

# Inspector-General Practice Direction 13

## IGPD 13 - Debt agreement administrator guidelines to certification

### 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 a debt agreement administrator (DAA) has a duty to certify a debt agreement proposal (DAP) that is lodged with AFSA's Debt Agreement Team (DAT team). ~~It provides details of the expectations of the Inspector-General in respect of. This document includes this duty, including best practice principles surrounding the need to obtain and retain documentation. It is complemented by practical examples. The document also outlines- the expectations of the Inspector-General in respect of set up fees charged by a DAA, the role of the Debt Agreement team (DA team) in relation to an administrator's duty to properly certify.~~

1.2 The Bankruptcy Act 1966 (the Act) sets out the legislative framework for a DAA's duty to certify. This framework provides a specific duty to properly certify in accordance with section 185C(2D), 185M and the Guidelines<sup>1</sup> in clauses 2.7.2 to 2.7.9.

1.3 At the outset, it should be clearly noted that it is not the Inspector-General's role nor that of DAT team to be prescriptive in advising what records must be sighted, obtained and retained in order to properly certify.

### 2. Set up fees

2.1 Prior to entering into a debt agreement, a DAA will usually charge an upfront set up fee for the work they perform to certify the DAP. Set up fees are often paid progressively by the debtor prior to the DAP being voted on by creditors. Any amount outstanding at the time the DAP is accepted by creditors is then paid through the debt agreement at the same rate of return as other creditors.

2.2 The period of time for a debtor to repay a set up fee before a DAP is lodged should:

- i. Not be extended to a period longer than the amount of time it takes for a DAA to perform their certification duties; and
- ii. Not be used as a trial run or test period to ascertain whether a debtor can meet payment obligations under a debt agreement.

The Inspector-General would generally expect this period not to extend beyond three months.

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<sup>1</sup> Guidelines Relating to the Registration and Cancellation of Registration of a Registered Debt Agreement Administrator and Ineligibility of an Unregistered Debt Agreement Administrator under the Bankruptcy Act 1966.

### **3. Overview of duty to certify**

#### **Debt Agreement Proposal**

~~32.1~~ At the time a ~~debt agreement proposal~~DAP is lodged with ~~the DAT team~~, a DAA is required to certify pursuant to section 185C(2D) ~~of the Act:–There are four (4) mandatory elements to each certification.~~

- i. the DAA must consent to deal with the identified property in the way specified in the proposal
- ii. the DAA has given the debtor the information about alternative means of dealing with financial difficulty as prescribed by the regulations
- iii. the DAA has 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 having regard to the circumstances in existence at the time when the debtor's statement of affairs was signed by the debtor
- iv. the DAA has 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.

For DAPs lodged with the OR on or after 27 June 2019, the following also apply:

- i. where a broker has referred a debtor to the DAA, the DAA must specify the nature of their relationship with the broker, and set out any payments made, or to be made to the broker.
- ii. where a related entity of the administrator is an affected creditor, the DAA must specify the name and nature of their relationship with the affected creditor.

~~32.2~~ A DAA is required to ensure the certification provided to ~~DAT team~~ with the ~~debt agreement proposal~~DAP is correct.

~~2.3~~ If a DAA does not certify these matters in a proposal, the proposal will not be accepted. DAAs must ~~certify~~complete the certificate using the online form.

~~3~~ the approved form Certificate by Debt Agreement Administrator [PDF 268KB]. It may be filed with DA team electronically.

~~2.4~~ A debtor wishing to administer their own debt agreement does not have to lodge a certificate when lodging the proposal with DA team.

~~2.35~~ For 'single creditor' proposals, practitioners should be aware that the OR has a published policy in relation to how it deals with this class of proposals.<sup>2</sup>

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<sup>2</sup> See Official Receiver Practice Statement 11 – Debt Agreements (para 6.12 to 6.14)

3.4 For DAPs lodged after 27 June 2019, the OR will have the power to refuse to accept a DAP or variation proposal where they believe it will cause undue hardship to a debtor.

