate and appropriate professional indemnity and fidelity insurances, and is a fit and proper person.-

3.3 If an applicant is a company, the Inspector-General must approve the application on being satisfied that the applicant passes the *basic eligibility test*, ~~and~~ has the ability to immediately perform the duties of a debt agreement administrator to a satisfactory standard, has taken out adequate and appropriate professional indemnity and fidelity insurances, is a fit and proper person, and each director of the company is a fit and proper person. ~~It is a condition of a company's registration as an administrator that each individual who takes overall responsibility for managing the company's debt agreement activities must be a registered debt agreement administrator or a registered trustee. Therefore, in practice, an individual who takes overall responsibility for managing the company's debt agreement activities and who is not a registered trustee, must be registered to act as an administrator so that a company may proceed to registration.~~

3.4 The Inspector-General must approve an application for a renewal of registration by an individual or a company if the applicant still satisfies the requirements in s186C of the Act. In addition, the Inspector-General must approve an application for renewal if the applicant does not owe more than the prescribed amount of notified estate charges. A person will owe a notified estate charge if the person owes a charge under the *Bankruptcy (Estate Charges) Act 1997* or a penalty under section 281 of the Act. The Inspector-General will notify an administrator of outstanding notified estate charges prior to their renewal.

Who needs to become ~~r~~Registered?

3.5 From 27 June 2019, if an any individual or a company that intends to be nominated as an administrator in more than of in a five debt agreements must be registered under the Act.

3.6 Where a company is registered as an administrator, it is a condition of the company's registration that each individual who has overall management responsibility takes overall responsibility for managing the of a company's debt agreement activities must be either a registered administrator or a registered trustee. Therefore, an individual who has overall management responsibility for the company's debt agreement activities and who is not a registered trustee will also need to become registered (more information is provided at **Who can Apply**).

Who does not need to become ~~r~~Registered?

3.7 Registered trustees are not required to apply to be registered as an administrator. As a trustee administering debt agreements, they must adhere to the same duties and obligations under the Act as administrators. A breach of these duties will provide grounds for considering possible sanctions or disciplinary action under s40-40 (Schedule 2 of the Act - Insolvency Practice Schedule (Bankruptcy)) (IPS). A registered trustee who intends to act as an administrator does not need to become registered. As a trustee they are subject to the same duties and obligations as registered administrators. A breach of these duties will provide grounds under s40-40 (Schedule 2 - Insolvency Practice Schedule (IPS) (Bankruptcy)) for considering whether to continue registration.

3.8 Until 27 June 2019, an administrator is not required to be registered if they are nominated as an administrator for five debt agreements or less. The Official Receiver must not accept a debt agreement proposal from an unregistered administrator unless the person passes

the basic eligibility test (more information is provided at **Who can Apply**). From 27 June 2019, this exemption will cease.

Who can aApply

Individuals

3.9 Adults can be registered as administrators provided they:

- pass the *basic eligibility test*;
- have the ability (including the knowledge) to satisfactorily perform the duties of an administrator in relation to a debt agreement; ~~and~~
- ~~have such qualifications and experience as are prescribed by the regulations;~~
- have taken out adequate and appropriate fidelity and professional indemnity insurances (or is noted under a corporate policy held by a registered company administrator)
- are a fit and proper person

~~3.10~~ (1) An individual ~~passes the basic eligibility test~~ at a particular time (the *test time*) unless:

- ~~— (a) at any time during the 10 year period ending at the test time, the individual was an insolvent under administration; or~~
- ~~— (b) at any time during the 10 year period ending at the test time, the individual was convicted of an offence involving fraud or dishonesty; or~~
- ~~— (c) at the test time, the individual is disqualified from managing corporations under Part 2D.6 of the Corporations Act 2001; or~~
- ~~— (d) at any time during the 10 year period ending at the test time, the individual's registration as a liquidator was cancelled under the Corporations Act 2001 (other than in response to a written request by the individual to have the registration cancelled); or~~
- ~~— (e) at any time during the 10 year period ending at the test time, the individual's registration as a trustee was cancelled (other than in response to a written request by the individual to have the registration cancelled); or~~
- ~~— (f) at any time during the 10 year period ending at the test time, the individual's registration as a debt agreement administrator was cancelled under section 186K on the ground that:~~
 - ~~— (i) the individual contravened a condition that applied in relation to that registration; or~~

