EXPLANATORY STATEMENT

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

Summary

The Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2011 (the Guidelines) are made under subsection 1209N(4) and subsection 1209U(4) of the Social Security Act 1991 (the Act). The purpose of the Guidelines is twofold.

Firstly, it allows the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs, to provide guidelines about what are the reasonable care and accommodation needs of a principal beneficiary of a special disability trust for the purposes of a trust meeting the requirements of subsection 1209N(1).

Secondly, it also allows the Secretary to make guidelines in regard to whether or not to provide a waiver notice to the trustees of a trust, the conditions to include in the notice and the period during which the waiver is to have effect. A waiver notice exempts a trust from certain requirements that must normally be met, under Division 1 of Part 3.18A of the Act, for a trust to qualify as a special disability trust.

The Guidelines are a legislative instrument for the purposes of the Legislative Instruments Act 2003.

Part 1—Preliminary

Section 1.1 sets out the name of the Guidelines.

Section 1.2 provides that the Guidelines are taken to have commenced on 1 January 2011. The reason these Guidelines commence retroactively is due to legislative amendments which were made to Part 3.18A of the Act by the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendments (Budget and Other Measures) Act 2011 (the Amending Act) and have a retrospective commencement date of 1 January 2011. The changes relate to a broadening of the purpose requirements from a sole purpose to a primary purpose of the trust. The amendments also introduce a new purpose which allows the trust to undertake a level of discretionary spending for other purposes that are primarily for the benefit of the principal beneficiary. These changes are beneficial in nature. Retrospective commencement of this Determination does not affect the rights of a person so as to disadvantage that person or impose any liabilities in respect of anything done or omitted to be done before the date of registration.

Section 1.3 revokes the Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008.
**Section 1.4** defines various terms that are used in the Guidelines.

**Part 2 – Trust Purpose Requirements**

*Division 2.1 Primary Purpose – Reasonable Care Needs*

**Section 2.1** provides that division 2.1 sets out guidelines for deciding what is, or is not, a reasonable care need in regard to a principal beneficiary of a special disability trust, for the purposes of subsection 1209N(4)(a).

**Section 2.2** sets out guidelines for what actually is a reasonable care need for the principal beneficiary of a special disability trust. Generally a care need will be a reasonable care need for the purposes of this measure where it arises as a result of the disability of the principal beneficiary, the need is for any medical-related or dental costs of the principal beneficiary or the need is to pay for approved fees. The need must also be met in Australia.

For example, reasonable care needs may include, but are not limited to, professional care and case management required for, or because of, the principal beneficiary’s disability; specialised food specified by a medical practitioner as essential for the principal beneficiary’s health; and sleeping and sensory aids required for, or because of, the principal beneficiary’s disability. Reasonable care needs may also include fees that are charged by an approved provider in a residential care service for the daily care, or itemised fees that are additional to those for the daily care, of the principal beneficiary. These fees may also be reasonable care needs where they are being charged by 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 (see the Social Security (Special Disability Trust) Beneficiary Requirements) (FaCSIA) Nomination of Agreement 2006), in which care and accommodation is provided for the principal beneficiary.

*Division 2.2 Primary Purpose – Reasonable Accommodation Needs*

**Section 2.3** provides that Division 2.2 sets out guidelines for deciding what is, or is not, a reasonable accommodation need in regard to a principal beneficiary of a special disability trust, for the purposes of subsection 1209N(4)(a).

**Section 2.4** sets out guidelines for what actually is a reasonable accommodation need for the principal beneficiary of a special disability trust. Generally an accommodation need will be a reasonable accommodation need for the purposes of this measure where it arises as a result of the disability of the principal beneficiary or the need meets the requirements of either subsection 2.4(2), (3) or (4). For example, reasonable accommodation needs may include, but are not limited to, modification to the principal beneficiary’s place of residence arising from his or her disability and payment of rental for the principal beneficiary’s place of residence if the payment is not made to an immediate family member of the principal beneficiary.
Subsection 2.4(2) provides that the need to pay for property, or for an interest in a property (which would include a payment of rental in regard to a property), will be a reasonable accommodation need as long as the interest is acquired or rented from a person who is not an immediate family member of the principal beneficiary and is for the accommodation needs of the principal beneficiary. If the property is not for the accommodation needs of the principal beneficiary under subparagraph 2.4(2)(b)(i), the property will be a reasonable accommodation need if the property is rented at market value and the income from the rent is used for the benefit of the principal beneficiary.

