Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2011

Social Security Act 1991

I, FINN PRATT, Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs, make these Guidelines under subsections 1209N (4) and 1209U (4) of the Social Security Act 1991.

Dated 16 June 2011

Finn Pratt
Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs

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Part 1  Preliminary

1.1  Name of Guidelines

These Guidelines are the Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2011.

1.2  Commencement

These Guidelines are taken to have commenced on 1 January 2011.

1.3  Revocation

The Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008 are revoked.

1.4  Definitions

In these Guidelines:

- **approved provider** has the same meaning as in the Aged Care Act 1997.
- **approved fees** means fees that:
  - (a) are:
    - (i) charged for the daily care of the principal beneficiary; or
    - (ii) itemised fees that are additional to the fees mentioned in paragraph (i) and are related to the principal beneficiary’s care and accommodation; and
  - (b) are charged by:
    - (i) an approved provider who is providing a service to the principal beneficiary in a residential care service; or
    - (ii) an institution, hostel or group home, for which funding is provided (wholly or partly) under an agreement, between the Commonwealth, the States and the Territories, nominated by the Secretary under subsection 1209M(3) of the Act, in which care and accommodation is provided for the principal beneficiary.
- **residential care service** has the same meaning as in the Aged Care Act 1997.
- **trust** means a trust that would be a special disability trust if it were not for a contravention of a requirement of Division 1 of Part 3.18A of the Act in relation to the trust.
waiver notice has the same meaning as in paragraph 1209U(1)(a) of the Act.

Part 2 Trust purpose requirements

Division 2.1 Primary Purpose – Reasonable care needs

2.1 Guidelines about reasonable care needs
For paragraph 1209N (4) (a) of the Act, this Division sets out guidelines for deciding what are, and what are not, reasonable care needs for principal beneficiaries of special disability trusts.

2.2 What are reasonable care needs
(1) A care need is a reasonable care need if:
   (a) one of the following conditions is satisfied in relation to the need:
      (i) the need arises as a result of the disability of the principal beneficiary;
      (ii) the need is for any medical-related or dental costs of the principal beneficiary;
      (iii) the need is to pay approved fees; and
   (b) the need is met in Australia.

Division 2.2 Primary Purpose – Reasonable accommodation needs

2.3 Guidelines about reasonable accommodation needs
For paragraph 1209N (4) (a) of the Act, this Division sets out guidelines for deciding what are, and what are not, reasonable accommodation needs for principal beneficiaries of special disability trusts.

2.4 What are reasonable accommodation needs
(1) An accommodation need is a reasonable accommodation need if:
   (a) the need arises as a result of the disability of the principal beneficiary; or
   (b) the need meets the requirements set out in subsection (2), (3) or (4).

(2) The need to pay for property, or for an interest in property, is a reasonable accommodation need if the property or interest:
   (a) is acquired or rented from a person who is not an immediate family member of the principal beneficiary; and
(b) either:
   (i) is acquired or rented for the accommodation needs of the principal beneficiary; or
   (ii) if subparagraph (i) does not apply – is rented at market value and the income from the rent is used for the benefit of the principal beneficiary.

(3) The need to pay rates and taxes on a property is a reasonable accommodation need if the property:
   (a) is owned by a special disability trust; and
   (b) either:
       (i) is used for the accommodation needs of the principal beneficiary; or
       (ii) if subparagraph (i) does not apply – is rented at market value and the income from the rent is used for the benefit of the principal beneficiary.

(4) The need to pay for the maintenance or upkeep on property is a reasonable accommodation need if the property:
   (a) is owned by a special disability trust; and
   (b) either:
       (i) is used for the accommodation needs of the principal beneficiary; or
       (ii) if subparagraph (i) does not apply – is rented at market value and the income from the rent is used for the benefit of the principal beneficiary.

2.5 What are not reasonable accommodation needs
A need that relates to property or an interest in property is not a reasonable accommodation need for the principal beneficiary if the property or interest is acquired or rented from a person who is an immediate family member of the principal beneficiary.

Division 2.3 Other Purposes

2.6 Guidelines about other purposes
For paragraph 1209N (4) (b) of the Act, this Division sets out guidelines for deciding what are, and what are not, purposes, other than the primary purpose, that are primarily for the benefit of the principal beneficiary of a special disability trust.
2.7 Other purposes relating to expenditure for the primary benefit of the principal beneficiary

In deciding whether or not purposes relating to expenditure by the special disability trust are other purposes that are primarily for the benefit of the principal beneficiary, consideration must be given to whether the expenses:

(a) are not related to the reasonable care needs and reasonable accommodation needs of the principal beneficiary; and

(b) are for the health, wellbeing, recreation, independence and social inclusion of the principal beneficiary.

2.8 Other purposes that are not expenditure for the primary benefit of the principal beneficiary

In deciding that purposes, other than purposes relating to expenditure by the special disability trust, are not other purposes that are primarily for the benefit of the principal beneficiary, consideration must be given to whether the expenses:

(a) are for payment to, or on behalf of, a person who is an immediate family member of the principal beneficiary; or

(b) are for payment to a carer for purposes except for:

   (i) the reasonable care needs of the principal beneficiary; or

   (ii) other purposes primarily for the benefit of the principal beneficiary as provided by section 2.7.

Note The maximum amount that may be spent in a particular financial year for purposes, other than the primary purpose of a special disability trust, that are primarily for the benefit of the principal beneficiary, as provided by paragraph 2.7(b), is as determined by the Secretary in the legislative instrument made under subsection 1209RA (3) of the Act as in force at a particular time.