- ~~(ii) the individual failed to properly carry out the duties of an administrator in relation to a debt agreement; or~~
- ~~(g) at any time during the 10 year period ending at the test time, the individual's registration as a debt agreement administrator was cancelled as a result of an order under section 185ZCA; or~~
- ~~(h) at any time during the 10 year period ending at the test time, a declaration was made under former section 186M in relation to the individual; or~~
- ~~(i) at any time during the 10 year period ending at the test time, a determination in relation to the individual was made under subregulation 9.06(3) of the Bankruptcy Regulations 1996 as in force before the commencement of s186A of the Bankruptcy Act.~~

A Company

~~3.101~~ A company can be registered as a debt agreement administrator if:

- ~~• the company passes the *basic eligibility test*; and~~
- ~~• the company has the ability to satisfactorily perform the duties of a debt agreement administrator; and~~
- ~~• the company has taken out adequate and appropriate fidelity and professional indemnity insurances;~~
- ~~• and the company is a fit and proper person; and~~
- ~~• each director of the company is a fit and proper person.~~

~~3.12~~ A company ~~passes the *basic eligibility test*~~ at a particular time (the *test time*) unless:

- ~~(a) at any time during the 10 year period ending at the test time, the company was a Chapter 5 body corporate; or~~
- ~~(b) at any time during the 10 year period ending at the test time, the company was convicted of an offence involving fraud or dishonesty; or~~
- ~~(c) at any time during the 10 year period ending at the test time, the company's registration as a debt agreement administrator was cancelled under section 186L on the ground that:
 - ~~(i) the company contravened a condition that applied in relation to that registration; or~~
 - ~~(ii) the company failed to properly carry out the duties of an administrator in relation to a debt agreement; or~~~~

~~(d) at any time during the 10-year period ending at the test time, the company's registration as a debt agreement administrator was cancelled as a result of an order under section 185ZCA; or~~

~~(e) at any time during the 10-year period ending at the test time, a declaration was made under section 186M in relation to the company; or~~

~~(f) at the test time, a director of the company does not pass the basic eligibility test; or~~

~~(g) at any time during the 10-year period ending at the test time, a determination in relation to the company was made under subregulation 9.06(3) of the Bankruptcy Regulations 1996 as in force before the commencement of s186A of the Bankruptcy Act.~~

3.131 It is a condition of a company's registration that each person with *overall management responsibility* for the company's debt agreement activities must be either:

- (a) a registered debt agreement administrator; or
- (b) a registered trustee who has not been declared ineligible to be a debt agreement administrator.

3.142 *Overall management responsibility* in this context means making key decisions about practice and procedure for the company and includes supervision of the business, its employees, agents and brokers, money handling and finances, approving training, and approving implementation of systems and processes. They need not be the person who specifically deals with individual debt agreements. If there is more than one person responsible for the company's key decisions, if they are not registered trustees, each person will need to be registered as an administrator. The Inspector-General will need to be satisfied that each person with *overall management responsibility* for the company's debt agreement activities is a registered administrator and will not merely accept the company's assurance that all such persons have been registered.

Partnerships

3.153 If an applicant is in a partnership and the partnership intends to act as an administrator it will be necessary for each partner to be separately registered. Each partner would need then to act in their own name as the administrator of the debt agreement proposal and not in the name of the business or partnership.

Fit and proper assessment

3.164 To determine whether an individual is a fit and proper person to act as an administrator, AFSA will request recent referee reports which confirm that a person is of good fame and character, and is known to act with honesty and integrity. The delegate will determine whether the referee reports provided are acceptable, and may request further reports if necessary.

