



Australian Government

Australian Financial Security Authority

COMMONWEALTH OF AUSTRALIA

Bankruptcy Act 1966

Bankruptcy (Registration and Cancellation of Registration of a Debt Agreement
Administrator) Guidelines 2020

I, Hamish McCormick, Inspector-General in Bankruptcy, acting under section 186Q of the *Bankruptcy Act 1966*, repeal the Guidelines Relating to the Registration and Cancellation of a Registered Debt Agreement Administrator (which commenced on 27 June 2019) and make the attached legislative instrument as guidelines for the purposes of sub-sections 186C(6), 186K(7) and 186L(7) of that Act.

These Guidelines commence on 1 January 2021.

Dated this 17 December 2020

HAMISH MCCORMICK

Inspector-General in Bankruptcy



Australian Government

Australian Financial Security Authority

Bankruptcy (Registration and Cancellation of Registration of a Debt Agreement Administrator) Guidelines 2020

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	3
Individuals	3
Companies	4
Partnerships	4
Fit and proper assessment	5
Insurance – corporate and individual	5
Insurance – adequate and appropriate	6
Assessment of ability to satisfactorily perform the duties of an administrator	6
(a) Duties to ensure certificate is correct and properly administer the agreement	7
(c) Ensure creditors and the Official Receiver are informed about default	10
(d) Taking fees and expenses	10
(e) Handling and properly accounting for money	11
(f) Inform the Official Receiver within 5 days from the end of the agreement	12
(g) Consider whether offences under the Act have occurred and refer any evidence of such offences to the Inspector-General	12
Conditional registration	12
Industry wide conditions	13
Mandatory qualifications	14
4. Cancellation of registration	14
Involuntary cancellation of an individual's or company's registration	14
Grounds for cancellation	15
Voluntary cancellation of registration	16
Ineligibility of an unregistered administrator	17
Matters considered by the Inspector-General	17
Categories of breaches	18
Category A breaches	18
Category B breaches	18
Category C breaches	18

1. Introduction

1.1 These Guidelines¹ 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 under the *Bankruptcy Act 1966* (the Act). They incorporate changes contained in the *Bankruptcy Amendment (Debt Agreement Reform) Act 2018* (the Debt Agreement Reform Act). The majority of the changes contained in the Debt Agreement Reform Act commenced on 27 June 2019.²

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:

- 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 *Bankruptcy Regulations 1966* (the Regulations), including about alternative means of dealing with financial difficulty
- 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
- they have reasonable grounds to believe all information required to be set out in the debtor's statement of affairs and explanatory statement, has been set out and they have a reasonable basis for believing that the debtor has properly disclosed their affairs to creditors.

2.2 For proposals lodged with the Official Receiver on or after 27 June 2019, the signed certificate under sub-section 185C(2D) of the Act must also include:

¹ The Guidelines commence on 1 January 2021.

² The Debt Agreement Reform Act gives the Minister power to make legislative instruments including instruments relating to the payment to income ratio (a new debt agreement eligibility requirement). If this instrument is made, these Guidelines will be updated to reflect the relevant amendments becoming operative.

- 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 to that broker in connection with the referral
- where an affected creditor was a related entity of the proposed administrator, the name of the affected creditor and details about the nature of the relationship between that creditor and the administrator.

2.3 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 sub-section 185M(1DB) of the Act.

3. Registration

3.1 From 27 June 2019, registration as a debt agreement administrator is mandatory.³ 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 as are prescribed by the Regulations, is assessed to have 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, has the ability to immediately perform the duties of a debt agreement administrator to a satisfactory standard, is assessed to have 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.

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 section 186C 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 they owe a charge under the *Bankruptcy (Estate Charges) Act 1997* or a penalty under section 281 of the Act.

³ Prior to 27 June 2019, an administrator was not required to be registered if they were nominated as an administrator for five debt agreements or less. From 27 June 2019, this exemption has ceased.

The Inspector-General will notify an administrator of outstanding notified estate charges prior to their renewal.

Who needs to become registered?

3.5 From 27 June 2019, any individual or company that intends to be nominated as an administrator of a debt agreement must be registered under the Act.

3.6 It is a condition of registration that each individual who has overall management responsibility of a company's debt agreement activities must be either a registered administrator or a registered trustee (more information is provided at 'who can apply').

