



Australian Government  
Department of Social Services

# Special Disability Trusts Questions and Answers

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# SPECIAL DISABILITY TRUSTS QUESTIONS & ANSWERS

## **IMPORTANT DISCLAIMER**

Whether a Special Disability Trust is suitable for your purposes is a complex matter that involves the need to carefully consider your personal circumstances and those of the intended beneficiary. Those circumstances may change over time, as may other factors such as relevant laws, taxation treatment and relevant policies. You should always seek advice from qualified legal, taxation and other professional advisers before taking any action in respect to a Special Disability Trust and take into account both long term and short term considerations as applicable to your individual circumstances.

These Special Disability Trust Questions and Answers and all associated information (the 'Information') are intended to provide you with generic and high level information only. While we believe the Information is generally accurate, it is intended for general consideration only and not for decision making purposes. You should not rely on this information for any purpose. To the extent permitted by law the Commonwealth of Australia provides this information without any representation or warranty of any kind including, without limitation, in respect to accuracy, completeness or currency and will have no liability to you of any kind in respect to any use that you may make of the Information.

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## 1. About Special Disability Trusts

### 1.1 What is a Special Disability Trust?

A Special Disability Trust is a trust established primarily for succession planning by parents and immediate family members for the current and future care and accommodation needs of a person with a severe disability or medical condition.

The general approach is that the trust can pay for any care, accommodation, medical costs and other needs of the beneficiary during their lifetime.

We recommend that you consult with a financial advisor and/or a solicitor for advice before establishing a Special Disability Trust.

**Note:** 'Special' refers to the social security and tax treatment of the trust and is not a reference to the beneficiary's disability.

### 1.2 Who can establish a Special Disability Trust?

Anyone can establish a trust for an eligible severely disabled beneficiary.

**Note:** It is important that, before a Special Disability Trust is established, the prospective trust beneficiary be assessed as severely disabled under the legislation for this type of trust.

In general, there are four main roles in establishing a trust:

1. **The settlor:** The settlor is the person or company who, with the trustee(s), establish the trust by contributing an initial amount (typically \$10 is the settled sum) and executing a trust deed. After the trust is set up, assets or cash to purchase assets can then be transferred into the trust.

The settlor will often be an accountant, solicitor or a distant family member, who will not have an ongoing role in the operation of the trust. A settlor **cannot** be a beneficiary, contributor or trustee of the trust.

The intention of this provision is to prevent the person who formally sets up the trust from still being seen as the owner of the trust assets and income for tax purposes. To ensure this, the settlor has nothing further to do with the trust.

2. **The appointor:** An appointor can be any person or corporation who is not the beneficiary or Settlor. The appointor usually indirectly controls the trust and hires (and can dismiss) the trustee(s). An appointor is not responsible for the day-to-day operation of the trust. The trust deed should provide for the future control of the trust after the appointor dies.

3. **The trustee:** The trustee manages the day to day activities of the trust, conducting business on behalf of the trust, including making investment decisions aimed at increasing the value of the assets.

Trustees, among other things, must be fully acquainted with the terms of the trust and their responsibilities, know what the assets and liabilities of the trust are, keep proper accounts and prepare tax returns.

4. **The beneficiary:** The beneficiary is the person who benefits under the trust. They have no right or claim to any of the trust property until it is vested in them under the terms of the trust. This means that they receive what the Trustee(s) determine is applicable under the trust deed.

### 1.3 What are the main characteristics of a Special Disability Trust?

A Special Disability Trust must meet the following requirements:

- have only one beneficiary (that is the person for whom the trust is established),
- the beneficiary must meet all eligibility criteria. See Question 2.1 Who can be the beneficiary?
- the primary purpose must be to provide only for the accommodation and care needs of the beneficiary,
- have a trust deed that contains the clauses as set out in the [Model Trust Deed](#).

- have an independent trustee, or alternatively have more than one trustee,
- comply with the investment restrictions,
- provide annual financial statements, and
- conduct independent audits when required.

#### **1.4 What are the social security benefits of a Special Disability Trust?**

A gifting concession is available of up to \$500,000 combined (total amount in trust that has received gifting concession) by one or more eligible family members of the beneficiary.

An assets test assessment exemption of up to \$626,000 (as at 1 July 2014 indexed annually) is available for the beneficiary.

All trust income is excluded from the income test assessment for the beneficiary.

#### **1.5 Will any trust qualify as a Special Disability Trust?**

No. A trust will not be a Special Disability Trust unless the legislative requirements are met. For example, a trust deed must include the compulsory clauses of the Model Trust Deed. These are provisions that cannot be watered down if the trust is to qualify as a Special Disability Trust. However, a Special Disability Trust can have its own individual provisions, so long as they are consistent with the specified requirements.

#### **1.6 When does a Special Disability Trust end?**

The trust will end on the earlier of:

- a) the death of the beneficiary,
- b) if/when the assets are fully expended on the beneficiary, or
- c) any earlier date as required by law ('the end date').

#### **1.7 What changes have been made for Special Disability Trusts?**

In response to the Senate Standing Committee on Community Affairs report, *Building trust: Supporting families through Disability Trusts*, the Government announced several measures in the 2009/10, 2010/11 and 2011/12 Budgets to make further allowances for immediate family members to contribute into a Special Disability Trust for the benefit of a family member with severe disability.

Social security changes from 1 January 2011:

- a beneficiary of a Special Disability Trust can work up to seven hours a week at or above the relevant minimum wage,
- a trust may pay for the beneficiary's medical expenses, including private health fund membership costs, and maintenance of trust property, and
- trust funds may be spent on discretionary items for the beneficiary, not related to the care and accommodation needs of the beneficiary of the trust, as long as the expense complies with legislative requirements. Please refer to Question 7.1 What can the Special Disability Trust's income and capital be used for?

**Note:** Trust deeds created before 1 July 2011 need to be changed to reflect the 1 January 2011 social security measures to ensure the Special Disability Trust remains compliant. Please refer to Question 5.7 Do I have to change the Special Disability Trust deed if it was created before 1 July 2011 to reflect the 1 January 2011 social security measures?