Insurance – corporate and individual

3.175 The Act requires that both individuals and corporate debt agreement administrators hold professional indemnity and fidelity insurances against the liabilities that may be incurred in working as a debt agreement administrator. Individual debt agreement administrators who operate in their own name (or associated business name) and corporate administrators will be required to hold this insurance.

3.186 However, to ensure there is no unnecessary regulatory burden imposed on individual administrators acting on behalf of a corporate administrator, these individuals will not be required to hold personal professional indemnity and fidelity insurance in their own name upon compliance with the following conditions:

- the person is an individual who takes overall responsibility for managing a company's debt agreement activities for the purposes of s186G(2); and
- the person will carry on any activity related to a debt agreement in the name of and on behalf of the associated corporate debt agreement administrator; and
- the corporate debt agreement administrator holds adequate and appropriate fidelity insurance; and
- the corporate debt agreement administrator holds adequate and appropriate professional indemnity insurance; and
- the person is noted in the schedules of these insurance policies that the corporate debt agreement administrator holds.

Insurance - adequate and appropriate

3.197 The Act requires that professional indemnity (PI) and fidelity insurance must be adequate and appropriate and must cover liabilities that may be incurred in working as an administrator.

Adequate PI insurance

3.2018 The PI requirement covers claims for breach of professional, fiduciary or statutory obligations. We consider the minimum insured amount is a useful guide to what is adequate PI insurance for registered administrators. However you must review your business operations to determine your own insurance needs and ensure the cover is adequate and appropriate against the liabilities you may incur in working as a registered debt agreement administrator. You may need to seek professional advice to determine this.

3.2119 The excess or deductible in an appropriate PI insurance policy must be set at a sufficiently low level for the registered administrator's business, so there is capacity to pay this in the event of a claim.

Appropriate PI insurance

3.220 To meet this requirement the insurance policy should cover civil liability for loss or damage suffered by creditors or others arising from acts, errors or omissions by the administrator or their staff in the course of providing debt agreement services, including e.g. negligence, misleading or deceptive conduct or breaches of professional, fiduciary or statutory duties.

Adequate and appropriate fidelity insurance

3.231 You should seek professional advice as to what is adequate and appropriate fidelity insurance for you and your business. This policy may form part of your PI insurance.

-Assessment of Ability to satisfactorily perform the duties of an administrator

3.242 The delegate's decision will focus on determining whether a person has the required level of ability (including knowledge) to properly perform the duties of a debt agreement administrator. The following discussion deals with the level of knowledge and business systems required to be demonstrated by an applicant for registration as a debt agreement administrator, consistent with the type of duties expected of an administrator. The duties of an administrator have been generally categorised under the following headings.

(a) Duties to ensure certificate is correct and properly administer the agreement

3.253 These duties refer to the administrator's certificate which must accompany the debt agreement proposal under sub-section 185C(2D). At the time the debt agreement proposal is lodged with the Official Receiver, an administrator will have to certify that:

- they have consented to deal with the identified property in the way specified in the proposal;
- the debtor has been given the information prescribed by the regulations, including about alternative means of dealing with financial difficulty;
- ~~the debtor has received information about alternative means of dealing with financial difficulty as prescribed by the regulations;~~
- having regard to the circumstances in existence at the time when the debtor's statement of affairs was signed by the debtor, they have reasonable grounds to believe that the debtor is likely to be able to discharge the obligations created by the agreement as and when they fall due; and
- they have reasonable grounds to believe that all information required to be set out in the debtor's statement of affairs and proposal explanatory statement, has been set out.

~~3.264~~ In addition, ~~pursuant to~~ required under paragraph ~~s~~185C(4C)(b) of the Act, ~~an administrator must certify that they are satisfied that the debtor is likely to be able to discharge their obligations under the agreement as and when they fall due.~~

~~3.275~~ An administrator will also be required to certify that they have reasonable grounds to believe that a debtor is likely to discharge any obligations that arise under a proposed variation to the proposal as and when they fall due. Where ~~s~~185M(1DB) applies to a variation, ~~an administrator will also need to certify that there are reasonable grounds to believe that the debtor has experienced a substantial change in their circumstances since their proposal was accepted, that they cannot meet the obligations of their current agreement and that the overall total payments of the agreement have not increased in the variation proposal.~~

~~3.286~~ Only the administrator can sign the ~~sub-sections~~ 185C(2D), ~~and s~~185C(4C)(b), ~~s~~185M(1DB) and ~~s~~185M(1F) certificates. This duty cannot be delegated by the administrator.