### **Exceeding the Payment to Income Ratio**

3.5 From 27 June 2019, a debtor **cannot** lodge a DAP with the OR if the total payments under the agreement as a percentage of the debtor's after-tax income (the *proposal percentage*) exceeds the percentage determined by the Minister by legislative instrument (the *prescribed percentage*). A *proposal percentage* is determined by the formula:

$$\frac{\text{Total of payments that the debtor would be required to make under the agreement} + \text{Low income debtor amount}}{\text{The debtor's after tax income in the year beginning at the proposal time}}$$

The *prescribed percentage* and *low income debtor amount* is determined by the Minister by legislative instrument.

3.6 The only exceptions where a *proposal percentage* can exceed the *prescribed percentage* are:

- i. Where a debtor has an interest in real property that is a dwelling and is their principal place of residence. The type of "interest" applicable is discussed further under section 185C(2AB) of the Act. When relying on this interest for the purpose of section 185C(2AB) of the Act, the interest must not be identified under 185C(2)(a) of the Act.  
— A DAA can lodge a separate certificate under section 185C(4C)(b) of the Act if it states that they are "satisfied" the debtor is likely to discharge their obligations under the agreement as and when they fall due i.e. that the proposal is sustainable. DAAs should be aware that the threshold of 'satisfied' is higher than that of 'reasonable grounds to believe' referred to in section 185C(2D) of the Act.
- ii. This certificate must be lodged with the OR along with the DAP and the certificate under section 185C(2D) of the Act (the version specifically for exceeding the payment to income ratio)

32.7 It is a duty of a DAA to undertake reasonable inquiries and to take reasonable steps to verify a debtor's financial situation before signing the certificate. The certificate will require the DAA to specify what inquiries or reasonable steps they took to verify the debtor's financial situation. A DAA must have regard to the circumstances in existence at the time the debtor lodges their statement of affairs, or any other relevant matters, when signing the certificate.

23.8 Failure of a DAA to properly certify under section 185C(4C)(b) of the Act is a strict liability offence. It would also be a breach of their duty under the Act and could potentially lead to disciplinary action or sanctions.

### **Variations**

**Comment:** The draft for IGPD 13 has been prepared as part of AFSA's consultation process with stakeholders, and is in accordance with the last consultation paper issued by the Attorney-General's Department. We note that the *payment to income ratio* and *low income debtor amount* will be determined by the Attorney-General at a future date."

3.97 For DAPs lodged after 27 June 2019, any subsequent variation proposals must be certified by the DAA that the debtor will discharge their obligations under the varied agreement.

33.108 In circumstances where section 185C(2AB) of the Act did not apply or where a section 185C(4C)(b) certificate was not given at the time of the DAP being lodged, then a varied debt agreement's proposal percentage cannot exceed the prescribed percentage. The new proposal percentage would be determined by the formula:

$$\frac{\text{Total of payments that the debtor would be required to make under the varied agreement} + \text{Low income debtor amount}}{\text{The debtor's after tax income in the year beginning at the proposal time}}$$

3.1149 Where a variation proposal is made to extend a debt agreement for up to five years pursuant to section 185M(1DB) of the Act, a DAA must provide a certificate stating that they have reasonable grounds to believe that the debtor has suffered a substantial change in circumstances not foreseen at the time of the DAP. They must also certify that the debtor is not likely to discharge their obligations under the original agreement.

## **34. Inspector-General expectations**

~~3.1~~ As outlined above there are four (4) essential elements to each certification a DAA must lodge with DA team.

### **(i) Consent**

34.12 It is essential that a DAA consents to act. Should the creditors accept the debtor's proposal, the completed consent allows a DAA to act as soon as the debt agreement commences.