Taxation changes from 1 July 2006:

- allow capital gains tax exemption for any asset donated into a Special Disability Trust,
- allow capital gains tax main residence exemption for Special Disability Trusts,
- allow capital gains tax exemption for the recipient of the beneficiary's main residence, if disposed of within two years of the beneficiary's death, and
- ensure equivalent taxation treatment amongst Special Disability Trusts established under different Acts.

Taxation changes from 1 July 2008:

- unexpended income of a Special Disability Trust is taxed at the beneficiary's personal income tax rate, rather than the highest marginal tax rate.

## **1.8 What is a related party?**

A related party for the purposes of a Special Disability Trust is any of the following:

- the settlor;
- the trustee other than a professional trustee for the purposes of paragraph 5.1(a)(iii) of the Model Trust Deed;
- a donor to the trust;
- the principal beneficiary;
- the appointor;
- an immediate family member of the principal beneficiary;
- a parent or sibling of any of the people listed above;
- a partner of any of the people listed above; and
- an entity of which any of the people listed above is a director, shareholder, trustee, or holds the power to appoint a director or trustee, except for entities which are publicly listed companies.

## **2. About the beneficiary of a Special Disability Trust**

### **2.1 Who can be the beneficiary?**

To be eligible to be a beneficiary, the disabled person must meet the definition of severe disability under section 1209M of the *Social Security Act 1991*:

(a) a person who has reached 16 years of age:

- whose level of impairment would qualify the person for Disability Support Pension or who is already receiving a Department of Veterans' Affairs Invalidity Service Pension or Department of Veterans' Affairs Invalidity Income Support Supplement, and
- who has a disability that would, if the person had a sole carer, qualify the carer for Carer Payment or Carer Allowance, or
- who is living in an institution, hostel or group home in which care is provided for people with disabilities and for which funding is provided under an agreement between the Commonwealth, the states and the territories, and
- who has a disability as a result of which he or she is not working and/or who has no likelihood of working for more than seven hours per week at or above the relevant minimum wage.

or

(b) a person under 16 years of age who is a profoundly disabled child as defined in *Social Security Act 1991 section 197(1)* who was a beneficiary immediately before 1 July 2009,

or

(c) a child under 16 years of age:

- who is a person with a severe disability or a severe medical condition, and
- another person (the carer) has been given a qualifying rating of intense under the Disability Care Load Assessment (Child) Determination for caring for the child under 16 years of age, and
- a treating health professional has certified in writing that, because of that disability or condition:
  - the child will need personal care for 6 months or more, and
  - the child care is required to be provided by a specified number of persons,

and

- the carer has certified in writing that the beneficiary will require the same care, or an increased level of care, to be provided to him or her in the future.

## **2.2 When is the assessment of the beneficiary required?**

The Department of Human Services suggests that the assessment of the beneficiary take place before the preparation of the trust deed to ensure that the person with a disability is assessed as being eligible for a Special Disability Trust.

If a beneficiary assessment is not done and the trust deed is prepared, when it comes time for the trust deed to be implemented there is a risk that the person with a disability may be assessed as **not** being an eligible beneficiary for a Special Disability Trust. If this occurs, the trust will be assessed under normal trust rules and neither the beneficiary nor the contributor will benefit from the means test concessions that are applied to Special Disability Trusts.

## **2.3 How is a beneficiary for a Special Disability Trust assessed?**

The Department of Human Services' Special Disability Trust team will assess the beneficiary against the legislated criteria for medical impairment, care needs and work capacity.

In many cases, the Department of Human Services has most, if not all of the information already available. Where the information is not available, evidence needs to be supplied by the beneficiary's medical practitioner or the Department of Human Services will arrange for a work capacity assessment. This assessment is carried out by the Department of Human Services and there is no cost or obligation to proceed at any stage.

People who are interested in setting up a Special Disability Trust should first contact the Department of Human Services' Special Disability Trust team. An assessment officer will explain what a Special Disability Trust is and how it works, the process that needs to be followed and the information to be provided so that the beneficiary assessment can be completed. If requested they will also send an information package containing the following:

- *Planning for the Future: People with disability* booklet, and
- *Special Disability Trusts: Getting things sorted* booklet.

Relevant Department of Human Services' forms will be sent out for completion, as required.

**Note:** The Department of Human Services is unable to recommend any specific solicitors or financial advisers to you to consult about Special Disability Trusts.

Anyone, you as the Department of Human Services customer, your nominee or financial adviser or solicitor on your behalf, can call the Special Disability Trust team on **1800 734 750** to discuss these matters further.

## **2.4 How many trusts can a beneficiary have?**

Each beneficiary can only have one Special Disability Trust established on their behalf. The beneficiary can have other types of trusts in addition to the Special Disability Trust but any further trusts will not qualify for the generous Special Disability Trust asset and gifting concessions.

## **2.5 How many beneficiaries can be included in each Special Disability Trust?**

Each Special Disability Trust can only have one beneficiary.

## **2.6 Can a beneficiary work?**

From 1 January 2011, a beneficiary can work up to seven hours a week at or above the minimum relevant wage in open employment and still qualify for a Special Disability Trust.

Where a person is working for wages in accordance with the Supported Wage System (SWS) administered by the Commonwealth, there is no limit on the number of hours.



## **2.7 Are there any restrictions for people with disability residing in gaol or psychiatric confinement?**

There are no restrictions for people with disability who are in gaol or psychiatric confinement having a Special Disability Trust established for them where they meet the eligibility criteria.

## **2.8 Can the beneficiary gift to their Special Disability Trust?**

There are restrictions on what a beneficiary or their partner can gift to their Special Disability Trust.

Two types of assets cannot be contributed to the trust:

- any asset transferred to the trust by the beneficiary or their partner unless:
  - the asset is all or part of a bequest, or a superannuation death benefit, and
  - the bequest or superannuation benefit was received not more than three years before the transfer
- any compensation received by or on behalf of the beneficiary.

These rules are intended to preserve the existing treatment of compensation payment and prevent the person with severe disability from putting their own property into a Special Disability Trust in order to qualify for income support, rather than using it directly for their own support.