Subsection 2.4(3) provides that the need to pay for rates or taxes in regard to a property will be a reasonable accommodation need where the property is owned by the special disability trust and is used for the accommodation of the principal beneficiary. If the property is not used for the accommodation of the principal beneficiary under subparagraph 2.4(3)(b)(i), the need to pay for rates or taxes will be a reasonable accommodation need if the property is rented at market value and the income from the rent is used for the benefit of the principal beneficiary.

Subsection 2.4(4) provides that the need to pay for the maintenance or upkeep on property will be a reasonable accommodation need where the property is owned by the special disability trust and is used for the accommodation of the principal beneficiary. If the property is not used for the accommodation of the principal beneficiary under subparagraph 2.4(4)(b)(i), the need to pay for maintenance or upkeep will be a reasonable accommodation need if the property is rented at market value and the income from the rent is used for the benefit of the principal beneficiary.

Section 2.5 sets out guidelines for what would not be considered to be a reasonable accommodation need for the principal beneficiary of a special disability trust. This section provides that 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

Section 2.6 provides that Division 2.3 sets out guidelines for deciding what are, or are not, purposes, other than the primary purpose, that are primarily for the benefit of the principal beneficiary of a special disability trust, for the purposes of subsection 1209N(4)(b).
**Section 2.7** sets out guidelines for the decision-maker to consider when making a decision about what other purposes are primarily for the benefit of the principal beneficiary. In making a decision, expenses that are unrelated to the reasonable care and accommodation needs of the principal beneficiary and are for the health, wellbeing, recreation, independence and social inclusion of the principal beneficiary would be considered to be other purposes primarily for the benefit of the principal beneficiary. For example, other purposes may include, but are not limited to expenses for food; household items for the beneficiary; utilities, vehicle registration and insurance; and recreation and leisure activities.

**Section 2.8** sets out guidelines for the decision-maker to consider when making a decision about what are not other purposes primarily for the benefit of the principal beneficiary. This section provides that expenses that are for payment to, or on behalf of, a person who is an immediate family member of the principal beneficiary would not be considered to be other purposes primarily for the benefit of the principal beneficiary. In addition, expenses that are for payment to a carer for purposes, other than the reasonable care needs of the principal beneficiary or as provided by section 2.7, would not be considered to be other purposes primarily for the benefit of the principal beneficiary.

The note at the end of section 2.8 directs the reader to the legislative instrument made by the Secretary under subsection 1209RA(3) of the Act which provides for the maximum amount that may be spent in a particular financial year for purposes (see paragraph 2.7(b)), other than the primary purpose of a special disability trust, that are primarily for the benefit of the principal beneficiary.

**Part 3 – Waiver of contravention of requirements**

**Section 3.1** provides that this Part sets out guidelines for deciding whether or not to give a waiver notice in regard to a trust; what conditions to include in that notice; and the periods during which the notice will have effect, for the purposes of subsection 1209U(4). A waiver notice may allow a trust that does not comply with all the qualification criteria for a special disability trust to be exempted from those criteria which it does not meet, subject to certain conditions and for certain specified periods.

**Section 3.2** provides the guidelines for deciding whether or not to give a waiver notice to trustees, in relation to a trust. Subject to subsection (2), a waiver can only be provided in regard to a matter falling within Division 1 of Part 3.18A of the Act. In deciding whether or not to grant a waiver notice, the Secretary must be satisfied in relation to the following:

a) For a trust created prior to 20 September 2006 a waiver can only be granted in regard to the following items, and only if the trust deed cannot be amended or varied in relation to those items:
- Section 1209N (the trust must have the primary purpose of providing for the reasonable care and accommodation needs of the principal beneficiary or other purposes that are primarily for the benefit of the principal beneficiary);

- Section 1209P (the trust deed must be in a certain form and contain, or not contain, certain specified clauses);

- Subsections 1209S(1) and (3) (the trustees must provide the financial records of the trust to the Secretary each year by 31 March in regard to the last completed financial year and the records must contain all information of the kind specified by the Secretary for the purposes of subsection 1209S(3)).

For a trust created on or after 20 September 2006 and before 1 January 2011 a waiver can only be granted in regard to the following items, and only if the trust deed cannot be amended or varied in relation to those items:

- Section 1209N (the trust must have the primary purpose of providing for the reasonable care and accommodation needs of the principal beneficiary or other purposes that are primarily for the benefit of the principal beneficiary);

- Section 1209P (the trust deed must be in a certain form and contain, or not contain, certain specified clauses);

- Subsections 1209S(1) and (3) (the trustees must provide the financial records of the trust to the Secretary each year by 31 March in regard to the last completed financial year and the records must contain all information of the kind specified by the Secretary for the purposes of subsection 1209S(3)).

