



Australian Government

Insolvency and Trustee Service Australia

INSPECTOR-GENERAL PRACTICE STATEMENT 9

**Involuntary Cancellation of Registration of
Debt Agreement Administrators
& Ineligibility Process**

Release Date January 2009

CONTENTS.....	Page No
Introduction	1
Overview of a debt agreement administrator’s duties	1
Sanctions for non-compliance	2
<i>Classification of non-compliance</i>	<i>2</i>
Eligibility to act as administrator	3
<i>Basic eligibility test</i>	<i>3</i>
<i>Companies</i>	<i>4</i>
<i>Ineligibility for breach of duty.....</i>	<i>4</i>
Cancellation of registration or conditional registration.....	5
<i>Grounds for commencing action</i>	<i>5</i>
<i>The decision to cancel registration or impose conditions.....</i>	<i>5</i>
Right of review.....	6

Introduction

1. All debt agreement administrators, whether registered or otherwise, need to meet basic eligibility requirements to administer debt agreements. The Inspector-General is required to cancel the registration if the Inspector-General is satisfied that the administrator no longer passes any of these tests (see paragraph 18 below).
2. For registered debt agreement administrators the Inspector-General can also cancel registration if it is considered that the administrator no longer has the ability to satisfactorily perform the duties, has failed to carry out the duties, or no longer holds the prescribed qualifications.
3. Furthermore the Inspector-General can also declare an unregistered administrator ineligible to act as an administrator if the Inspector-General has reasonable grounds to believe the person has failed to carry out the relevant duties of an administrator.
4. This document outlines the process involved when the Inspector-General considers taking steps to cancel the registration of a debt agreement administrator or declare an unregistered debt agreement administrator ineligible to act. It also outlines the broad steps that may lead to the Inspector-General taking such action and the basis of the Inspector-General's decision making.
5. Disciplining of registered trustees who act as debt agreement administrators is not dealt with in this document rather see IGPS 8 "*Involuntary cancellation of registration of registered trustees*".

Overview of a debt agreement administrator's duties

6. Registered debt agreement administrators and registered trustees who act as administrators, have statutory duties set out in the Bankruptcy Act. Prior to becoming the administrator they have a fundamental duty to provide a certification with the debtors proposal setting out that they have:
 - (a) provided required information to the debtor,
 - (b) reasonable grounds to believe that the debtor is able to discharge their obligations under the agreement as and when they fall due; and
 - (c) reasonable grounds to believe that all the information required to be set out in the debtors statement of affairs and proposal has been set out.
7. Once an agreement is entered into the registered administrator or registered bankruptcy trustee has a fundamental duty to deal with the debtor's property in the manner specified in the debt agreement and to give information about the administration of a debt agreement to debtors and creditors. They are also required to monitor and report on debtor default; maintain proper accounts and records; have proper money handling processes; and assist the Inspector-General in investigations when required.
8. Administrators should also have regard to the guidelines assisting the Inspector-General called "*Guidelines relating to the Registration and Cancellation of a Registered Debt Agreement Administrator and Ineligibility of an Unregistered Debt Agreement Administrator*" set out in the [Legislative Instrument](#) pursuant to section 186Q of the Act.

9. Administrators who are not registered as trustees or debt agreement administrators are also required to undertake a range of duties.