## **2.9 Can the beneficiary reside permanently outside of Australia and still be an eligible beneficiary for a Special Disability Trust?**

A beneficiary is not able to reside permanently outside of Australia. One of the purposes of a Special Disability Trust is to pay for the reasonable care needs for the beneficiary and those needs must be met in Australia. However, a beneficiary is able to travel overseas on a temporary basis.

# **3. About the contributors and contributions to a Special Disability Trust**

## **3.1 Who can gift to a Special Disability Trust?**

Anyone can gift to a Special Disability Trust except the beneficiary (ie the person with disability), their partner (if any) and the settlor. Contributions by the beneficiary (and their partner) will be allowed only if it has been received by a bequest or superannuation death benefit and is within three years of receipt of the bequest or superannuation death benefit.

Before a person contributes to a Special Disability Trust, they should carefully consider the effect it may have on their financial security, including checking the effect on any social security entitlements.

Any gift to the trust must be unconditional and made without expectation of receiving any payment or benefit in return.

For more information, see [Gifting](#) on the Department of Human Services website.

## **3.2 Who can receive the gifting concessions for a Special Disability Trust?**

Immediate family members of the beneficiary who are at, or over, age or service pension age and are receiving a pension (for example Age Pension, Carer Payment) may be eligible for the gifting concession.

Immediate family members who are within five years of Age Pension age or over age service pension age and are not on a pension may still contribute to a Special Disability Trust and take advantage of the gifting concession later when reaching qualifying age, provided the gifting concession has not been fully used.

Where there is more than one contributor to the trust, the combined concession first applies to those eligible family members who are receiving a pension after age or service pension age.

### 3.3 Who is an immediate family member?

An immediate family member includes:

- natural parents,
- legal guardians (as defined),
- adoptive parents,
- step parents,
- grandparents, and
- siblings (as defined).

**Note:** the term 'legal guardian' includes a person who is, or was, the legal guardian of the person with a severe disability while that person was under 18 years of age.

**Note:** siblings means brother, sister, half-brother, half-sister, adoptive brother, adoptive sister, step-brother or step-sister.

### 3.4 Can any amount of money or assets be contributed to a Special Disability Trust?

Assets to any value can be contributed or gifted to the trust at any time. However, the rate of the contributor's pension and/or allowance may be affected if they gift assets worth more than the allowable concessional amount and/or if they do not meet the required eligibility criteria.

Gifts affect a pension or allowance because they directly or indirectly reduce the assets available for personal use. The Department of Human Services needs to be notified about any gifts or transfers within 14 days of when they have occurred.

Any gift or number of gifts whose total value is greater than the allowable concessional amount will be assessed under normal gifting rules. See [Gifting](#) on the Department of Human Services website.

### 3.5 How much gifting concession can the trust receive?

The gifting concession applies to gifts up to \$500,000 per trust.

This concessional amount can only be used once. For example, if an eligible contributor gifts to a Special Disability Trust and receives a concession, then dies, their concession amount cannot be accessed by any other immediate family member. Or, if an eligible contributor is of Age Pension age or receiving a pension and gifts \$400,000 and receives the gifting concession, then another eligible contributor who receives a pension or reaches Age Pension age gifts \$200,000 they can only receive \$100,000 as a gifting concession. When the gifting concession has been fully used, any additional contributions by immediate family members will be assessed under the normal gifting rules. See [Gifting](#) on the Department of Human Services website.

## 4. About the trustee(s) of a Special Disability Trust

### 4.1 Who can be a trustee?

Anyone, except the beneficiary or settlor, can be a trustee as long as they meet the legislative requirements. A trustee can either be an individual or a corporation, which includes accountants, solicitors, corporate trustees and state trustees.

An individual, or a director of a trustee corporation, must:

- be an Australian resident,
- not have been disqualified at any time from managing corporations under the *Corporations Act 2001*,
- have not been convicted of an offence of dishonest conduct against a law of the Commonwealth, state, territory or foreign country, and
- have not been convicted of an offence under the *Social Security Act 1991* or the *Social Security (Administration) Act 1999* or the *Veterans' Entitlement Act 1986*.

#### **4.2 How many trustees are required?**

Where there is an 'arm's length' professional trustee, only one trustee is required. Otherwise, at least two trustees are necessary, to help ensure the beneficiary's interests are protected.

**Note:** A professional trustee is either a trustee corporation or an Australian legal practitioner within the meaning of the *Legal Profession Act 2004* or its legislative equivalent in other Australian states or territories.

#### **4.3 What are the trustee's responsibilities?**

The trustee's responsibility is to act in the best interests of the beneficiary in accordance with the terms of the trust, through provisions in the trust deed or will.

In brief, the duties of the trustee are:

- to implement the trust in accordance with its terms,
- to consider whether to spend trust money or otherwise use the trust property for the benefit of the beneficiary, with reasonable regularity,
- to invest trust property prudently and in accordance with the directions contained in the trust,
- to avoid unnecessary expense or waste of trust property,
- to take professional advice (legal, financial, accounting, medical or other advice) if required (at the expense of the trust),
- to keep accounts of assets and liabilities and income and expenditure and be ready to account to the beneficiary if required, and
- if the trust is relevant to the income support entitlements of the beneficiary, to provide information to the Department of Human Services or the Department of Veterans' Affairs as required.

Trustees have the right to have their reasonable trust-related expenses paid from the trust.

There is a legal obligation on the trustee to look after the trust property, and invest it and use it wisely and carefully for the benefit of the beneficiary.

The trustee must:

- keep or cause to be kept proper accounts in respect of all receipts and payments on account of the trust fund and all dealings connected with the trust fund, and
- prepare or cause to be prepared written financial statements showing the financial position of the trust at the end of that accounting period.

The trustee must provide the financial statements of the trust and action audits when/if requested.

Further information is available at [\*Special Disability Trusts: getting things sorted\*](#).

#### **4.4 How is the trustee(s) changed?**

A trustee may resign their office by notice in writing given to the other trustee(s) and the appointor (if any). The resignation shall take effect upon this notice being given.