34.23 The DAA must sign the certification in order to consent. An electronic signature is acceptable ~~if the certification is being filed with DA team by email,~~ however the signature must be that of the DAA. ~~A DAA cannot delegate the signing of the certificate to another person, or an officer with the appropriate delegated authority. DAAs must inform both DA team and AFSA Regulation and Enforcement when there are changes in the authorised people who may sign the consent.~~

### **(ii) Prescribed Information**

34.34 The DAA must give the debtor the prescribed information and ensure the debtor reads, understands and signs the form. It is expected that DAAs will explain the meaning of the prescribed information to debtors and answer any questions debtors have. ~~DAI team~~ checks this has been done appropriately via a sample of compliance telephone calls to debtors. ~~The Inspector-General's functions and powers are delegated to the Regulation and Enforcement (R&E) division of AFSA, whilst AFSA Regulation and Enforcement (R&E) also checks a sample of debtors~~ through the course of its ~~annual~~ inspection program.

~~34.45~~ The original of the signed prescribed information form must be retained on the DAA's file either in paper or electronic ~~image~~-form.

~~34.56~~ It is particularly important that DAAs explain the effect of personal insolvency administrations on credit agency reporting and the record on the [National Personal Insolvency Index](#) (NPII). DAAs should also explain that lodging a DAP is an act of bankruptcy, even if it is not accepted, and that creditors could use this to apply to the court to make a debtor bankrupt.

~~34.67~~ In assisting debtors to make informed choices about alternative means of dealing with financial difficulty, the DAA will need to be capable of providing debtors with information about the options available to them. This, includes ~~es, ing~~ but is not limited to, the Act, ~~understand the~~ general bankruptcy concepts relevant to a debtor formulating a ~~DAP debt agreement proposal~~, the explanatory statement and completing a statement of affairs that discloses income, property and liabilities. It is expected that a DAA will be able to explain to a debtor what the differences are between the various options and the consequences.

~~34.78~~ To be capable of doing this, the type of general insolvency and business knowledge expected of the DAA includes the following matters:

- i. A basic knowledge of the Act. In particular, a DAA needs to know the options ~~available along with the impact of these and their impact~~ on a debtor. This includes 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.
- ~~ii.~~ A detailed knowledge of debt agreement legislation detailing the duties of a DAA including legislative requirements for a DAA to cooperate with the Inspector-General's inquiries and investigations
- ~~iii.~~ A general knowledge of other financial and banking options available including refinancing, mortgages, informal arrangements and banking industry hardship provisions.
- ~~iv.~~ Knowledge of common business structures such as companies, partnerships, trusts and sole traders, the liability and tax 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.

### **(iii) Affordability & Sustainability**

~~34.89~~ To properly certify that a DAA has reasonable grounds for believing that the debtor is likely to be able to discharge the obligations created by the agreement as they fall due, they are expected to demonstrate the following abilities based on their knowledge and business systems:

- i. to evaluate financial choices and understand money and debt, including how to budget and plan
- ii. to recognise and competently inform debtors on life events that affect everyday financial decisions, including events in the general economy

- iii. to determine what budgeting processes are needed to assist the debtor
- iv. ~~to determine~~ how they plan to assist the debtor determine what they can afford to pay. For example, does the DAA plan to use supporting systems such as the Australian Bureau of Statistics Expenditure Survey or Household Income and Labour Dynamics in Australia research to assist determine whether the debtor's disclosed expenses are reasonable?

~~34.910~~ DAAs must look behind the budget supplied by the debtor and apply independent tests such as allowance for lifestyle expenses, copies of payslips to verify all sources of income including overtime, ~~and~~ allowances and the nature of employment. Where a debtor is employed on a casual basis, it is expected that a DAA would require further evidence (such as copies of payslips over a longer period of time) to establish the debtor's level of income compared to a debtor working full time. It is not acceptable to certify that the debtor can afford what is being proposed without a detailed review of the debtor's budget.

