



Australian Government

Insolvency and Trustee Service Australia

**INSPECTOR-GENERAL
PRACTICE DIRECTION No. 13**

**Debt Agreement Administrators
Guidelines relating to Certification
Requirements**

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Introduction.....	1
<i>Overview of Duty to Certify</i>	<i>1</i>
Inspector-General Expectations	2
(i) <i>Consent.....</i>	<i>2</i>
(ii) <i>Prescribed Information</i>	<i>2</i>
(iii) <i>Affordability & Sustainability</i>	<i>3</i>
(iv) <i>Full Disclosure.....</i>	<i>3</i>
Reasonable grounds to certify.....	4
Retention of documentation	5
<i>Example 1 - Acceptable retention of documentation.....</i>	<i>5</i>
<i>Example 2 - Unacceptable retention of documentation</i>	<i>5</i>
Practical Examples.....	6
(i) <i>Consent</i>	<i>6</i>
(ii) <i>Prescribed Information</i>	<i>6</i>
(iii) <i>Affordability and Sustainability.....</i>	<i>6</i>
(iv) <i>Full Disclosure</i>	<i>7</i>
ITSA Roles.....	8
<i>Debt Agreement Service (DAS)</i>	<i>8</i>
<i>Regulation</i>	<i>8</i>
Conclusion	9

Introduction

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 that is lodged with ITSA's Debt Agreement Service (DAS). It provides details of the expectations of the Inspector-General in respect of 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 role of the Debt Agreement Service (DAS) in relation to an administrator's duty to properly certify.
2. The *Bankruptcy Act 1966* 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) and the [Legislative Instrument](#) in clauses 2.7.2 to 2.7.9.
3. At the outset, it should be clearly noted that it is not the Inspector-General's role nor that of DAS to be prescriptive in advising what records must be sighted, obtained and retained in order to properly certify.

Overview of Duty to Certify

4. At the time a debt agreement proposal is lodged with DAS, a DAA is required to certify pursuant to section 185C(2D). 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.
5. A DAA is required to ensure the certification provided to DAS with the debt agreement proposal is correct.
6. If a DAA does not certify these matters in a proposal the proposal will not be accepted. DAAs must certify using the [approved form](#). It may be filed with DAS electronically.
7. A debtor wishing to administer their own debt agreement does not have to lodge a certificate when lodging the proposal with DAS.

Inspector-General Expectations

8. As outlined above there are four (4) essential elements to each certification a DAA must lodge with DAS.

(i) Consent

9. 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.
10. The DAA must sign the certification in order to consent. An electronic signature is acceptable if the certification is being filed with DAS by e-mail, however the signature must be that of the DAA or an officer with the appropriate delegated authority. DAAs must inform both DAS and ITSA Regulation when there are changes in the authorised people who may sign the consent.

(ii) Prescribed Information

11. 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. DAS checks this has been done appropriately via a sample of compliance telephone calls to debtors whilst ITSA Regulation also checks a sample through the course of its annual inspection program.
12. The original of the signed prescribed information form must be retained on the DAA's file either in paper or electronic image form.
13. It is particularly important that DAAs explain the effect of personal insolvency administrations on credit agency reporting and the permanent record on the National Personal Insolvency Index (NPII).
14. 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, including but not limited to the Act, understand the general bankruptcy concepts relevant to a debtor formulating a 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.
15. 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 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; and

(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

16. 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; and

(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?

17. 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 nature of employment. 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

18. To properly certify that a DAA 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, 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 DAS that they have a reasonable basis for believing that the debtor has properly disclosed their affairs.

19. 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.
20. 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 debt agreement proposal (DAP);
 - (ii) Fully aware of a debtor's current circumstances and make informed decisions;
 - (iii) Suspend collection action against the debt; and
 - (iv) Given the opportunity to provide details of their debt and vote.
21. 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.