Part 3 Waiver of contravention of requirements

3.1 Guidelines about waivers

For subsection 1209U (4) of the Act, this Part sets out guidelines for deciding:

(a) whether or not to give waiver notices to trustees of trusts; and

(b) what conditions to include in waiver notices; and

(c) the periods during which waiver notices are to have effect.
3.2 Whether or not to give waiver notices

(1) Subject to subsection (2), the Secretary may decide to give a waiver notice to the trustees of a trust if the Secretary is satisfied of the following matters:

(a) the requirement of Division 1 of Part 3.18A of the Act that has been contravened in relation to the trust is a requirement in 1 of the following provisions of the Act:
   (i) for a trust created before 20 September 2006 in relation to which the trust deed cannot be varied — section 1209N, section 1209P or subsection 1209S (1) or (3) of the Act;
   (ii) for a trust created on or after 20 September 2006 and before 1 January 2011 in relation to which the trust deed cannot be varied — subsection 1209N, section 1209P or subsection 1209S (1) or (3) of the Act;
   (iii) for any other trust — section 1209N or subsection 1209S (1) or (3) of the Act;

(b) the contravention of the requirement of Division 1 of Part 3.18A of the Act to which the waiver notice relates does not involve fraudulent conduct;

(c) for a contravention of a requirement in subsection 1209S (1) of the Act — the contravention was not caused by the trustees;

(d) for 1 or more contraventions of a requirement to only use income that the trust derives and the assets of the trust for the purposes mentioned in subsection 1209N (1) or (2) of the Act:
   (i) the total use of income that the trust derives and assets of the trust for a purpose other than:
      (A) to meet reasonable care and accommodation needs of the principal beneficiary; or
      (B) for purposes, ancillary to meeting the reasonable care and accommodation needs of the principal beneficiary, that are necessary or desirable to facilitate the meeting of those needs; or
      (C) for other purposes that are primarily for the benefit of the principal beneficiary;
   does not amount to more than $5 000 for the financial year during which the contravention or contraventions occurred; and
   (ii) having regard to all the circumstances, including the nature of the contravention or contraventions and the frequency of contraventions, the requirement should be waived.
(2) The Secretary may decide to give a waiver notice to the trustees of a trust created on or after 20 September 2006 and before 1 January 2011 in relation to which the trust deed cannot be varied, if the Secretary is satisfied that the trust has complied with section 1209N of the Act.

3.3 Conditions to include in waiver notices

(1) In deciding what conditions to include in a waiver notice that is to be given to the trustees of a trust, the Secretary must consider the need to include a condition that the waiver notice ceases to have effect if the trustees cease to comply with a condition that is included in the waiver notice after the time or times stated in the waiver notice for complying with the condition.

(2) In deciding what conditions to include in a waiver notice that is to be given to the trustees of a trust created before 1 January 2011 in relation to which the trust deed cannot be varied, the Secretary must consider:

(a) the need to include a condition requiring the trustees to give the Secretary a statutory declaration made by the trustees stating the matters mentioned in subsection (3); and

(b) if:

(i) the trust was created on or after 20 September 2006 and before 1 January 2011; and

(ii) the only contravention is due to a breach of the purpose of the trust despite the trust having complied with section 1209N of the Act as in force from time to time before 1 January 2011;

the need to include a condition requiring the trustees to give the Secretary a statutory declaration made by the trustees stating that the trust has complied with section 1209N of the Act as in force from time to time before 1 January 2011.

(3) A statutory declaration must state that the trustees will comply with Division 1 of Part 3.18A of the Act, including the following requirements:

(a) that the trust has no more than 1 beneficiary, not including any residuary beneficiary;

(b) that the beneficiary of the trust meets the requirements of subsection 1209M (2) or (4) of the Act;

(c) that the primary purpose of the trust is to meet reasonable care and accommodation needs of the beneficiary of the trust;

(d) that the other purpose of the trust is primarily for the benefit of the principal beneficiary;

(e) that the trust complies with a determination made by the Secretary under subsection 1209P (2) of the Act.
3.4 Periods during which waiver notices have effect — trusts created before 1 January 2011 with a trust deed that can be varied and all trusts created after 1 January 2011

(1) This section applies to:

(a) a trust created before 1 January 2011 (other than a trust in relation to which the trust deed cannot be varied);
(b) a trust created on or after 1 January 2011.

(2) The period during which a waiver notice in relation to a trust may have effect is a period of not more than 3 months from the time the period of effect starts under paragraph 1209U (2) (a) of the Act.

(3) The Secretary may, on application made by the trustees of the trust, extend the period of effect of a waiver notice (other than a waiver notice given in relation to a contravention of a requirement in subsection 1209S (1) of the Act) for further periods of up to 3 months only if the total period during which the waiver notice would have effect would not exceed 12 months.

3.5 Periods during which waiver notices have effect — trusts created before 1 January 2011 with a trust deed that cannot be varied

(1) This section applies to a trust created before 1 January 2011 in relation to which the trust deed cannot be varied.

(2) The period during which a waiver notice in relation to a trust (other than a waiver notice given in relation to a contravention of a requirement in subsection 1209S (1) of the Act) may have effect is:

(a) if the notice does not state a time for the end of its period of effect — an indefinite period from the time the period of effect starts under paragraph 1209U (2) (a) of the Act; or
(b) in any other case — from the time the period of effect starts under paragraph 1209U (2) (a) of the Act until the time stated in the notice for the end of its period of effect in accordance with paragraph 1209U (2) (b) of the Act.

(3) A waiver notice given in relation to a trust in respect of a contravention of a requirement in subsection 1209S (1) of the Act may have effect during a period of not more than 3 months from the time the period of effect starts under paragraph 1209U (2) (a) of the Act.