#### **(iv) Full Disclosure**

~~34.104~~ To properly certify that a DAA ~~have~~ has 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, they must have an understanding of what enquiries can be easily made both from the debtor and other resources ~~to be able to certify with assurance to DA team that they have a reasonable basis for believing that the debtor has properly disclosed their affairs.~~

~~43.112~~ For example a DAA is expected to know what evidence they will require from a debtor concerning income, expenses, liabilities and assets; what simple checks can be undertaken and what evidence they will retain depending on the debtor's circumstances.

~~43.123~~ There is no prescribed requirement as to what enquiries a DAA should make to establish reasonable grounds to believe that the debtor has made full and true disclosure of their affairs. Full disclosure of all creditors is important to ensure that creditors are:

- i. notified of the DAP debt agreement proposal (DAP)
- ii. fully aware of a debtor's current circumstances and make informed decisions
- iii. suspending collection action against the debt
- iv. given the opportunity to provide details of their debt and vote.

~~34.134~~ In most cases it may be appropriate for the DAA to examine bank and credit card statements, review employment history and payslips, and ask if tax returns have been filed. Credit reporting records or creditors contacted to clarify amounts may also be needed.

#### **(v) Disclosure of brokers**

4.14 A broker is any person or corporation who acts as an intermediary or agent and facilitates a debt agreement proposal with the DAA as an administrator of the agreement. A DAA must disclose in the DAP any broker who refers a debtor to them.

The details that must be disclosed include the name of the broker, the nature of the relationship with the broker and any payments made or to be made to the broker for the referral.

4.15 It is imperative that DAAs are open and frank in their disclosure of brokers, to ensure that all referral arrangements are accounted for and that affected creditors are fully informed when voting on whether to accept the DAP.

#### **(vi) Disclosure of related entities**

4.16 A DAA must disclose any related entity that is an affected creditor in the DAP. It must state the name and relationship between the affected creditor and the administrator. This is to ensure that the voting process is transparent. For DAPs lodged with the OR on or after 27 June 2019, the OR will not invite creditors who are related entities of the administrator to vote on proposals, and any votes made by a related entity to the administrator will be disregarded by the OR.

## **5. Reasonable grounds to certify**

45.1 ~~Each~~ ~~Most~~ certifications will require the DAA to take at least 'reasonable grounds' to certify. It is not possible to be too prescriptive in outlining what constitutes reasonable grounds. Each debtor's circumstances vary and will require different levels of verification. This is to be monitored and assessed on a case by case basis.

45.2 For example, if a debtor has a house and vehicle, it is not always expected nor mandatory that the DAA has completed property and vehicle searches and received appraisals prior to putting forward the proposal. What would be reasonable depends on the circumstances. Regarding the major asset items it would be reasonable for the DAA to check the extent of the secured debt with the debtor and whether it is separate or joint, and ask the debtor to explain the basis on which a particular value was estimated. Depending on the responses further enquiry may be required. This is particularly relevant if the debtor resides and has property in a different State to that of the DAA. If the debtor did not comply then the DAA may form the opinion that the certification required under s185C(2D) should not be given and the proposal could not be lodged with ~~DAI~~ team for processing.

45.3 A breach of the certification duty will arise if:

- i. ~~AFSA Regulation and Enforcement~~ R&E looks at records retained and ~~has~~ ve concerns particularly as to the quality, the extent of questioning and verification by the DAA before certification (e.g. the prescribed information being provided, the accuracy of information or the sustainability of the DAP; monitoring of staff brokers or agents)
- ii. DAAs are unable to present us with evidence to show they verified issues that are clearly inconsistent or that appear to ~~AFSA Regulation and Enforcement~~ R&E as dubious before they certified.

DAA's and ~~AFSA Regulation and Enforcement~~R&E need to assess each on a case by case basis based on what is reasonable in the debtor's circumstances.