~~3.297~~ In assisting debtors to make informed choices about alternative means of dealing with financial difficulty, the administrator will need to:

- ~~• be capable of providing debtors with information about the options available to them, including but not limited to insolvency options under the Act;~~
- ~~• understand the general bankruptcy concepts relevant to a debtor formulating a debt agreement proposal and completing a statement of affairs that discloses income, property and liabilities;~~
- ~~• It is expected that an administrator will be able to explain to a debtor what the differences are between the various options and the consequences.~~

~~3.3028~~ To be capable of doing this, the type of general insolvency and business knowledge expected includes the following matters:

- ~~• A basic knowledge of the Act. In particular, an applicant will need to know the options available along with the impact of these on a debtor. This would need to include the bankruptcy, personal insolvency agreement and debt agreement options available under the Act; how people become bankrupt; what property a bankrupt could retain; bankrupts' and creditor's rights; income contributions and a general awareness of antecedent transactions;~~
- ~~• A detailed knowledge of debt agreement legislation detailing the duties of an administrator including legislative requirements for a debt agreement administrator to cooperate with the Inspector-General's inquiries and investigations;~~
- ~~• A general knowledge of other financial and banking options available including refinancing, mortgages, informal arrangements and banking industry hardship provisions;~~

- Knowledge of common business structures such as companies, partnerships, trusts and sole traders, the liability implications arising from these structures, commercial and financial transactions and documents, including: leases, hire purchase, guarantees, caveats, mortgages and other security, and basic contract law.;

3.3129 To properly certify that they have reasonable grounds for believing that the debtor is likely to be able to discharge the obligations created by the agreement as they fall due, an administrator will be expected to demonstrate the following abilities based on their knowledge and business systems:

- to discern between financial choices and understand money and debt, including how to budget and plan;
- to recognise and competently inform debtors on life events that affect everyday financial decisions, including events in the general economy;
- to determine what budgeting processes are needed to assist the debtor; ~~and~~
- to determine how they would plan to assist the debtor ~~determine-decide~~ what they can afford to pay. For example does the applicant plan to use supporting systems such as the Australian Bureau of Statistics Household Expenditure Survey or the Household, Income and Labour Dynamics in Australia Survey (conducted on behalf of the Department of Social Services) to assist in determining whether the debtor's disclosed expenses are reasonable.

3.320 To properly certify that they have reasonable grounds to believe that the debtor has made full and true disclosure of their claims in the proposal and accompanying explanatory statement and statement of affairs, the type of knowledge ~~and business systems~~ which the applicant will be required to demonstrate through the examination process is as follows:

- 2.7.8—An understanding of what enquiries can be easily made both from the debtor and other resources to be able to certify with assurance to the Official Receiver that they have a reasonable basis for believing that the debtor has properly disclosed their affairs. For example an applicant will be expected to explain what evidence they will require from a debtor concerning income, expenses, liabilities and assets;
- what simple checks can be undertaken and what evidence they might retain in support of these checks.;

3.331 To issue a certificate under ~~s~~paragraph 185C(4C)(b) of the Act, a proposed administrator must certify that they are satisfied that the debtor will discharge their obligations under the agreement i.e. that the proposal is sustainable. The threshold of 'satisfied' is a higher one than the threshold of 'reasonable grounds to believe' discussed in paragraphs 3.31-3.32.

3.342 During the inspection phase of the assessment, the Inspector-General will examine the systems and controls an administrator has in place in respect to these areas including:

- their budgetary and assessment processes that will enable identification of the debtor's income and likely expenses during the period of the proposed agreement; ~~and~~
- processes that will ensure they are able to explain to the debtor what their obligations are and the consequences of failing to meet those obligations.

