



Australian Government

Insolvency and Trustee Service Australia

**INSPECTOR-GENERAL
PRACTICE DIRECTION No 17**

Debt Agreement Administrators

**Guidelines relating to
Administrator's duty to notify
creditors of 3 month arrears
default**

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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 has a duty to notify creditors that a three month arrears default has occurred. It provides details of the expectations of the Inspector-General in respect of this duty including best practice principles. It is complemented by practical examples.
2. The *Bankruptcy Act 1966* sets out the legislative framework for an administrator's duty to notify creditors of three month arrears default. This framework provides a specific duty for an administrator to notify creditors in accordance with section 185LB and the [Legislative Instrument](#) in clauses 2.7.12 to 2.7.13.

Practical meaning and elements of duty

What constitutes a three month arrears default?

3. A three month arrears default occurs when a debtor falls in arrears in respect to any payment and **remains in arrears** for a period of three months. In the case of the debtor defaulting on one payment the default is not rectified if a subsequent payment due under the agreement is allocated to pay arrears. The default is only rectified when the arrears are paid in full and there are no other amounts outstanding at that point in time.

It is the time period, *not* the amount, of the default that will determine whether a three month default has occurred. This means that there does not have to be three months *worth* of overdue payments. A default may be as little as \$1 if that is the amount of the arrears 3 months after the payments was due. Administrators are to take the quantum of the arrears and circumstances of the debtor into account when preparing the content of their default notice to creditors.

4. The three months arrears default occurs on the day immediately after the expiration of the three month period ie 3 months and one day. See practical examples below.

How to measure "3 months"?

5. The three month time period is not to be measured or converted to "days" or "weeks." The three month period is only to be measured in calendar months. See practical examples.
6. In cases where the last day for making all arrears payment in the three calendar months fall on a public holiday the three calendar month period is extended to the next working day.

Notifying creditors

7. Administrators are required to notify creditors within 10 working days of the default occurring. There is no prescribed form that administrators must use in notifying creditors.

8. Administrators are required to only notify creditors a minimum of once every three months. If there is more than one missed payment in one three month period (ie ‘overlapping’), an administrator is not required to notify creditors on the occasion of every missed payment within the three month period. It is the time period, not the number of missed payments, which is important.
9. The clock starts ticking for the three month period when the first default occurs. However, if there is a missed payment that is also made good in the three month period and the **total arrears is nil** at the end of the three month period, the administrator is not required to notify creditors. The question to be asked is whether the debtor was in arrears for the **entire time** in a three month period.
10. In assessing whether an administrator’s duty to notify creditors has been invoked each 3 month test period must be reviewed in isolation. In effect each 3 month period stands on its own. If there have been no missed payments in a particular 3 month period the administrator is not required to report. Where a payment has been missed that triggers the commencement of the three month test period and if that payment or other missed payments during the period have not been made up by the end of the period, it is expected the administrator will not only report on the amount of arrears for that 3 month period but also the cumulative total of arrears to that point.
11. Whilst having regard to the level and severity of arrears administrators are expected to provide creditors with concise detail. Administrators may choose to develop precedents in accordance with whether they consider the default is “major” or “minor.”
 - (i) Major – creditors are advised that the debtor is in arrears and administrators may recommend creditors take appropriate action. eg. Debtor was made redundant then skipped without a trace and administrator has learned the debtor has changed bank accounts.
 - (ii) Minor – creditors are advised that the debtor is largely compliant with payments, is only slightly in arrears and administrators may recommend to creditors that no action be taken. eg. Debtor has unexpected car repairs that has meant he has missed one week of payments. All other payments have been made on time and the one week of payments is slowly being made up with extra payments.
12. If Administrators would like ITSA Regulation to review their three month arrears default notice precedents they are welcome to provide them to their Regional Regulation Business Manager or Regulation’s Practice Manager.

Practical examples

Example 1 – “Major default”

13. Mrs A’s debt agreement commenced on 3 September 2007. She has agreed to pay \$200 per week over 3 years. Her first payment was due 10 September 2007. Mrs A paid her \$200 weekly payments for the first month of her debt agreement but then stopped paying in mid October 2007. The administrator referred to his records to discover that the last payment made by Mrs A was on 22 October 2007. Therefore the last payment that was due but that remained unpaid was on 29 October 2007. The last day Mrs A has to pay all

accrued arrears and to prevent the three month arrears default occurring is 29 January 2008. The three month arrears default occurred on 30 January 2008. The administrator carried out his duty to notify creditors of this occurrence within ten working days of 30 January 2008 – this was done on 5 February 2008. The administrator advised creditors that the agreement was \$2,800 in arrears and that the debtor has skipped without a trace and to his knowledge it was unlikely that the debtor will bring the arrears up to date. Armed with the knowledge of the debtor’s affairs and the considerable amount of arrears creditor resolved to terminate the debt agreement.