## Reasonable Grounds – Assigned Debts

~~45.4~~ ~~Determining~~ Determining which creditors vote on a proposal is ultimately a responsibility of the ~~Official Receiver (OR)~~OR and it makes such decisions when it processes the DAP. However, in doing this the OR relies on the information disclosed by the debtor and certified as complete by the DAA. This part of IGPD13 sets out the Inspector-General has certain's expectations of DAAs in relation to assigned debts, to ensure that DAPs and variations to debt agreements are properly managed.

~~45.5~~ DAAs should be aware of the legislative limits within which they conduct their enquiries and ensure this aligns with and complements the statutory role and responsibility of the OR. Division 2 of Part IX of the Act establishes that only the OR is empowered to undertake certain assessments and determine who may vote on a proposal. As such, a DAA's certification duty does not extend to making assessments or decisions that only the OR may properly make. The certification duty of the DAA pursuant to s185C(2D) does not provide license for a forensic investigation scrutinising the validity of an assigned debt. ~~and It should not be confined to or confused with formalities required for the transfer of legal title under the various Conveyancing Acts operative in the States and Territories. Rather, to certify the DAA need have 'reasonable grounds'. The respective and complementary roles of the OR and the DAA are elaborated upon below.~~

~~4.6 It is the OR's responsibility to assess whether a creditor submitting a claim is an 'affected creditor' able to participate in the debt agreement. Once the assessment is concluded, and should the debtor's proposal be accepted, those 'affected creditors' and the debtor become parties to the debt agreement. Such a decision of the OR is reviewable in the Administrative Appeals Tribunal. That such a review right exists reinforces the role of the OR in accordance with administrative decision making principles.~~

~~45.67~~ The DAA must have reasonable grounds to believe that the assignee has been assigned the debts. In this regard the following principles apply:

- the DAA is entitled to receive evidence that an assignment has been effected. However, an agreement for assignment does not need to take any particular form. The DAA could be satisfied where it is provided evidence of an agreement that enables it to identify the personal information of the debtor and reasonable details of the assigned debt (such as, but not limited to, the amount outstanding, relevant account numbers where available and consideration paid by the assignee for the debt)
- the DAA must have regard to the substantive effect of the documentation that is provided and must not have undue regard to the form in which it is provided. As equitable assignees are capable of being a party to a debt agreement, (referred to in section 185I) it follows that assignments do not

have to meet the legal title requirements before a DAA can be satisfied that the assignment is effective, and

- a single agreement may relate to more than one assignment of debt.

**45.78** In determining who the owner of a debt is, consideration can be given to what the debtor understands of their financial affairs. However, when conducting their enquiries, DAAs may become aware of assignments prior to the debtor receiving formal notice, so DAAs may have more up to date information. Generally speaking, the debtor will be the best source of information about the existence of debts, and creditors will be source of information about the owner of debts. When in doubt, it is open for the DAA to contact the assignee and for the assignor to clarify who they believe is the owner of the debt. This should resolve most questions as to ownership. If, after this action, there remains doubt, the DAA should advise the OR when submitting the DAP. If creditors are aggrieved by the decision of the DAA, they may complain to the Inspector-General.

**54.89** The duties of a DAA described above can be distinguished from those duties relating to assignments occurring after the DAP has been accepted. Where a debt is assigned during the administration of the agreement the OR's involvement is limited (if any). Therefore it falls solely to the DAA to establish the owner of the debt and to whom dividends should be paid. Even so, DAAs are encouraged not to take an approach of form over substance to the assessment, particularly where the assignee and the assignor are not disputing the assignment. The principles in paragraph **64.76** are still relevant once a DAP has been accepted, and would reflect a reasonable approach by a DAA.