The appointor has the authority to make changes to trustee(s). The appointor may at any time by writing:

- remove any trustee (other than a trustee appointed by the court) from office,
- appoint a new or additional Trustee, or
- appoint a replacement trustee for any trustee who resigns as trustee or ceases to be trustee under any provision of these terms or trust law.

The appointor can also provide the means to resolve any deadlocks or conflict that exists between the trustees, avoiding the need for court proceedings.

## 5. About the Trust Deed of a Special Disability Trust

### 5.1 When can the trust deed be drafted?

The trust deed can be prepared at any time. However, it is recommended that the beneficiary assessment is undertaken before preparation of the deed to ensure that the person with disability is eligible for a Special Disability Trust.

If there is no eligible beneficiary for this type of trust, the trust will exist under normal private trust rules where the contributor and beneficiary means test concessions will **not** apply.

### 5.2 What are the requirements for the trust deed?

The trust deed must comply with a range of conditions and include compulsory clauses found in the Model Trust Deed. The Model Trust Deed contains both compulsory clauses needed to satisfy requirements for accessing the social security concessions and non-compulsory clauses that provide options for the person with severe disability and their family.

This deed can:

1. stand alone as a trust deed, or
2. be attached to a will, or
3. with some modifications, it can be included in a will.

It is not necessary to adopt this trust deed in its precise terms. Non-compulsory provisions can be varied. This will not create problems on application if the essential features are retained.

All compulsory provisions must be included in the trust deed to gain the concessions.

### 5.3 Does the Model Trust Deed (or parts of it) need to be inserted into a will?

There is no necessity for the terms of the trust deed to be recited in the will itself. For a Special Disability Trust to be established as part of an individual's will, two essential elements are required:

1. As a minimum, the will must provide the trustee with the power to create a Special Disability Trust that complies with current legislative requirements, on behalf of a specified individual. Alternatively, the full text of the Special Disability Trust can be either attached to, or included in the will. However, if full text is inserted into the will and there are legislative changes to Special Disability Trusts, the legislative changes will need to be reflected in the will for a Special Disability Trust to be created/compliant.
2. The will should clearly outline what assets are to go into the Special Disability Trust when it is created.

To ensure that the Special Disability Trust complies with current legislative requirements, individuals can check the terms of their trust against the compulsory provisions of the Model Trust Deed.

### 5.4 What happens if a 'beneficiary assessment' is not done before the trust deed is prepared?

If a beneficiary assessment is not done and the trust deed is prepared, when it comes time for the trust deed to be implemented there is a risk that the person with disability may be assessed as *not* being an eligible beneficiary for a Special Disability Trust.

This means a Special Disability Trust will not be established. If this occurs, neither the beneficiary nor contributor(s) will benefit from the means test and gifting concessions.

### 5.5 Can a trust be set up in a will?

Yes, a Special Disability Trust can be a testamentary trust established through a will (that is, it does not come into effect until after the death of the person making the will).

### **5.6 Where a testamentary trust is being established (with the intention that it be a Special Disability Trust), does the beneficiary assessment need to take place before or on the creation of the trust?**

There is no requirement that a beneficiary assessment needs to take place before or on the creation of a testamentary (or other) trust for it to be a Special Disability Trust. However, unless the person with a severe disability is assessed as an eligible beneficiary for a Special Disability Trust, a Special Disability Trust cannot be established and the associated concessions cannot be implemented.

### **5.7 Do I have to change the Special Disability Trust deed if it was created before 1 July 2011 to reflect the 1 January 2011 social security measures?**

Yes, clauses 2.1, 2.4, 3.3, 6.1 and 6.3 of the Special Disability Trust's deed need to be changed to reflect the legislative beneficial measures that came into effect on 1 January 2011 and in accordance with the trust deed. See the *Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2011*. The beneficial measures introduced as at 1 January 2011 altered the purpose of a Special Disability Trust from 'sole purpose' to 'primary and other purposes'. Changing the above mentioned clauses ensures the Special Disability Trust remains compliant.

To assist you in updating your existing Special Disability Trust's deed, see the *Deed of Variation of Model Trust Deed for Special Disability Trusts*. The variation needs to be signed and attached to your Special Disability Trust's deed and lodged with the Department of Human Services to ensure the Special Disability Trust remains compliant. A full copy of the Special Disability Trust Model Trust Deed reflecting all the beneficial measures can also be found on the Department of Social Services website.

**Note:** The Deed of Variation of Model Trust Deed for Special Disability Trusts is based upon varying the Model Trust Deed, as previously published prior to 1 July 2011. If you have any concerns you may wish to speak to your legal representative.

### **5.8 What happens if I do not change the Special Disability Trust's deed that was created before 1 July 2011?**

If the Special Disability Trust's deed is not changed to reflect that the 'sole purpose' of a Special Disability Trust is now the 'primary and other purposes' of a Special Disability Trust in accordance with the *Social Security (Special Disability Trust - Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2011*, **the Special Disability Trust will become non-compliant**. If an existing Special Disability Trust's deed does not have a variation clause, please contact the Department of Human Services' Special Disability Trust team on 1800 734 750 to discuss your options.

### **5.9 How is the Special Disability Trust deed changed?**

The trustee, with the consent in writing of the appointor, may amend the provisions of the trust deed. Such an amendment:

- can be made only if it would not cause the trust to become non-compliant with the requirements in relation to Special Disability Trusts, and
- does not infringe any law against perpetuities, and
- only if it is not made in favour of, for the benefit of, or result in any benefit to the settlor, and
- does not affect the beneficial entitlement to any amount allocated for the beneficiary prior to the date of the amendment.