3.353 The Inspector-General will examine documented practices and check lists, and, where an applicant is relying on others to assist, how the applicant will properly supervise and train their employees, agents or brokers to properly perform these duties on their behalf.

(b) *Duty to respond in a timely manner to reasonable requests from debtors and creditors*

3.364 An applicant will need to demonstrate knowledge of the obligations of an administrator to respond in a timely manner to reasonable requests from creditors about the progress of individual agreements; and to respond in a timely manner to reasonable requests from debtors for information.

3.375 Depending on an administrator's business operations they may also need to outline what systems they have in place that will assist them in this regard.

(c) *Ensure creditors and the Official Receiver are informed about default*

3.386 An administrator has a duty to inform creditors when the debtor is in arrears for a period of ~~three~~ months. For debt agreement proposals lodged after 27 June 2019, an administrator has a duty to report arrears only where the arrears exceed \$300, or 20% of the total of all due payments (whichever is higher). Where the total due payments is \$300 or less, an administrator has a duty to report the arrears only if no payment was made in that period to reduce any of the due payments. The administrator must also advise the Official Receiver when the debtor has not made a payment in terms of the debt agreement for a continuous period of ~~six~~ months and/or when the debt agreement is not completed within six months of its due date for completion. Refer to Inspector-General Practice Statement 17 for further information about three month default reporting.

3.397 The payment monitoring and reporting system that will allow an administrator to quickly comply with these duties will be examined.

(d) *Taking Fees and Expenses*

3.4038 An administrator who is entitled to be remunerated is required to express that remuneration as a percentage of the total amount payable by the debtor in respect of provable debts. The remuneration must be taken proportionately over the duration of the agreement.

This forms part of the administrator's duty to administer the debtor's property in accordance with the terms of the agreement.

3.4139 –In addition, an administrator has a duty not to be reimbursed for expenses incurred in administering the agreement unless those expenses are of a kind specified in the relevant debt agreement proposal.

3.420 An administrator's systems for recovering remuneration will need to be capable of ensuring that only the correct percentage is taken when due, and ensuring that only expenses documented in a proposal are recovered. Systems need to be in place to ensure that general overheads are only recovered through remuneration charged and not treated separately as expenses. Levying of overhead costs to separate agreements in addition to remuneration is not permitted. Administrators will therefore need to understand what constitutes genuine "out of pocket" expenses that, if detailed in the proposal and creditors agree, are able to be recovered directly from funds held in trust for an individual agreement as opposed to an overhead recoverable only through remuneration.

~~_____ By the general nature of an expense or outlay, an administrator will may not know what it is until it is incurred. If expenses incurred in an administration are material, administrators are strongly encouraged to notify creditors and/or submit a variation for their consideration.~~

~~_____ As a general guide, any right to reimbursement for out of pocket expenses in a particular administration is limited to actual expenses incurred in respect of that debt agreement and the administrator must be able to show:~~

~~(a) _____ how it is directly attributable to the debt agreement;~~

~~(b) _____ how it is of the same kind as that specified in the original proposal, and~~

~~(cb) _____ how the actual expense for a particular matter was calculated.~~

~~Costs not able to be identified to a particular administration and which can only be recovered as a general fixed amount charged across all administrations periodically is considered to bear remuneration. Such costs are unable to be recovered as an out of pocket expense.~~

(e) Handling and properly accounting for money

3.431 Money received under the debt agreement is considered to be held in trust for the benefit of the debtor and creditors. In general, an applicant will need to demonstrate both an understanding of, and have, ~~_____~~ proper money handling processes, records and controls in place including: data backup and contingency plans, basic book-keeping knowledge, correct banking processes, the ability to monitor unrepresented and stale cheques, reconcile accounts and interest, monitor when dividends and fees are due and calculate and pay dividends and fees accurately.