Stage of Agreement	Assignment Information	How to Treat Assignment	Outcome
Pre DAP	Debtor is aware a debt has been assigned. Notice provided to RDAA. Debtor is not aware of assignment or hasn't understood what it means. Fails to advise RDAA of assignment.		RDAA includes assignee as creditor in DAP  RDAA can accept information from debtor and include original creditor in DAP
Post DAP	RDAA becomes aware during voting period that debt was assigned pre DAP acceptance OR becomes aware during voting period that debt was assigned pre DAP acceptance	Principles reflected in IGPD13 apply  OR determines whether there has been an effective assignment	RDAA notifies OR  OR includes assignee as creditor

		Debtor, OR or RDAA or may become aware of this, principles reflected in IGPD13 apply	RDAAs notify OR; OR includes assignee as affected creditor and accepts vote
After DA in force	Debt is assigned during voting period	Principles reflected in IGPD13 apply	Assignee is now a party to the debt agreement, entitled to dividends

## 65. Retention of documentation

56.1 Documentation collated in support of a proposal and in the course of certifying is not to be forwarded to ~~DAI team~~ when filing the proposal. On occasion ~~DAI team~~ may request documentation to be made available for review.

~~56.2 With the exception of the original prescribed information, the DAA's duty is not to retain pre-debt agreement records.~~ DAAs are not committing a breach of their certification duty if they decide to keep only minor documentation, provided that on review by ~~AFSA Regulation and Enforcement R&E~~, the information retained is sufficient to conclude the certification was reasonably made. DAAs are required to exercise sound judgement on a case by case basis. This is best illustrated by two examples.

### Example 1 - Acceptable retention of documentation

56.3 Debtor works for the local council as a clerk and earns \$45,000 pa. She owns a second hand 1985 Mazda vehicle worth \$5,000 and rents at \$270 pw in a known middle class area. She has no spouse nor kids and 5 credit card debts totalling \$40,000. The DAA has only kept copy of the proposal and statement of affairs, signed prescribed information and a file note recording what was sighted and the information it contains.

56.4 The information on the proposal and statement of affairs is consistent, salary and expenses reasonable and liabilities not excessive. In this example it is probably not essential to keep copies of all documentation. With sound judgment and common sense a DAA can form the view by viewing the rent agreement, pay slips and bank accounts/statements. ~~AFSA Regulation and Enforcement R&E~~ is likely to be satisfied if the evidence to that effect was a file note recording what was sighted and the information it contains. ~~AFSA Regulation and Enforcement R&E~~ would not expect to see a property search or other information regarding the house or the vehicle. ~~AFSA Regulation and Enforcement R&E~~ would not record any breach of certification duty.

### Example 2 - Unacceptable retention of documentation

56.5 A high profile debtor (with a proven track record of the capacity to earn a very high income) living in Toorak, Melbourne discloses his only income as a disability

pension. He has three (3) credit card debts totalling \$40,000 and is 'supported' in putting the proposal forward by funds provided by his family and living in the family house. The DAA has kept a copy of the signed prescribed information, Centrelink slip, his last tax return and his 3 bank statements. The DAA believes they have properly certified.

~~66.6~~ Clearly these documents are not sufficient upon which to base certification. In this example ~~AFSA Regulation and Enforcement~~we would expect significantly more. ~~AFSA Regulation and Enforcement~~R&E expects more questions to be asked, and far more documentation regarding income from other sources, lifestyle expenses, debts disclosed, property, trusts etc. Such documentation would need to be retained on the DAA's file so ~~AFSA Regulation and Enforcement~~we can be assured that adequate investigations were undertaken in order to properly certify.

## **67. Practical examples**

### **I. Consent**

~~67.1~~ This element of the certification does not lend itself to a practical example.

~~67.2~~ ~~AFSA Regulation and Enforcement~~R&E will review during annual inspections to ensure that only those that are authorised to consent do so.