## 5.10 Five common errors with a Special Disability Trust Deed.

### 1. Naming a settlor who has ongoing involvement.

- The person who formally sets up the trust, the settlor, cannot be seen as the owner of the trust assets and income for tax purposes. This is reinforced by the compulsory exclusion clauses of the Model Trust Deed at clause 1.7 and as a related party at clause 3.5.
- The settlor should not be the same person as the trustee or appointor and cannot be a residual beneficiary upon the death of the beneficiary. The settlor is also precluded from making any further contribution beyond the settled sum and therefore should have no intention of donating to the Special Disability Trust, beyond the settled sum.
- The settlor should not be a professional such as solicitor, accountant or financial planner, acting as a professional trustee. The related party clause at 3.5 (a) (iii) excludes the settlor from being engaged, employed or paid by the trust. If the professional takes no further part it may be argued that they were engaged prior to the existence of the Special Disability Trust, but they are still prohibited from being paid by the funds of a Special Disability Trust. Any fees would need to be paid externally, eg by the trustee or donor personally. The professional is prohibited from providing any further service, such as preparing annual income tax returns, even if they were to be paid externally or provided their services for free.

### 2. Failing to name a settlor, where the trust is created by deed.

- If the terms of the Special Disability Trust are not part of, or attached to a will, but instead created by a Deed to receive an inheritance or assets transferred from an estate or a testamentary trust, then a settlor is still required to be named to establish the trust. The settlor needs to be listed as a party under Parties on page 2 of the Model Trust Deed and referenced in clauses 1.7, 3.2 (a), 3.5 (b) and 9.2 (b) (iii) and the definition of 'Trust fund (a) settled sum' at clause 9.3 should be included.

### 3. Including a settlor for a testamentary trust, where not required.

- Where the trust is created by the testator, the clauses relating to the settlor should be excluded as a named party in the introduction and within clauses 1.7, 3.2 (a), 3.5 (b) and 9.2 (b) (iii) and the settled sum removed from the definition of 'Trust fund' at clause 9.3.

### 4. Failing to adopt the compulsory terms as per the current Model Trust Deed.

- The deed is not required to be word for word as per the Model Trust Deed, but must include the compulsory provisions defined by [Social Security \(Special Disability Trust - Trust Deed, Reporting and Audit Requirements\) \(FaHCSIA\) Determination 2013](#) as shown in unshaded text in the Model Trust Deed.
- Any optional or additional clause cannot be in conflict with a compulsory clause eg a clause to provide specific powers to the trustee, including the capacity to lend money to the beneficiary, contrary to the prohibition at clause 3.6.
- The Model Trust Deed is subject to change. Changes in July 2011 reflect the allowance of expenditure for not only the 'sole purpose' of meeting the care and accommodation needs of the beneficiary, but now for the 'primary purpose' of the care and accommodation needs and 'other purposes' primary to the benefit of the beneficiary.

### 5. Failing to adjust the cross referencing within the Deed where the numbering is not as per the Model Trust Deed, eg when added into a will.

- Clauses 1.6 (d), 4.2 (c) (i), 4.2 (f), 5.1(a) (ii), 5.1 (a) (iii), 5.4 , 6.3, 7, 9.2 (c) (i), 9.2 (c) (ii) and 9.3 definitions for 'the Appointor', 'Specified Beneficiary' and 'the Trust Fund' all reference other clauses within the deed.

- Please note that the ‘Trustee Corporation’ definition at clause 9.3 should now reference NSW Trustee and Guardian created by the *NSW Trustee and Guardian Act 2009* rather than Public Trustee as created by the repealed (*NSW*) *Public Trustee Act 1913*.

## 6. About the Income and Assets of a Special Disability Trust

### 6.1 What value of assets can be held in the trust?

There is no limit on the value of assets held in the trust. However, a specified limit of assessable assets plus the beneficiary’s principal residence will be exempt for the purposes of calculating the beneficiary’s income support payment.

As at 1 July 2014, the concessional amount on assessable assets is \$626,000. This is indexed each year on 1 July.

### 6.2 How is the trust assessed under the Social Security or Veterans’ Entitlements Acts means test?

**Assets test:** All of the trust’s assessable assets are attributed to the beneficiary. For the beneficiary, all assessable trust assets up to the specified limit are exempt from the assets test. The specified limit at 1 July 2014 is \$626,000, and is indexed annually on 1 July in line with the Australian Bureau of Statistics, Consumer Price Index (CPI). Trust assets above the specified limit will be counted as assessable assets for the beneficiary.

**Income test:** all of the trust’s income is exempt from the means test for the purposes of calculating the beneficiary’s income support payment as long as all the trust income is only used for the benefit of the beneficiary and administrative purposes, as per the conditions of the use of the trust income.

### 6.3 How will the trust’s income and assets affect the beneficiary’s social security payment?

Eligible beneficiaries in receipt of income support pensions receive modified means test limits. The following is excluded from the means test assessment for the beneficiary of a Special Disability Trust:

- all income of the trust, and
- up to \$626,000 in trust assets (current as 1 July 2014 and indexed annually), plus any exempt asset (eg the beneficiary’s principal residence).

The above income and asset concession amounts **are** in addition to the existing social security income and assets test free areas.

For example: A single adult, receiving a Disability Support Pension, is assessed by the Department of Human Services as an eligible beneficiary under the Special Disability Trust requirements. The parents of the Disability Support Pension recipient, who set up a trust which is also assessed by the Department of Human Services as meeting the Special Disability Trust requirements, contribute a house and \$400,000 for their child’s care and accommodation costs. The beneficiary of the trust lives in the trust’s house.

Under the Special Disability Trust rules:

- the trust’s house is assessed as the beneficiary’s principal residence and therefore, for the beneficiary, this is an exempt asset under the *Social Security Act 1991* and not counted, and
- the trust’s \$400,000 is under the Special Disability Trust beneficiary’s concessional limit.

Therefore, there is no effect on the Disability Support Pension recipient’s (beneficiary’s) payments. The beneficiary is assessed as a homeowner as they have a life interest in the principal residence and has a security of tenure of the residence.

The house is assessed as an exempt asset as it is the beneficiary’s principal residence. The beneficiary may still have up to another \$202,000 in other personal assets before their disability support pension payment may be affected.

**Note 1:** An asset limit of \$348,500 for non-homeowners and \$202,000 for homeowners is current as at 1 July 2014. These limits are indexed each July.