3.442 Some of the specific elements to be considered are:

- (i) Administrators are required to pay all money received from debtors under agreements to the credit of a single interest-bearing bank account that bears the administrator's name and the words "Debt Agreement Administration Trust Account".
- ~~(ii)~~ Administrators must only pay into these accounts money received from debtors under debt agreements;
- ~~(ii)~~(iii) Administrators must only pay money out of these accounts for the administration of the debt agreement, in accordance with the Act or a direction of the Court;
- ~~(iii)~~(iv) Administrators are entitled in their personal capacity to each payment of interest on the accounts, less the bank fees and charges (if any) paid or payable during the period that the interest relates. The interest is payable to the Commonwealth as a charge imposed by the *Bankruptcy (Estate Charges) Act 1997*:-
- ~~(iv)~~(v) Administrators must keep such accounts, books and records as are necessary to give a full and correct account of the administration of the debt agreement; and if required to do so by the Inspector-General, make those accounts and records available for inspection by the Inspector-General;
- ~~(v)~~(vi) When required, administrators must answer any inquiries about the debt agreement and cooperate with any inquiry or investigation made by the Inspector-General, including in relation to any conduct of the administrator prior to the lodgement of a proposal;
- ~~(vi)~~(vii) If they are to be remunerated, the administrator must maintain a separate record of money received, payments made and the balance of money held in relation to each debt agreements and at least once every 45 days, reconcile the balance held in the bank account with these records; and
- ~~(vii)~~(viii) Administrators must account for interest and bank charges.

3.453 The Inspector-General's delegate will assess an applicant's knowledge in these areas and their systems and practices. An applicant will therefore need to maintain appropriate documentation such as a cash book, ledgers for each debt agreement and proper accounting for receipts, (including direct debits) and payments, (including cheques and electronic transfers) both in the cash book and in a debtor's ledger, to enable them to determine quickly the amount received, paid out and the balance on hand for each debt agreement, and be able to account for interest.

(f) Inform the Official Receiver within 5 days from the end of the agreement

3.464 An applicant will need to demonstrate that they have a reporting system in place which allows the progress of individual agreements to be monitored so that details of completed agreements can be provided within 5 working days to the Official Receiver, both for recording

on the National Personal Insolvency Index and to provide the certificate of release to the debtor which will evidence the debtor's discharge from their debts.

3.475 When notifying the Official Receiver, using the approved form, an administrator will be required to confirm that all money has been received and all creditors paid and provide a final accounting summary of the administration showing the receipts and payments including dividend and fee details.

(g) – Consider whether offences under the Act have occurred and refer any evidence of such offences to the Inspector-General

3.486 For debt agreement proposals lodged after 27 June 2019, administrators are required to consider whether the debtor has committed any potential offences under the Act. Administrators are then required to report to the Inspector-General or other relevant law enforcement authority, any evidence of an offence by the debtor under the Act.

Conditional Registration

3.497 The decision of the delegate of the Inspector-General may be to register an applicant with conditions. These may include:

- completion of additional studies. For example, the applicant may have substantially completed the minimum course of study but is yet to receive the final results;
- installation of further systems, controls and practices within a set timeframe;
- limiting the number of administrations that can be active because their current business systems and controls suggest they are equipped to deal only with a limited number of administrations.

3.5048 The requisite condition for a company is that the person with overall management responsibility for debt agreement activities is registered as an administrator.

3.4951 Applications can be made for removal of conditions imposed by the Inspector-General in the approved form. In this instance, the delegate will advise of their requirements concerning any further documents and a further interview will be needed.

Mandatory Qualifications

3.520 Mandatory qualifications for registration applied from 1 July 2009. These are prescribed under regulation 9.02 of the *Bankruptcy Regulations 1966*.

3.531 A company's registered debt agreement administrator/s with overall management responsibility for debt agreement activities must also obtain the qualifications.

4. Cancellation of registration

4.1 An existing registration must be cancelled if the administrator no longer passes the basic eligibility test. The Inspector-General may cancel an administrator's registration on other

grounds relating to their ability, or failure, to properly carry out the duties of an administrator, [for failing to hold adequate and appropriate fidelity or professional indemnity insurance, for failing to be considered a fit and proper person- or for](#) having breached a condition of registration.