For a trust created on or after 1 January 2011 a waiver can only be granted in regard to a contravention of section 1209N or subsection 1209S(1) or (3) of the Act.

b) A waiver cannot be in regard to a contravention involving fraudulent conduct by any party.

c) Where the relevant contravention is a breach of subsection 1209S(1) (ie the trustees must provide the financial records of the trust to the Secretary each year by 31 March in regard to the last completed financial year), the contravention cannot have been caused by any or all of the trustees of the trust.
d) Where the relevant contravention, or contraventions, is that the trust has paid for certain items that are not to meet the reasonable care and accommodation needs of the principal beneficiary of the trust, or are ancillary to meeting those needs or are not for other purposes that are primarily for the benefit of the principal beneficiary (subsections 1209N(1) and (2)) and the amount paid out in contravention of those provisions is no more than $5,000 for the relevant financial year then the Secretary may waive the requirement to comply with those provisions if, considering the whole circumstances of the case (including the nature and frequency of the contraventions) the requirement should be waived.

Subsection 3.3(1) provides that when the Secretary considers giving a waiver notice in relation to a particular trust, the Secretary must consider imposing a condition on the trustees of that trust that if they no longer comply with any other conditions imposed by the Secretary that the waiver notice will no longer have effect.

Subsection 3.3(2) provides that, in relation to a trust created prior to 1 January 2011, where the trust deed cannot be varied or amended, the Secretary should consider imposing a condition on the trustees of that trust that they provide to the Secretary a statutory declaration stating the matters set out in subsection 3.3(3).

In addition, the Secretary must consider imposing a condition on the trustees of a trust created on or after 20 September 2006 and before 1 January 2011 (where the trust deed cannot varied or amended) that they provide the Secretary with a statutory declaration stating that the trust has complied with section 1209N of the Act as in force from time to time before 1 January 2011, if the only contravention of a trust created during this period is due to a breach of the purpose of the trust despite the trust having complied with the requirements under section 1209N that were in force before 1 January 2011. This is applicable to those trusts, which had complied with the purpose requirements of section 1209N of the Act prior to the Amending Act receiving Royal Assent but now find that the trust deed no longer complies due to the changes in the purpose requirements made by that Act.

Subsection 3.3(3) provides that if the Secretary requires the trustees of a trust to provide the Secretary with a statutory declaration under subsection 3.3(2) then the statutory declaration must state that the trust and 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 one beneficiary, excluding any residuary beneficiary;

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

c) That the primary purpose of the trust is to meet the reasonable care and accommodation needs of the trust’s beneficiary;
d) That the other purpose of the trust is primarily for the benefit of the principal beneficiary; and

e) That the trust meets any requirements under subsection 1209P(2) of the Act.

Section 3.4 specifies that the Secretary may grant a waiver for a period of up to three months from the time the notice has effect under paragraph 1209U(2)(a) of the Act. This period may be extended (except in a case where a contravention of subsection 1209S(1) has occurred) for further periods of up to three months as long as the aggregated total of those periods is no more than 12 months. This section only applies to a trust created on or after 1 January 2011 or a trust created prior to that date where the trust deed can be varied or amended.

Section 3.5 specifies that the Secretary may grant a waiver for a contravention of any matter listed in Division 1 of Part 3.18A of the Act (other than subsection 1209S(1)) for a period starting from the time the notice has effect under paragraph 1209U(2)(a) of the Act for either an indefinite period (if no end date is stated in the waiver notice) or until a specified date. Where the waiver is in regard to a contravention of subsection 1209S(1) of the Act, a waiver can only be granted for a period of no more than three months, starting from such time as the notice has effect under paragraph 1209U(2)(a) of the Act. Section 3.5 only applies to a trust created prior to 1 January 2011, where the trust deed cannot be varied.

Consultation

The Department of Education, Employment and Workplace Relations and the Department of Veterans’ Affairs were consulted in the making of these Guidelines, to ensure a co-ordinated approach.

Regulatory Impact Analysis

There was no requirement to prepare a Regulation Impact Statement in regard to the Determination, as this measure is not likely to have a direct, or a substantial indirect, effect on business and is not likely to restrict competition.

Changes from previous instrument

The reason for remaking the Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008 is due to legislative amendments which were made to Part 3.18A of the Act by the Amending Act. The changes relate to changes to the purpose of the trust and to enable the trust to undertake a level of discretionary spending that is not directly related to care and accommodation needs of the principal beneficiary.