**Note 2:** The combined gifting concessional limit for contributions from immediate family members to a Special Disability Trust is \$500,000. Gifts received over the \$500,000 limit will be assessed as a deprived asset for 5 years from the date of the gift and be subject to the income deeming provisions. See [Gifting](#) on the Department of Human Services website.

#### **6.4 What are the taxation requirements of a Special Disability Trust?**

Changes to the way a Special Disability Trust is taxed were announced in the 2009/10 and 2011/12 Budgets.

Taxation measures include:

- from 1 July 2008 unexpended income of a Special Disability Trust is taxed at the beneficiary's personal income tax rate, rather than the highest marginal tax rate\*, and
- from 1 July 2006:
  - a capital gains tax exemption is allowed for any asset donated into a Special Disability Trust,
  - a capital gains tax main residence exemption is allowed for Special Disability Trusts,
  - a capital gains tax exemption is allowed for the recipient of the beneficiary's main residence, if disposed of within two years of the beneficiary's death, and
  - equivalent taxation treatment amongst Special Disability Trusts established under different Acts is ensured.

**Note:** If you have paid capital gains tax in relation to a Special Disability Trust please telephone the Australian Tax Office on **13 2861** to arrange reimbursement.

\* Prior to this change, unexpended income of a Special Disability Trust was taxed at the highest marginal tax rate.

#### **6.5 How is a Special Disability Trust's and/or an individual Special Disability Trust beneficiary's tax return completed?**

- Unexpended income of a Special Disability Trust is taxed at the beneficiary's personal income tax rate, rather than the highest marginal tax rate.
- The changes to taxation of unexpended income require consideration of how to complete tax returns for both a trustee of a Special Disability Trust and the trust's beneficiary.

For more information refer to the [Australian Tax Office](#) to assist with completion of tax returns.

#### **6.6 What happens if a Special Disability Trust fails to lodge a tax return?**

Failure to lodge a tax return, if required, could result in the Special Disability Trust being assessed as non-compliant, resulting in access to the concessions being denied.

Further, if the trust is not compliant with the social security requirements, the trust may lose the benefit of the taxation changes, resulting in the unexpended income being taxed at the highest marginal tax rate rather than the personal income tax rate of the principal beneficiary.

If you are not sure whether you need to lodge an income tax return, you should contact your tax agent or telephone the Australian Tax Office on **13 2861**.

#### **6.7 Is there any other tax relief for Special Disability Trusts?**

Some state and territory governments have advised there are concessions available, eg stamp duty and rates. Contact your local state or territory government for further information on concessions and any exemptions available for Special Disability Trusts.



## 7. About the expenditure of funds in a Special Disability Trust

### 7.1 What can the Special Disability Trust's income and capital be used for?

The trust is allowed to pay for any reasonable care and accommodation costs incurred by, or on behalf of, the beneficiary, including costs to facilitate the achievement of this outcome.

This includes paying, on behalf of the beneficiary, trust administration expenses and any personal income tax associated with assessable income from the trust.

The trust's expenditure is to be no more than is reasonable having regard to all of the circumstances and, in particular, the beneficiary's care and accommodation needs that are necessary because of their disability, and the trust's total income and assets.

Since 1 January 2011, the trust has been able to undertake a level of discretionary spending that is not directly related to the care and accommodation needs of the beneficiary. The discretionary spending must be for the benefit of the beneficiary. This allows Special Disability Trusts greater flexibility to meet additional costs relating to the beneficiary's health, wellbeing, recreation, independence and social inclusion.

Commencing on 1 January 2011 to 30 June 2011 the discretionary amount was \$10,000. Since 1 July 2011 the discretionary amount has been indexed annually by CPI. For the financial year:

- 2011-12 the discretionary amount was \$10,250
- 2012-13 the discretionary amount was \$10,500
- 2013-14 the discretionary amount was \$10,750

The discretionary amount for the current financial year 2014-15 is \$11,000.

For more information, refer to Question 7.5 What else can the trust pay for?

### 7.2 Can a beneficiary's medical needs be met by the Special Disability Trust?

From 1 January 2011, a Special Disability Trust is able to pay for the beneficiary's medical expenses including private health fund membership and dental treatment.

### 7.3 What are reasonable care needs?

A care need is a reasonable care need if:

- the need arises as a result of the disability of the beneficiary,
- the need is for the primary benefit of the beneficiary, and
- the need is met in Australia.

The following are some examples of reasonable care needs (please note, these are only **some** of the examples and should not be regarded as a definitive list):

- specialised food specified by a medical practitioner as essential for the beneficiary's health,
- mobility aids, prostheses and positioning aids required for, or because of, the beneficiary's disability,
- sleeping and sensory aids required for, or because of, the beneficiary's disability,
- personal care aids required for, or because of, the beneficiary's disability,
- pressure care aids required for, or because of, the beneficiary's disability,
- continence aids required for, or because of, the beneficiary's disability,
- communication devices (including computers) that are essential, or that have been modified, because of the beneficiary's disability,
- modified vehicle, if required for, or because of, the beneficiary's disability,
- modification to vehicle, if required for, or because of, the beneficiary's disability,
- transport required for, or because of, the beneficiary's disability,

- training for transitional or independent living skills of the beneficiary,
- the daily care fee and any additional itemised fees charged by an approved provider in relation to the beneficiary's care and accommodation in a residential care service,
- Medical related and dental costs of the beneficiary, including but not limited to: health insurance and ambulance cover, medicines, surgery, specialist and general practitioner services.

#### 7.4 What are reasonable accommodation needs?

An accommodation need of the beneficiary is a reasonable accommodation need if:

- it arises as a result of the disability of the beneficiary, or
- the need to pay for property (whether purchased in part or full, or rented) is for the accommodation needs of the beneficiary and the property is acquired or rented from a person who is not an immediate family member of the beneficiary.

The need to pay rates and taxes on a property is a reasonable accommodation need if the property:

- is owned by a Special Disability Trust, and/or
- is used for the accommodation of the beneficiary of the Special Disability Trust.