Note the relevant dates in this example are:

Date	Event
3 September 2007	Mrs A’s debt agreement commences. \$200 per week to be paid over 3 years.
10 September 2007	Date first payment due and paid by Mrs A
22 October 2007	Mrs A makes her last payment
29 October 2007	Date last payment due but unpaid
29 January 2008 ¹	The last day Mrs A has to pay all accrued arrears to prevent the three month arrears default occurring
30 January 2008	3 month arrears default occurs
5 February 2008	RDAAs notifies creditors of 3 month default within 10 working days

Example 2 – “Minor default”

14. Mr B’s debt agreement commenced on 23 April 2008. He is required to pay \$100 per week over 4 years. Mr B’s first payment was due 30 April 2008. Mr B regularly pays his instalments but is paying \$95 per week rather than the \$100 required. It wasn’t until 29 May 2008 that the administrator discovered that Mr B was making the incorrect payment amount. At being notified Mr B immediately switched payments to \$100 per week and has maintained these since. Despite maintaining the \$100 per week payment Mr B has not paid the accrued arrears of \$25 from the first five weeks of the debt agreement. The last day Mr B has to pay the accrued arrears of \$25 is 30 July 2008. On 31 July 2008 the 3 month arrears default occurs. The administrator has a duty to report this 3 month arrears default to creditors and did so within 10 working days – she did this on 7 August 2008. The administrator advised creditors that the agreement was \$25 in arrears and that the debtor had inadvertently paid the wrong amount for the first 5 weeks but has since paid the correct amount and has agreed to make good the arrears. Armed with the knowledge

¹ Note this date is **not** to be calculated from reference to **days** eg 3 months x 30 days in a month = 90 days after 29 October 2007 nor from reference to **weeks** eg 4.3 weeks in a month x 3 months = 13 weeks.

of the debtor's affairs and the small amount of arrears that were since brought up to date, creditors resolved to allow the debt agreement continue.

In February 2009, Mr B missed one weekly payment due to personal issues. He missed the payment that was due on 18 February 2009 but then made good these arrears on top of his normal payment on 4 March 2009. All other payments were maintained for the rest of the 3 month period which began on 18 February 2009. On 19 May 2009 (ie 3 months and a day after 18 February 2009) the administrator is not required to report to creditors as the arrears have been rectified within the 3 month period.

On 16 June 2010 Mr B paid \$50 rather than the required \$100 and did not repay this shortfall. The three month arrears default occurs on 17 September 2010 and administrators are to report to creditors within 10 working days of this date. The administrator contacted the debtor and the debtor immediately paid the \$50 arrears amount into the administrator's trust bank account. In her notification to creditors sent on 19 September 2010, the administrator advised that although the 3 month arrears default had occurred, the amount was only \$50 and this amount had since been paid by Mr B. It was the administrator's recommendation that the administration continue.

Note the relevant dates in this example are:

Date	Event
23 April 2008	Mr B's debt agreement commences. \$100 per week to be paid over 4 years.
30 April 2008	Date first payment due by Mr B
30 July 2008 ²	Last day Mr B has to pay the accrued arrears of \$25
31 July 2008	Three month arrears default occurs
7 August 2008	RDAA notifies creditors of 3 month arrears default within 10 working days
16 June 2010	Mr B pays \$50 rather than the required \$100 and is therefore \$50 in arrears
17 September 2010	Three month arrears default occurs
19 September 2010	RDAA notifies creditors of 3 month arrears default within 10 working days

15. The practical effect is to keep creditors informed of all material developments with respect to the debtor's affairs and any event that may impinge on the ability of the debt agreement to continue. The debtor has the option when they fall into arrears to propose a

² Note this date is **not** to be calculated from reference to **days** eg 3 months x 30 days in a month = 90 days after 30 July 2008 nor from reference to **weeks** eg 4.3 weeks in a month x 3 months = 13 weeks.

variation and inform creditors of their circumstances and why the debtor should be given more time to pay. There may be strong reasons such as a period of unemployment between jobs or expenses associated with the birth of a child. It is expected that administrators will take a leading role in working with debtors and creditors in times of default so all parties are aware of these alternatives to address the situation in the most appropriate manner.

16. It is in the spirit of the legislation that creditors are kept informed of all material developments with respect to an administration. In essence, administrators are facilitating the contract between the debtor and creditors and must not show bias to either party or their own interests.

Consequences if administrators breach this duty

Debtors and creditors

17. An administrator failing to advise creditors of three months arrears default leads to a delay in updating creditors as to the correct status of the administration thus adversely affecting the integrity of the personal insolvency system. It is also a likely indicator that creditors are not being kept informed as to the progress of an administration. Creditors want to know when the three month default is occurring and have a right to be informed as expeditiously as possible.

Administrators

18. ITSA Regulation will monitor closely that this duty is carried out appropriately. Breaches identified will be required to be rectified immediately. Systemic breaches, especially after ITSA Regulation intervention, may lead to one of the remedial alternatives listed in [Inspector-General Practice Statement 9](#) at paragraph 11 being undertaken. This includes disciplinary action.

ITSA Roles

Regulation

19. Section 12 provides ITSA Regulation with the power to investigate 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 the three month arrears duty being performed by reference to the principles in this Practice Direction and the Legislative framework outlined in paragraph 2 above.
20. Where breaches of this duty or a lack of record keeping are identified an administrator 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 an administrator's registration.
21. During annual inspections, ITSA Regulation will examine the systems and controls an administrator has in place in respect to:

- (i) the system that will enable accurate identification of three month arrears default; and
- (ii) processes that will ensure they notify creditors of the three month arrears default within 10 working days.

22. ITSA Regulation will examine documented practices and check lists, delegations and, where an administrator is relying on others to assist, how the administrator properly supervises and train their employees, agents or brokers to properly perform these duties on their behalf.

Debt Agreement Service

23. DAS is in regular contact with creditors through the DAS telephone help line, regular visits to major creditors and the convening of the six-monthly Major Creditor fora. DAS will report to ITSA Regulation any instance when creditors raise concerns about whether 3-monthly arrears reports are being sent by administrators. Once advised by DAS, ITSA Regulation will address the issues with the relevant administrator and if necessary ensure appropriate remedial action is undertaken.

Conclusion

24. This Practice Direction outlines the Inspector-General position on some of the vexed questions relating to an administrator's duty to notify creditors of a three month arrears default. It will be against these principles and the Legislative framework that an administrator's performance of this duty will be assessed by ITSA Regulation.