### **II. Prescribed Information**

#### **Example of acceptable certification**

~~67.3~~ A debtor sees a DAA's advertisement and makes contact with the DAA. The debtor is taken through each part of the prescribed information by the DAA. All options suitable to the debtor's circumstances are explored, not only the Part IX option. The debtor reads the prescribed information and asks questions of the DAA on parts that are not understood. The DAA ensures the debtor understands each option and the consequences of each option, particularly in respect of the impact on credit records and NPII. A signed copy of the prescribed information and any other information given is retained on the DAA's file.

#### **Example of unacceptable certification**

~~67.4~~ A debtor makes contact with the DAA. Debtor is then referred to a broker who does not explain options to the debtor. Broker insists that a debt agreement is the best and only alternative. Debtor is advised to 'sign here' (on the prescribed information) saying 'it is only paperwork'. The prescribed information is not retained on the DAA's file; rather it is filed with ~~DA~~T-team.

### **III. Affordability and Sustainability**

#### **Example of acceptable certification**

67.5. Debtor is 21 years old and earning \$30,000 p.a. He has no spouse, no children and is living at home with his parents. Total unsecured debts of \$30,000. After performing a review of the debtor's lifestyle, past spending habits and future plans the budget prepared by the DAA discloses a weekly surplus of \$150 per week. The debtor proposes to pay creditors \$100 per week for a period of 3 years. The DAA retains a copy of the debtor's payslip and a file note detailing what documents were sighted. The DAA certifies that the proposal is affordable and sustainable.

#### **Example of unacceptable certification**

67.6 Debtor is married with one child and earns \$65,000 p.a. Half of the debtor's salary is based on commission. Total unsecured debts are \$50,000. Spouse does not work and the child is enrolled in private high school commencing in 1 month. Debtor has had consistent health concerns over the last 5 years, some requiring hospitalisation. The family does not have private health cover. The budget prepared by the DAA discloses a weekly surplus of \$200 per week. The debtor proposes to pay creditors \$195 per week for a period of 3 years. No documentation is retained to evidence what investigations were carried out and what documentation was sighted. The DAA certifies that the proposal is affordable and sustainable.

67.7 This is clearly an example of unacceptable certification as the proposal is neither affordable nor sustainable. The impact of a salary ~~dependant~~dependent upon commission in light of the debtor's health concerns and likely absence from work casts doubt on this element of the certification. Further, there is no evidence of supplementary income to support the proposal and with the impending increase in expenses through the child's enrolment in a private school, the proposal is clearly not sustainable. It is likely that upon inspection, ~~AFSA Regulation and Enforcement~~R&E will record this matter as a breach of certification duty, investigate to discover if the breach is systemic and if appropriate, supervise the implementation of a change in practice to ensure instances like this do not recur.

## **IV. Full Disclosure**

### **Example**

76.8 A debtor is a consultant to a law firm earning \$75,000 p.a. She owns a house in Sydney worth \$600,000 with \$550,000 owing on the mortgage. She also owns a one year old vehicle that she values at \$75,000 with \$70,000 owing to a secured creditor. Unsecured debts total \$65,000 although she is unsure about a potential liability to the Australian Taxation Office (ATO).

### **Acceptable certification**

67.9 The DAA verifies through freely available property websites that the house's value is more in the vicinity of \$750,000. A phone call from the DAA to a local real estate agent confirms the value as approximately \$750,000. The mortgagee confirms with the DAA that their current debt is \$550,000.

~~6.10~~ The DAA verifies through freely available vehicle websites that the vehicle's value is approximately \$60 000. The secured creditor confirms with the DAA that their current debt is \$70,000.

~~6.11~~ The DAA reviews the debtor's prior year tax returns and assessments and discovers that there is an outstanding liability to ATO of \$75,000.

~~6.102~~ Taking into account the above points, it is clear both the asset and liability threshold amounts for a debt agreement have been exceeded. The DAA correctly decides not to proceed any further with the proposal. The debtor is again made aware of her options and referred to appropriate other sources of assistance.

### Unacceptable certification

~~6.113~~ This relates to the same example above.