The following are examples of reasonable accommodation needs (please note, these are only *some* of the examples and should not be regarded as a definitive list):

- modification to the beneficiary's place of residence arising from his or her disability,
- payment for the purchase of the beneficiary's place of residence if the payment is **not** made to an immediate family member of the beneficiary,
- payment of rental for the beneficiary's place of residence if the payment is **not** made to an immediate family member of the beneficiary,
- payment of accommodation bond for the beneficiary if the payment is **not** made to an immediate family member of the beneficiary,
- any itemised fees which specifically relate to the accommodation of the beneficiary residing in a residential care service. **Note:** The standard daily care fee charged by accredited Aged Care Residential accommodation is an approved expense,
- from 1 January 2011, the trust may pay for the maintenance of trust property if there is a reasonable need and if the payment is not made to an immediate family member of the beneficiary.

Maintenance of trust property assets means keeping the property in comparable condition and/or to a condition that it is safe for use. Maintenance does not mean replacement, unless it can be proven in writing by a specialist in the specific field that the item needs to be replaced as it cannot be fixed.

Example: the heating system malfunctions and due to the age of the system, a part cannot be obtained to return it to working order, therefore a new comparable heating system needs to be installed, ie ducted heating replacing ducted heating, a wall heater cannot be replaced under maintenance for ducted heating, but can be replaced under the discretionary expenditure provisions. Refer to Question 7.5 What else can the Special Disability Trust pay for?

Examples of maintenance include, but are not limited to:

- having a leaking roof fixed by replacing several tiles, or getting the ridge capping re-capped,
- having a leaking pipe fixed or tap washers replaced,
- having faulty part/s replaced on heating/air-conditioning units that are malfunctioning
- servicing of heating/air-conditioning units,
- painting of exterior of house once every 10-12 years,
- painting of interior of house once every 8-10 years,
- monthly garden maintenance eg lawn mowing, pruning (if required),
- adjustment of internal/external doors due to house movement,
- yearly steam cleaning of floor coverings eg carpets/tiles, and
- yearly cleaning of gutters (if required).

## **7.5 What else can the Special Disability Trust pay for?**

From 1 January 2011, a Special Disability Trust can undertake a level of discretionary spending that is not directly related to care and accommodation needs of the beneficiary as long as the expense complies with legislative requirements. The level of discretionary spending is currently \$11,000 (indexed annually on 1 July) for the 2014-15 financial year. This allows Special Disability Trusts greater flexibility to meet additional costs relating to the beneficiary's health, wellbeing, recreation, independence and social inclusion.

The following are some examples of what the trust can pay for from the discretionary amount:

- food other than food specified by a medical practitioner as essential for the beneficiary's health,
- toiletries such as toothpaste, toilet paper, soap, shampoo, sanitary pads and tampons,
- vehicle maintenance and vehicle related expenses other than those required for, or because of, the beneficiary's disability,
- vehicle registration and insurance,
- petrol for vehicle,
- recreation and leisure activities,
- computer, except if the computer is essential for communication because of the beneficiary's disability (as this can be paid for out of other trust monies),
- communication devices unless modified because of the beneficiary's disability,
- therapy that is not required for, or because of, the beneficiary's disability or that is not approved in writing by a medical practitioner,
- building and contents insurance,
- payment of utilities charges in connection with the principal beneficiary's place of residence,
- household cleaning services,
- clothing and footwear that is not required for, or because of, the beneficiary's disability, and
- life skills and social inclusion workshops.

## **7.6 Can the trust pay for care provided by immediate family members?**

The trust cannot be used to meet the costs of care provided by the trustee, partner, parent or immediate family member (as defined in Question 3.3 Who is an immediate family member) for providing care to the beneficiary. Any paid care must be provided by an arm's-length employee of the trust eg nurse, physiotherapist, etc.

## **7.7 Can a third party benefit from Special Disability Trust expenditure?**

A third party can only benefit from expenditure for the care and accommodation of the beneficiary where the benefit is 'incidental'.

An 'incidental' benefit is where another party receives a benefit from expenditure that is incurred for the beneficiary. The expenditure is allowable where the other party's benefit was of a non-cash nature, minor and provided on a basis that is infrequent and irregular.

## **7.8 What are the rules for related parties and the use of Special Disability Trust funds?**

In order for a trust to be classed as a Special Disability Trust and maintain that status the trustee **must not**:

- provide a loan or any other financial assistance to a related party, which includes an investment in an entity which is a related party;
- intentionally acquire from a related party property which is not a listed security acquired at market value from a related party, or an unconditional contribution made as a donor to the trust;

- employ, engage or pay a related party as an agent, contractor or professional for any services in relation to the trust fund or the beneficiary (including provision of care by the trustee, partner, parent or immediate family member as outlined in Question 7.6 Can the trust pay for care provided by immediate family members?); or
- enter into an uncommercial transaction with a related party.

Refer to Question 1.8 What is a related party? for a list of related parties.

## 8. About reviews and compliance checks for a Special Disability Trust

### 8.1 When is a Special Disability Trust reviewed?

A Special Disability Trust is reviewed annually. The required documents must be provided to the Department of Human Services/Department of Veterans' Affairs on or before 31 March each year for the previous complete financial year.

### 8.2 What needs to be provided for each review?

The trustee must provide the financial statements of the trust as at 30 June of the relevant financial year. The financial statements must include information, which complies with the Australian Accounting Standards.

1. The financial statements include:
  - profit and loss statement for the relevant financial year,
  - balance sheet with applicable notes for the relevant financial year, and
  - depreciation schedule for each class of assets for the relevant financial year (where applicable).
2. If the trust was required by the Australian Tax Office to lodge a tax return, a copy of the tax return for the relevant financial year must also be provided.
3. A statutory declaration must be included that confirms that:
  - expenditure for the relevant financial year (apart from reasonable trust administration costs and taxes) was on:
    - care costs related to the beneficiary's disability, and/or
    - accommodation costs of the beneficiary and or discretionary items for the benefit of the beneficiary, and
  - expenditure for the relevant financial year did not include:
    - the day to day living expenses of the beneficiary, (excludes use of discretionary spending amount) or payments to any 'immediate family member' (see 3.3 Who is an immediate family member?) for services, including care provided to the beneficiary, and
  - a tax return was not required to be submitted to the Australian Tax Office (if applicable), and
  - the trustees have declared that the information provided therein is all true and correct.
4. A copy of the updated Donor Register if further contributions have been made to the trust.