Who does not need to become 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 section 40-40 (Schedule 2 of the Act - *Insolvency Practice Schedule (Bankruptcy)* (IPS)). If such action results in the person's deregistration as a trustee, they will cease to be the administrator of the debt agreement/s and will be replaced with the Official Trustee (sub-section 185ZB(3) of the Act).

Who can apply

Individuals

3.8 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
- have such qualifications and experience as are prescribed by the Regulations
- are assessed to have adequate and appropriate fidelity and professional indemnity insurances (or are noted under a corporate policy held by a registered company administrator)
- are a fit and proper person
- are a member of the Australian Financial Complaints Authority (AFCA), if required.

Companies

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

- the company passes the basic eligibility test
- the company has the ability to satisfactorily perform the duties of a debt agreement administrator
- the company is assessed to have adequate and appropriate fidelity and professional indemnity insurances
- the company is a fit and proper person
- each director of the company is a fit and proper person
- the company is a member of AFCA.

3.10 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:

- a registered debt agreement administrator or
- a registered trustee.

3.11 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

3.12 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

3.13 To determine whether an individual is a fit and proper person to act as an administrator, the Inspector-General 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 Inspector-General will determine whether the referee reports provided are acceptable, and may request further reports if necessary. From 27 June 2019, the Inspector-General may take action to cancel the registration of a practitioner if their conduct does not meet the expectations of the community.⁴

Insurance – corporate and individual

3.14 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.⁵ Individual debt agreement administrators who operate in their own name (or associated business name) and corporate administrators will be required to hold this insurance.

3.15 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 all the following conditions:

- the person is an individual who takes overall responsibility for managing a company's debt agreement activities for the purposes of sub-section 186G(2) of the Act
- the person will only carry on any activity related to a debt agreement in the name of and on behalf of the associated corporate debt agreement administrator
- the corporate debt agreement administrator holds adequate and appropriate fidelity insurance
- the corporate debt agreement administrator holds adequate and appropriate professional indemnity insurance

⁴ This will serve as a ground for cancellation where the practitioner was registered as a result of an application for registration or renewal made on or after 27 June 2019.

⁵ This requirement applies to practitioners who were registered as a result of an application for registration or renewal made on or after 27 June 2019.

- the person is noted in the schedules of these insurance policies that the corporate debt agreement administrator holds.

Insurance – adequate and appropriate

3.16 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

3.17 The PI requirement covers claims for breach of professional, fiduciary or statutory obligations. The Inspector-General considers the minimum insured amount is a useful guide to what is adequate PI insurance for registered administrators. However an administrator must review their business operations to determine their own insurance needs and ensure the cover is adequate and appropriate against the liabilities they may incur in working as a registered debt agreement administrator. An administrator may need to seek professional advice to determine this.

3.18 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

3.19 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 negligence, misleading or deceptive conduct or breaches of professional, fiduciary or statutory duties.

Adequate and appropriate fidelity insurance

3.20 An administrator should seek professional advice as to what is adequate and appropriate fidelity insurance for their business. This policy may form part of the requisite PI insurance. If an administrator does not have any employees then they will be exempted from the requirement to hold fidelity insurance as it is not necessary or possible to obtain this type of insurance when no staff are employed. If however, an administrator's circumstances change and they commence to employ any staff at all, the exemption will cease and this insurance will become an immediate requirement of registration.

Assessment of ability to satisfactorily perform the duties of an administrator

3.21 The Inspector-General'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*

3.22 These duties refer to the administrator's certificate which must accompany the debt agreement proposal under sub-section 185C(2D) of the Act. 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
- 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
- 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.

3.23 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 sub-section 185M(1DB) of the Act 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.

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

3.25 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
- be able to explain to a debtor the differences between the various options and the consequences.

3.26 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 could be retained; the rights of creditors and those applying for bankruptcy; 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.

3.27 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

- to determine how they would plan to assist the debtor 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 their disclosed expenses are reasonable.

3.28 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 which the applicant will be required to demonstrate through the examination process is as follows:

- 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.

3.29 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.
- 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.

3.30 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

3.31 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.

3.32 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*

3.33 An administrator has a duty to inform creditors when the debtor is in arrears for a period of 3 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 6 months and/or when the debt agreement is not completed within 6 months of its due date for completion. Refer to Inspector-General Practice Statement 17 for further information about 3 month default reporting.

3.34 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*

3.35 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.

3.36 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.

3.37 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.