Sanctions for non-compliance

10. There is an expectation that administrators who regularly fail to comply with the Bankruptcy Act without reasonable explanation, who diverge from acceptable practice or their behaviour/conduct brings the integrity of the profession in disrepute will be subject to disciplinary action.
11. There is a range of sanctions or actions which Bankruptcy Regulation can take when it considers breaches of duty or non compliance have occurred. Sanctions that Bankruptcy Regulation may consider include:
 - (a) Education – making administrators aware of problem areas and the correct practice or law individually and collectively;
 - (b) Individual counselling – by far the most effective means to achieve timely remedial action;
 - (c) Change in the risk classification of an administrator. This will lead to a more in depth annual inspection;
 - (d) Formal investigation and reporting under section 12 of the Bankruptcy Act. Such reports may be supplied to creditors, police and other regulator or disciplinary bodies such as ICAA, CPA or Law Councils and Societies;
 - (e) Imposition of penalties for Realisation and Interest Charge breaches;
 - (f) Issue of “show cause” letters requiring an administrator to explain both their actions and why they should continue to be registered;
 - (g) Litigation including seeking orders that the administrator make good any losses caused by negligence;
 - (h) Referral to other investigation units or law enforcement bodies;
 - (i) Declarations of ineligibility pursuant to either 186A or 186M; and
 - (j) Cancellation of registration pursuant to sections 186K & 186L.
12. Cancellations of registration, or declarations that an administrator is ineligible, are generally sanctions of last resort . Such disciplinary action may be taken where a breach of the Act is identified. In deciding what action is appropriate Bankruptcy Regulation takes into account:
 - (a) the nature of the breach;
 - (b) the seriousness of the effect of a failure to comply, including the impact on a particular administration or individual; and
 - (c) an administrator’s performance history and whether the administrator has previously failed to comply.

Classification of non-compliance

13. Bankruptcy Regulation utilises a classification system to describe areas of non-compliance and assist it to decide on the appropriate action to take subject to the seriousness and impact.

Category A

Fundamental breaches and lack of controls that are likely to bring into question the integrity of the system. This includes cases where there are repeat non-compliance occurrences of Cat B type previously identified and reported on.

These matters will give rise to either legal action, referral to fraud investigators and or section 186K, 186L or 155H action concerning deregistration.

Category B

Serious and systemic issues that will have a material impact on the administration and require timely action.

In these cases the administrator will be counselled and timely remedial action is expected to be taken. Failure to take timely remedial action will give rise to reclassification to a Cat A and appropriate action.

Category C

One off practice or procedural non compliance is not systemic and doesn't have a significant impact on the administration, dividend or creditors, debtor's rights or system integrity but should be brought to the attention of the trustee.

Further identification of errors of this nature through complaints or later inspections would see the escalation of the error to a category B and counselling of the administrator.

14. This provides a structured process that will see the escalation of a matter if it is not resolved by the administrator. Most matters are resolved quickly and amicably on Bankruptcy Regulation intervention.
15. Hence breaches or non-compliance with the Act may give rise to a simple query by Bankruptcy Regulation on the reasons why there has been a deviation and where repetitive breaches occur or, in the case of a serious breach, result in action to cancel an administrator's registration or declare an unregistered administrator ineligible to act.

Eligibility to act as administrator

Basic eligibility test

16. The *basic eligibility test* applies during the period of registration and failure to pass the tests at any time will impact on their ability to act as an administrator. 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*.
17. As from 1 July 2007, the Official Receiver must not accept a debt agreement proposal from a non-registered administrator unless the Official Receiver is satisfied that the person passes the *basic eligibility test*.

18. An individual *passes the basic eligibility test* unless at any time during the 10 years prior, the individual:
- (a) Was an insolvent under administration; or
 - (b) Was party (as a debtor) to a debt agreement; or
 - (c) Was convicted of an offence involving fraud or dishonesty; or
 - (d) Is disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*; or
 - (e) Had their registration as a liquidator, trustee or administrator cancelled; or
 - (f) Had been declared ineligible to act as administrator.

Companies

19. A company must ensure that at all times it has in its employ at least one registered administrator or registered trustee and that person has *overall management responsibility* for the company's debt agreement activities. This is a condition of the company's registration.
20. If these individuals have their registration cancelled, the condition of the company's registration will be breached and this will prompt commencement of the involuntary cancellation process for the company commencing with the Inspector-General seeking an explanation as to why the company should remain registered.
21. Should the individual with *overall management responsibility* resign from their employment with the registered company administrator, the onus is on the individual and the company to notify the Inspector-General as soon as possible. If a company continues to conduct debt agreement activities without a registered person in that position, the cancellation process will also commence.
22. If a director of a company 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. Usually the director will have knowledge of pending matters that may effect their eligibility and should take steps to remove themselves as director to circumvent possible cancellation of the company's registration.