4.2 [Up until 26 June 2019, a](#)A person who is not registered as an administrator may be declared ineligible to act as an administrator for failing to properly carry out the duties as an administrator.

4.3 The following information provides guidelines on matters considered by the Inspector-General in determining whether to cancel a registration of, or declare a person ineligible to act as, an administrator.

Involuntary Cancellation of an individual's or company's registration

4.4 The *basic eligibility test* continues to apply during the period of registration. The Inspector-General must cancel an individual's registration as a debt agreement administrator if the Inspector-General is satisfied that the individual no longer passes the *basic eligibility test*.

4.5 A company must ensure that at all times it has in its employ at least one qualified individual who has *overall management responsibility* for the company's debt agreement activities as that will be a condition of the company's registration. The *basic eligibility test* applies to these individuals who are required to be registered and if they become ineligible they will automatically lose their registration. As this is a condition of the company's registration it will prompt commencement of the involuntary cancellation process.

4.6 If a director becomes ineligible, any company of which the person is a director is also ineligible to act as an administrator and the company's registration must be cancelled.

Grounds for cancellation

4.7 The Inspector-General may ask for a written explanation why an individual should continue to act as a debt agreement administrator, if the Inspector-General has reasonable grounds to believe that the individual:

- (a) no longer has the ability (including the knowledge) to satisfactorily perform the duties of an administrator in relation to a debt agreement; or
- (b) has failed to properly carry out the duties of an administrator in relation to a debt agreement; or
- (c) no longer has the qualifications or experience prescribed by regulations; or
- (d) [ceased to have adequate and appropriate fidelity or personal indemnity insurance against the liabilities that the individual may incur working as a registered debt agreement administrator; or](#)
- (e) [is not a fit and proper person; or](#)

~~(d)~~(f) has contravened a condition of registration.

4.8 The Inspector-General may ask for a written explanation why the company should continue to act as a debt agreement administrator, if the Inspector-General has reasonable grounds to believe that the company:

- (a) no longer has the ability (including the knowledge) to satisfactorily perform the duties of an administrator in relation to a debt agreement; or
- (b) has failed to properly carry out the duties of an administrator in relation to a debt agreement; or
- (c) ceased to have adequate and appropriate fidelity or personal indemnity insurance against the liabilities that the company may incur working as a registered debt agreement administrator; or
- (d) is not a fit and proper person; or
- ~~(b)~~(e) a director of the company is not a fit and proper person; or
- ~~(e)~~(f) has contravened a condition of registration.

4.9 Such action may follow the identification of breaches and deficiencies in practices either during inspection, through the investigation of complaints or other compliance activity, or through the identification of questionable conduct issues by any means (such as criminal or civil action, actions taken by other regulators or disciplinary bodies etc).

4.10 In relation to the fit and proper test, this is a new standard where, from 27 June 2019, the Inspector-General may take action to cancel the registration of a practitioner if conduct which does not meet the expectations of the community is identified. For individuals or corporations acting in a position of trust as an administrator of debt agreements, being of good fame and character and acting with honesty and integrity at all times is an expectation held by the Inspector-General on behalf of the broader community. Any evidence that this standard is not being met will result in some form of sanction, including action taken to cancel the registration of an administrator.-

4.11 Should the individual with *overall management responsibility* resign from their employment with the registered company administrator or have their registration cancelled, the onus is on the individual and the company to notify the Inspector-General as soon as possible as to who is replacing that person. If a company continues to conduct debt agreement activities without a registered debt agreement administrator with *overall management responsibility*, the Inspector-General may seek an explanation as to why the company should remain registered.

4.12 An administrator's activity will also be monitored and should there be periods where an administrator has ceased to practice, this may give rise to enquiries aimed at establishing whether the administrator has maintained their knowledge and ability.

4.13 The failure on the part of a registered trustee, acting as an administrator, to properly carry out the duties of an administrator provides grounds pursuant to s40-40 of the IPS for the

Inspector-General to consider whether to continue their registration as a trustee under the Act. This includes when the trustee has not acted in a fit and proper manner.