The financial statements, income tax return, statutory declaration and an updated Donor Register must be provided on or before 31 March each year for the previous complete financial year.

A waiver notice may be given in limited circumstances for a limited period where the financial statements are delayed and the delay is not due to the actions of the trustee.

### **8.3 What happens if the required documents are not available by the due date?**

There may be some circumstances where the trustee is unable to comply with the requirements for a short period of time. Rather than the trust ceasing to be a Special Disability Trust and losing any associated concessions, it may be more appropriate to waive the requirement until it can be met.

A waiver notice can only be given to the trustee in certain circumstances and only for a limited time.

While the financial statements must be prepared and provided to the Department of Human Services to protect the interests of the beneficiary, if there is a delay in providing the financial statements and the delay is not due to the actions of the trustee, a waiver notice can be issued by the Department of Human Services/Department of Veterans' Affairs for a period up to 3 months from 31 March in the relevant year.

This can be extended if the circumstances warrant it for an additional 3 month period, up to a maximum of 12 months.

A waiver notice **cannot** be given where any of the purpose requirements are not met or if fraudulent behaviour has occurred.

### **8.4 Who can prepare the financial reports?**

Where one of the trustee/s is a trustee corporation, the financial statements must be prepared in accordance with the regulatory and legislative requirements applying to trustee corporations.

Where none of the trustees is a trustee corporation, the financial statements must be prepared by a person who is a member of CPA Australia, the Institute of Chartered Accountants in Australia, the National Institute of Accountants, or by a person approved by the Secretary of the Department of Social Services for the purpose. They cannot be an 'immediate family member' of the beneficiary or the trustee.

The trustee must provide yearly financial statements certified by an accountant, who is a member of CPA Australia; Institute of Chartered Accountants in Australia; or National Institute of Accountants, to the Department of Human Services or Department of Veterans' Affairs. The financial statements must give a true and fair view of the trust's financial position and performance as at 30 June in the relevant financial year, in accordance with the applicable accounting standards.

The Department of Human Services/Department of Veterans' Affairs have the power to ask the trustee(s) for any documentation supporting their financial statements and tax return.

The trust deed includes clauses that specify that the beneficiary and/or donor can request an independent audit if they are not satisfied with the management of the trust. The Department of Human Services/Department of Veterans' Affairs can obtain an independent audit, at the trust's expense, when there is reason to believe that the trust's assets are being misused.

### **8.5 When is an audit of a Special Disability Trust required?**

An audit can be requested at any time and must relate to the period specified by the person requesting the audit.

An audit must include the following information:

- a statement to the effect that the trust's financial statements give a true and fair view of the trust's financial position and performance as at 30 June of the relevant financial year
- if the requested audit is for the purpose of determining whether the trust has met the requirements of all of the provisions of the trust deed — a statement indicating whether the trust has met the requirements of all of the provisions of the trust deed,
- if the requested audit is for the purpose of determining whether the trust has met the requirements of specified provisions of the trust deed — a statement indicating whether the trust has met the requirements of those specified provisions of the trust deed.

Information mentioned in the audit must comply with Australian Auditing Standards.

## **8.6 Who can request an audit of a Special Disability Trust?**

The following persons may request an audit of the trust:

- the beneficiary,
- an immediate family member of the beneficiary,
- a person who is, under the law of the Commonwealth, a state or territory, the legal guardian or financial administrator of the beneficiary,
- a person who is otherwise acting as the beneficiary's guardian on a long-term basis, and
- the Department of Human Services/Department of Veterans' Affairs.

## **8.7 What happens if the trust, trustee or trust deed is found to be non-compliant with the Special Disability Trust requirements?**

All Special Disability Trust concessional treatment will cease and the trust will be assessed under the normal private trust rules from the date the trust was deemed by the delegate to be non-complying. Any gifts will lose their concessional treatment.

Further, for income tax purposes, if the trust is not a Special Disability Trust at the end of the financial year, any unexpended income will be taxed at the highest marginal tax rate (including Medicare levy) rather than at the beneficiary's personal income tax rate.

In some limited circumstances the Department of Human Services/Department of Veterans' Affairs may issue a waiver for this breach of compliance for a period of time while the contravention is rectified.

## **9. About ending a Special Disability Trust**

### **9.1 What happens when the beneficiary dies?**

The trust will terminate and the trust's assets will vest in the residual beneficiaries named in the trust deed, in the proportions specified in the trust deed.

**Note:** there may be gifting implications under the means test if a donor gifted to the trust within 5 years of the beneficiary's death.

### **9.2 Are there any implications under the gifting rules when the beneficiary dies?**

If a donor contributes to the trust and they receive a social security benefit under the gifting concession, there may be an impact on their income support payment if the gift is within 5 years of the beneficiary's death.

Deprivation will only apply where the contributor does not receive, on the termination of the trust, a comparable percentage of the remaining funds which reflects their contribution to the trust.

Deprivation will apply from the date of the trust's termination and will continue for 5 years from the date of the gift to the trust.

## **10. About finding out more regarding a Special Disability Trust**

### **10.1 Where can I get further information about Special Disability Trusts?**

People who are interested in setting up a Special Disability Trust should first contact the Department of Human Services' Special Disability Trust Team by phoning 1800 734 750. An assessment officer will explain what the Special Disability Trust is and how it works.

Booklets available via the Department of Social Services' website are:

- *Planning for the Future: People with disability* booklet
- *Special Disability Trust: Getting things sorted* booklet

The Special Disability Trust, **Model Trust Deed** is also available on this website.

Taxation information for Special Disability Trusts is available on the Australian Tax Office website.

Taxation information to assist with completion and lodgement of a Special Disability Trust's or an individual principal beneficiary return are available on the Australian Tax Office website.

Further information is available on the Department of Social Services website, and the Department of Human Services' website.