Ineligibility for breach of duty

23. In some cases an administrator is not required to be registered as a debt agreement administrator. Any individual or company who is not registered may 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 has reasonable grounds to believe that they have failed to properly carry out the duties of an administrator in relation to the debt agreement. This letter is referred to as the "show cause" letter elsewhere in this document.
24. If no explanation is received within 28 days of the Inspector-General's request or if there is no satisfactory explanation received, the Inspector-General or delegate may declare the person ineligible under section 186M.

25. For procedural fairness this final decision will be made by a delegate independent to Bankruptcy Regulation's investigations and decision to issue the "show cause" letter.
26. The effect of such a decision is that the person cannot administer debt agreements for a period of 10 years from the date on which the decision is made.

Cancellation of registration or conditional registration

27. Section 186K provides that the Inspector-General **must** cancel the registration of an administrator if satisfied that the administrator no longer passes the basic eligibility test.
28. Usually an administrator will be well informed of issues of concern regarding possible breaches of the law or their duty, these being raised by Bankruptcy Regulation as delegate for the Inspector-General in Bankruptcy during investigations or inspections, and will have been provided the opportunity to state their position.
29. However Bankruptcy Regulation on behalf of the Inspector-General **may** commence action against an administrator if Bankruptcy Regulation as delegate of the Inspector-General forms the belief that one or more of the prescribed grounds are established and other sanctions are not appropriate.

Grounds for commencing action

30. The Inspector-General may commence action if the Inspector-General has reasonable grounds to believe that the individual:
 - (a) no longer has the ability (including the knowledge) to satisfactorily perform the duties of an administrator in relation to a debt agreement; or
 - (b) has failed to properly carry out the duties of an administrator in relation to a debt agreement; or
 - (c) no longer has the qualifications or experience prescribed by regulations (individual only); or
 - (d) has contravened a condition of registration.

The decision to cancel registration or impose conditions

31. Either in the absence of a response to the show cause letter, or on review of the response provided Bankruptcy Regulation as delegate of the Inspector-General will decide on whether one or more of the prescribed grounds is established and if so what sanctions are appropriate.
32. The Inspector-General has three decision options at this point:
 - Cancel the registered administrator's registration;
 - Allow the administrator to remain registered unconditionally; or
 - Allow the administrator to remain registered but with conditions imposed.

33. The Inspector-General cannot suspend an administrator's registration. However a conditional registration could be made where the administrator remains registered but may be restricted from practicing for a certain period or restricted in some other way.
34. For procedural fairness this final decision will be made by a delegate independent to Bankruptcy Regulation's investigations and decision to issue the "show cause" letter.
35. In reaching the decision the Inspector-General or delegate is guided by "*Guidelines relating to the registration and cancellation of a registered debt agreement administrator and eligibility of an unregistered debt agreement administrator under the Bankruptcy Act 1966*" set out in the [Legislative Instrument](#) pursuant to section 186Q of the Act.
36. If the Inspector-General or delegate decides to cancel the administrator's registration, or impose conditions on registration, the Inspector-General must give the administrator written notice of the decision and the reasons for it.
37. The Inspector-General is required by law to record the imposition of conditions on an administrator's registration or the cancellation of a registration on the National Personal Insolvency Index, a publicly accessible database. The Inspector-General is also required to report to Parliament on activities under the Bankruptcy Act. This means that, while the decision in detail is not made publically available, the name of the administrator will be made public as will the general nature of the breaches involved.
38. Upon advice of any decision to cancel registration, the administrator is required to return their Certificate of Registration unless they have a reasonable excuse not to do so. The administrator will not be entitled to a refund of all or part of any registration fee that has been paid. The administrator will not be entitled to re-apply for registration for a period of 10 years.

Right of review

39. If the administrator is dissatisfied with the Inspector-General's decision to either declare them ineligible for breaches of duty, impose conditions on registration or cancel the registration, they may appeal to the Administrative Appeals Tribunal (the AAT). An application to the AAT for a review of the Inspector-General's decision must be in writing, set out the reasons for the application and must be made within 28 days of the date the Inspector-General's decision is received by the administrator. Full information about applications to the AAT can be obtained from the local AAT Registry or from the internet at www.aat.gov.au.