~~6.14~~ The DAA is unaware of property values in the area of Sydney in which the debtor owns her house. The DAA assumes that the house value of \$600,000 is correct and performs no independent verification of the value nor confirms the current indebtedness to the mortgagee.

~~6.15~~ Similarly with the vehicle, the DAA performs no independent verification of the value of the vehicle nor confirms the amount owing to the secured creditor.

~~6.16~~ With respect to the potential debt owing to the ATO, the DAA performs no independent verification and decides that in light of the uncertainty the amount owing to ATO should be disclosed in the proposal as \$1.

~~6.17~~ Taking into account the above points, the DAA certifies that the debtor has made full and accurate disclosure of all assets and liabilities.

~~6.67.18-12~~ This is an example of ~~incorrectly~~ certifying ~~in breach of the Act~~, and upon inspection, ~~AFSA Regulation and Enforcement R&E~~ would take issue with the DAA ~~as they have~~. ~~The DAA has~~ clearly breached their certification duty. The ~~severity of the sanction applied by AFSA Regulation and Enforcement R&E on the DAA's action taken~~ registration by R&E will be ~~dependant~~ dependent upon whether ~~the DAA's inability to certify correctly is this type of breach was found to be~~ systemic.

## 78. AFSA roles

### Debt Agreement team (DAI-team)

~~78.1~~ DAI-team checks that the DAA has given the certification in the approved form and that it contains all ~~four~~ mandatory elements.

~~78.2~~ DAI-team will apply compliance checks largely by phoning the debtor to ensure that in a sample of cases the debtor has gone through an adequate process and been informed in relation to essential issues such as the prescribed information, fees and budget preparation.

~~78.3~~ If ~~DAT team~~ believes an adequate process has not been followed, the ~~Official Receiver OR~~ may either reject the proposal for processing or cancel it during voting. Intelligence on such matters is provided to ~~AFSA Regulation and Enforcement R&E~~ and feedback given to the DAA.

## Regulation

~~78.4~~ Section 12 ~~of the Act~~ provides ~~AFSA Regulation and Enforcement R&E under delegation from the Inspector-General with~~ the power to investigate and ~~make inquiries~~ where there are issues of concern either during ~~an the annual~~ inspection program or through a complaint ~~being made~~. ~~This power extends to any conduct of a DAA from the first point of contact between the DAA and the debtor.~~, ~~AFSA Regulation and Enforcement R&E~~ will examine the level and thoroughness of certification performed by reference to these stated principles and the ~~Guidelines~~. ~~Legislative Instrument in clauses 2.7.2 to 2.7.9.~~

~~78.5~~ Where breaches of the law, including the ~~Guidelines~~, or lack of record keeping are identified, a 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 including conditions being placed on a DAA's registration ~~or cancellation of registration~~.

~~78.6.~~ During ~~annual~~ inspections, ~~AFSA Regulation and Enforcement R&E~~ will examine the systems and controls a DAA has in place in respect to:

- i. the budgetary and assessment processes that will enable identification of the debtor's income and likely expenses during the period of the proposed agreement
- ii. 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.

~~78.7~~ ~~AFSA Regulation and Enforcement R&E~~ will examine documented practices and check lists, delegations and, where a DAA is relying on others to assist, how the DAA properly supervises and ~~trains~~ their employees, agents or brokers to properly perform these duties on their behalf.

## 98. Conclusion

~~89.1~~ This Practice Direction outlines the principles informing the Inspector-General's approach to regulating some of the day-to-day issues faced by DAAs certifying ~~DAPs debt agreement proposals~~. It will be against these principles and the standards contained in the ~~Guidelines~~ that a DAA's conduct of an administration will be assessed by ~~AFSA Regulation and Enforcement R&E~~.

89.2 When there are other specific issues where clarification is required, following consultation with DAT team, the Inspector-General will continue to develop policy and practice statements to assist practitioners.