Reasonable grounds to certify

22. Each certification will require the DAA to take "*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.
23. 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 DAS for processing.
24. A breach of the certification duty will arise if:
 - (i) ITSA Regulation looks at records retained and have concerns particularly as to the quality, the extent of questioning and verification by the DAA before certification (eg the prescribed information being provided, the accuracy of information or the sustainability of the DAP; monitoring of staff brokers or agents); and
 - (ii) DAAs are unable to present us with evidence to show they verified issues that are clearly inconsistent or that appear to ITSA Regulation as dubious before they certified.

DAA's and ITSA Regulation need to assess each on a case by case basis based on what is *reasonable in the debtor's circumstances*.

Retention of documentation

25. Documentation collated in support of a proposal and in the course of certifying is not to be forwarded to DAS when filing the proposal. On occasion DAS may request documentation to be made available for review.
26. With the exception of the original prescribed information, the DAA's duty is not to retain pre debt agreement records. DAA's are not committing a breach of their certification duty if they decide to keep only minor documentation, provided that on review by ITSA Regulation, the information retained is sufficient to conclude the certification was reasonably made. DAA's are required to exercise sound judgment on a case by case basis. This is best illustrated by two examples.

Example 1 - Acceptable retention of documentation

27. 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.
28. 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. ITSA Regulation is likely to be satisfied if the evidence to that effect was a file note recording what was sighted and the information it contains. ITSA Regulation would not expect to see a property search or other information regarding the house or the vehicle. ITSA Regulation would not record any breach of certification duty.

Example 2 - Unacceptable retention of documentation

29. 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.
30. Clearly these documents are not sufficient upon which to base certification. In this example ITSA Regulation would expect significantly more. ITSA Regulation 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 ITSA Regulation can be assured that adequate investigations were undertaken in order to properly certify.

Practical Examples

(i) Consent

31. This element of the certification does not lend itself to a practical example.
32. ITSA Regulation will review during annual inspections to ensure that only those that are authorised to consent do so.

(ii) Prescribed Information

Example of acceptable certification

33. 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 permanency of NPII record. A signed copy of the prescribed information is retained on the DAA's file.

Example of unacceptable certification

34. 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 DAS.

(iii) Affordability and Sustainability

Example of acceptable certification

35. 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

36. 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.

37. This is clearly an example of unacceptable certification as the proposal is neither affordable nor sustainable. The impact of a salary dependant 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, ITSA Regulation 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

38. 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

39. 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.
40. 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.
41. 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.
42. 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

43. This relates to the same example above.

44. 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.
45. 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.
46. 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.
47. Taking into account the above points, the DAA certifies that the debtor has made full and accurate disclosure of all assets and liabilities.
48. This is an example of incorrectly certifying and upon inspection, ITSA Regulation would take issue with the DAA. The DAA has clearly breached their certification duty. The sanction applied by ITSA Regulation on the DAA's registration will be dependant upon whether the DAA's inability to certify correctly is systemic.

ITSA Roles

Debt Agreement Service (DAS)

49. DAS checks that the DAA has given the certification in the approved form and that it contains all four (4) mandatory elements.
50. DAS 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.
51. If DAS believes an adequate process has not been followed, the Official Receiver may either reject the proposal for processing or cancel it during voting. Intelligence on such matters is provided to ITSA Regulation and feedback given to the DAA.

Regulation

52. Section 12 provides ITSA Regulation with the power to investigate and where there are issues of concern either during the annual inspection program or through a complaint being made, ITSA Regulation will examine the level and thoroughness of certification performed claimed by reference to these stated principles and the Legislative Instrument in clauses 2.7.2 to 2.7.9.
53. Where breaches of the law, including the Legislative Instrument, 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.

54. During annual inspections, ITSA Regulation 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; and
 - (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.
55. ITSA Regulation will examine documented practices and check lists, delegations and, where a DAA is relying on others to assist, how the DAA properly supervises and train their employees, agents or brokers to properly perform these duties on their behalf.

Conclusion

56. 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 debt agreement proposals. It will be against these principles and the standards contained in the Legislative Instrument that a DAA's conduct of an administration will be assessed by ITSA Regulation.
57. When there are other specific issues where clarification is required, following consultation with DAS, the Inspector-General will continue to develop policy and practice statements to assist practitioners.