(e) Handling and properly accounting for money

3.38 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 in place, proper money handling processes, records and controls including: data backup and contingency plans, basic book-keeping knowledge, correct banking processes, the ability to monitor unpresented and stale cheques, reconcile accounts and interest, monitor when dividends and fees are due and calculate and pay dividends and fees accurately.

3.39 Some of the specific elements to be considered are:

- 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"
- administrators must only pay into these accounts money received from debtors under debt agreements
- 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
- 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*
- 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
- 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
- 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

- administrators must account for interest and bank charges.

3.40 The Inspector-General will assess an applicant's knowledge in these areas and their systems and practices. An applicant will 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

3.41 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.

3.42 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

3.43 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

3.44 The decision 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 the current business systems and controls suggest they are equipped to deal only with a limited number of administrations.

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

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

Industry-wide conditions

3.47 From 1 January 2021, a number of industry-wide conditions will apply to all debt agreement administrators.

These industry-wide conditions have been determined by the Minister under subsection 186F(4) of the Act. These conditions cannot be removed by the Inspector-General and are not subject to appeal. The industry-wide conditions are:

- Advertisements or promotion (in any form or medium) of the services of the administrator, whether by the administrator or by a person acting on behalf of the administrator, must not be false, misleading or deceptive.
- Advertisements or promotion (in any form or medium) of the services of the administrator, whether by the administrator or by a person acting on behalf of the administrator, must include the full name and registration number of the administrator.
- Disclosure of information to debtors must follow a two-stage process as outlined by the legislative instrument determined by the Minister⁶. The administrator must ensure the information provided to the debtor is factual and objective.
- The information provided to the debtor in accordance with the legislative instrument must be recorded before the end of the second business day after the information is given. The records must be retained for 6 years beginning on the day the debt agreement is made.
- Administrators must be a member of AFCA. An individual is not required to be a member where the individual has overall management responsibility for managing a company's debt agreement activities, and that company is a registered debt agreement administrator (and so is a member of AFCA).

⁶ *Bankruptcy (Registered Debt Agreement Administrator Conditions) Determination 2020.*

Mandatory qualifications

3.48 Mandatory qualifications for registration are prescribed under regulation 9.02 of the Regulations.

3.49 A company's registered debt agreement administrator 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.⁷

4.2 The following information provides guidelines on matters considered by the Inspector-General in determining whether to cancel a registration of an administrator.

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

4.3 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.

4.4 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.

4.5 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.

⁷ The failure to hold adequate and appropriate professional indemnity or fidelity insurance, or to be a fit and proper person, are grounds for cancellation of registration where the practitioner was registered as a result of an application for registration or renewal made on or after 27 June 2019.

Grounds for cancellation

4.6 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:

- no longer has the ability (including the knowledge) to satisfactorily perform the duties of an administrator in relation to a debt agreement
- has failed to properly carry out the duties of an administrator in relation to a debt agreement
- no longer has the qualifications or experience prescribed by Regulations
- 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
- is not a fit and proper person
- has contravened a condition of registration.

4.7 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:

- no longer has the ability (including the knowledge) to satisfactorily perform the duties of an administrator in relation to a debt agreement
- has failed to properly carry out the duties of an administrator in relation to a debt agreement
- 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
- is not a fit and proper person
- a director of the company is not a fit and proper person
- has contravened a condition of registration.

4.8 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).

4.9 In relation to the fit and proper test, 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.⁸ 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.

4.10 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.

4.11 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.

4.12 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 section 40-40 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

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

4.14 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

⁸ This will serve as a ground for cancellation where the practitioner was registered as a result of an application for registration or renewal made on or after 27 June 2019.

- 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.

4.15 The cancellation will only take place once the resignation is accepted by the Inspector-General. The administrator 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 Trustee in AFSA unless other arrangements for transfer as prescribed by law have taken place.

Ineligibility of an unregistered administrator

4.16 Prior to 27 June 2019, an individual or company who was 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.

4.17 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 the Official Receiver.

Matters considered by the Inspector-General

4.18 When considering whether a registration should be the Inspector-General will consider the following matters:

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

4.19 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 Inspector-General upon review of the administrator's response.

Categories of breaches

4.20 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

4.21 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 and 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, 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.

Category B breaches

4.22 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 may result in it being elevated to category A and the commencement of the cancellation process.

Category C breaches

4.23 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 breach 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 would be elevated to category B.

Note: The name of this instrument was amended on registration as the instrument as lodged did not have a unique name (see subsection 10(2), *Legislation Rule 2016*).