EXPLANATORY STATEMENT

Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2011

Summary

The Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2011 (the Determination) is made under subsections 1209P(2), 1209S(4) and 1209T(7) of the Social Security Act 1991 (the Act).

The Determination has three purposes. Firstly, it allows the Secretary to the Department of Families, Housing, Community Services and Indigenous Affairs to specify certain matters in regard to the form and provisions to be used in a trust deed for it to qualify as a special disability trust. Secondly, it sets out certain matters in regard to the annual financial reports of a trust and, thirdly, it sets out certain matters in regard to the auditing of special disability trusts.

The Determination is a legislative instrument for the purposes of the Legislative Instruments Act 2003.

Part 1—Preliminary

Section 1.1 sets out the name of the Determination.

Section 1.2 provides that the Determination is taken to have commenced on 1 January 2011. The reason this Determination commences retrospectively 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 – Trust Deed, Reporting and Audit Requirements) (FaCSIA) Determination 2006.

Section 1.4 defines various terms that are used in the Determination.
**Section 1.5** provides that this Determination applies to special disability trusts that were established before, on or after commencement of the Determination. That is, the Determination is intended to apply to existing trusts, including trusts that were special disability trusts before this Determination commenced.

**Part 2 – Trust Deed Requirements**

**Section 2.1** provides that for the purposes of paragraph 1209P(2)(a) of the Act, a trust deed for a special disability trust must be in the form of the ‘model trust deed’. Generally this means that a trust deed must have the same structure and order as the ‘model trust deed’, but does not need to be exactly the same as it.

**Section 2.2** provides a list of provisions, as set out in the ‘model trust deed’, that must be included in a trust deed for a special disability trust (for paragraph 1209P(2)(b) of the Act). These provisions must be used in the form set out in the ‘model trust deed’ (paragraph 1209P(2)(c)).

**Section 2.3** provides that, for the purposes of paragraph 1209P(2)(d) of the Act, a trust deed of a special disability trust cannot contain any clause that is inconsistent, or overrides, the operation of any of the clauses listed in the table in subsection 2.2(1).

**Part 3 – Reporting requirements**

**Section 3.1** provides that, for the purposes of paragraph 1209S(2)(a) of the Act, the financial statements of a special disability trust must be prepared by a person who is a member of CPA Australia, the Institute of Chartered Accountants in Australia or the National Institute of Accountants, or is an employee of a trustee corporation and who is engaged to work as an accountant or financial planner. The person preparing the statements is not to be an immediate family member of the principal or residuary beneficiary or a trustee of the trust.

**Section 3.2** provides that, for subsection 1209S(3), the financial statements about the trust must include, for the relevant financial year, a profit and loss statement, a balance sheet (with applicable notes) and, if necessary, a depreciation schedule for each class of assets held by the trust. The financial statements must comply with relevant Australian Accounting Standards and give a true and fair view of the trust’s position as at 30 June in the relevant year. The financial statements must include a statement that all amounts paid out of the trust (other than those paid for reasonable administration expenses and taxation) were to meet the reasonable care and accommodation needs of the principal beneficiary (or for other purposes ancillary to meeting those needs) or for other purposes that are primarily for the benefit of the principal beneficiary and no amount was paid out for purposes other than those noted above or for services provided to the principal beneficiary by an immediate family member.
Section 3.3 provides that, subject to subsection (2), when the Secretary is provided with the trust’s financial statements each year, a certified copy of the trust’s income tax return, in relation to this same period, must also be provided. However, a certified copy of the trust’s income tax return is not required, if section 95AB of the *Income Tax Assessment Act 1936* applies to the trust’s income.

Section 3.4 provides that when the trust’s financial statements are provided each year, the trustees of the trust must also provide a Statutory Declaration to the effect that all the information that has been presented to the Secretary, in accordance with section 1209S of the Act, is true and correct in all material particulars.

**Part 4 – Auditing requirements**

Section 4.1 provides that for the purposes of paragraph 1209T(2)(b), where a person has requested an audit under subsection 1209T(3), the period of the audit will be the period specified by the person requesting the audit, being a period of 1 to 5 financial years during the last 5 completed financial years prior to the audit request.

Section 4.2 provides that, for the purposes of paragraph 1209T(5)(a) of the Act, the auditing of a special disability trust must be conducted by a person who is a member of CPA Australia, the Institute of Chartered Accountants in Australia of the National Institute of Accountants. The person conducting the audit cannot be an immediate family member of the principal or residuary beneficiary or a trustee of the trust. The auditor also cannot be any person who prepared, or is preparing, the financial statements of the trust for the financial year to be audited.

Section 4.3 provides that, for subsection 1209T(6), the audit must comply with relevant Australian Accounting Standards and provide a statement that the trust’s financial statement give a true and fair view of the trust’s position and performance as at 30 June in the relevant year. The audit must also include a statement as to whether the trust has complied with specified provisions of the trust deed (or all of the provisions of the trust deed), if the person requesting the audit has asked for this matter to be audited.

**Consultation**

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

**Regulation Impact Statement**

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 – Trust Deed, Reporting and Audit Requirements)) (FaCSIA) Determination 2006 is due to legislative amendments which were made in relation to the purpose of the trust under Part 3.18A of the Act by the Amending Act. Changes have also been made to section 3.3 of the Determination as a result of legislative amendments made to the income tax assessment of special disability trusts by the Tax Laws Amendment (2010 Measures No. 3) Act 2010.