Voluntary cancellation of registration

4.14 Only registered administrators can surrender their registration. When this is proposed you will need to provide a written notice in the approved form to the Inspector-General, requesting acceptance of the surrender of your registration.

4.15 AFSA Regulation and Enforcement will then liaise with the administrator to ascertain the status of uncompleted debt agreements and to ensure that necessary work has been undertaken prior to accepting the request. Generally approval will only be given if all the following requirements are met:

- all accounts are reconciled and in order
- the administrator has assisted or is able to assist AFSA in the transfer of all funds and records needed
- any other outstanding work on the part of the administrator to comply with the Act and meet their duties has been completed.

4.16 The cancellation will only take place once the resignation is accepted by the delegate of the Inspector-General. You will be advised and the AFSA website will be updated when this occurs. Any incomplete agreements that remain at the time of the cancellation will be transferred to the Official Receiver in AFSA unless other arrangements for transfer as prescribed by law have taken place.

Ineligibility of an unregistered administrator

4.17 Prior to 27 June 2019, an individual or company who is not registered as a debt agreement administrator under the Act could also be asked for a written explanation why they should continue to be eligible to act as a debt agreement administrator, if the Inspector-General had reasonable grounds to believe that they have failed to properly carry out the duties of an administrator in relation to the debt agreement.

4.18 This provision under section 186M of the Act will not apply from 27 June 2019 at which time all debt agreement administrators will be required to be registered to lodge proposals with AFSA. Any agreements already being administered by an unregistered debt agreement administrator will need to be transferred to a registered administrator, a registered trustee or to the Official Trustee.

Matters considered by the Inspector-General

[4.19](#) When considering whether a registration should be cancelled and in determining whether a person should be declared ineligible¹, the Inspector-General will consider the following matters:

- (i) the importance of the duty that has not been complied with or the breach of the Act; and
- (ii) the seriousness of the effect of a failure to comply, including the impact of the failure to comply; and
- (iii) an administrator's performance history including whether previous failures to comply with the Act or undertake the duties have been raised.

[4.20](#) Usually an administrator will be given opportunity to rectify simple breaches, such as an oversight in reporting to creditors. However if the issue is considered sufficiently serious such as in the case of accounting irregularities, or if the issue has not been rectified within the requested time frame, the Inspector-General may issue a formal notice of the breach of duty to the administrator. The administrator then has 28 days to explain or show cause why their registration should not be cancelled. The final decision as to whether the registration should be cancelled will be made by the delegate upon review of the administrator's response.

Categories of breaches

[4.21](#) More specifically the following system for categorising errors provides a guide to assist the Inspector-General in determining whether to consider the process [of cancellation of registration](#).

Category A breaches

[4.22](#) Fundamental breaches and lack of controls that are likely to bring into question the integrity of the debt agreement system. This would include but is not limited to defalcation, systemic overcharging, systemic failure to account or maintain proper accounts and records and negligence resulting in losses to creditors or the debtor. This also includes cases where there are repeat category B errors previously identified and not rectified. These matters will generally give rise to legal action, investigation of possible Bankruptcy Act offences, [ineligibility](#) or registered trustees and administrators having their registration cancelled or conditions placed on it. [This also includes where an administrator is found not to be a fit and proper person.](#)

¹ [Ineligibility can only be assessed up until 26 June 2019.](#)

Category B breaches

4.23 Serious or systemic breaches that will have a material impact on the administration and require timely action. The administrator or registered trustee would be counselled and timely remedial action expected to be taken. This would include a breach causing material loss to creditors or the debtor. Failure to remedy a category B breach within the specified timeframe ~~will~~may result in it being elevated to category A and the commencement of the cancellation process ~~will commence~~.

Category C breaches

4.24 One off practice or procedural errors and compliance breaches that are not systemic, occurring through inadvertence rather than through lack of appropriate systems, controls and procedures. This category of breaches is not likely to have a serious effect on individual administrations or creditors, debtors' rights or system integrity but should be brought to the attention of the practitioner and where possible, remedied. Repeats of a previous category C breach will result in the breach being considered to have become systemic and hence ~~are~~would be elevated to category B.