EXPLANATORY STATEMENT

Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008

Summary

The Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008 (the Guidelines) are made under subsection 1209N(4) and subsection 1209U(4) of the Social Security Act 1991 (the Act). The purpose of the Instrument is twofold. Firstly, it allows the Secretary to the Department of Families, Housing, Communities 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 notices 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. Waivers made under subsection 1209U(4) are of a broader nature than those made under is made under subitem 14(5) of Part 1 of Schedule 7 to the Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Act 2006.

The significant changes between this instrument and the Social Security (Special Disability Trust) (FaCSIA) Guidelines 2006 are the additional examples of what constitutes ‘a reasonable care need’ and ‘a reasonable accommodation need’. These examples have been added to provide clarity to affected persons.

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

Part 1—Preliminary

Part 1 sets out preliminary information about the Determination, namely, the name of the Guidelines (section 1.1), the commencement (section 1.2), the repeal of the Social Security (Special Disability Trust) (FaCSIA) Guidelines 2006. (section 1.3) and definitions (section 1.4).

Part 2 – Trust Purpose Requirements

Division 2.1 – 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).
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 direct result of the disability of the principal beneficiary, the need is for the primary benefit of the principal beneficiary and the need is met in Australia. Consequently, a care need that would also be a care need of a person not suffering from a form of disability that would be sufficient for that person to qualify as a principal beneficiary under subsection 1209M of the Act, would not be a reasonable care need for the purposes of subsection 1209N(4).

Subsection 2.2(2) sets out a number of examples of reasonable care needs in regard to a principal beneficiary. This should not be considered to be an exhaustive list of all possible examples, however given that Public Trustees have indicated their support of these amendments, it was considered prudent to specifically add the present examples. However, subsection 2.2(3) provides that in the event that one of the examples in 2.2(2) is inconsistent with the Act or with another provision of the Guidelines, then the Act or the other provision of the Guidelines will prevail.

Section 2.3 sets out guidelines for what would not be a reasonable care need for the principal beneficiary of a Special Disability Trust. Subsection 2.3(1) provides that a care need will be a reasonable care need for the purposes of this measure where it arises as a direct result of the disability of the principal beneficiary, the need is primarily for the benefit of the principal beneficiary and the need is met in Australia. Consequently, a care need that would also be a care need of a person not suffering from a form of disability sufficient for that person to qualify as a principal beneficiary under subsection 1209M of the Act, or is a care need that is met outside Australia, would not be a reasonable care need for the purposes of subsection 1209N(4).

Subsection 2.3(2) sets out a number of examples of things that are not reasonable care needs in regard to a principal beneficiary. This should not be considered to be an exhaustive list of all possible examples. However, subsection 2.3(3) provides that in the event that one of the examples in 2.2(2) is inconsistent with the Act or with another provision of the Guidelines, then the Act or the other provision of the Guidelines will prevail.

Division 2.2 – Reasonable Accommodation Needs

Section 2.4 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).

Section 2.5 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 direct result of the disability of the principal beneficiary, and the need meets the requirements of either subsection 2.5(2) or (3).
Subsection 2.5(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.

Subsection 2.5(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.

Subsection 2.5(4) sets out a number of examples of reasonable accommodation needs in regard to a principal beneficiary. This should not be considered to be an exhaustive list of all possible examples. However, subsection 2.5(5) provides that in the event that one of the examples in 2.5(4) is inconsistent with the Act or with a provision of the Guidelines, then the Act or the provision of the Guidelines will prevail.

Section 2.6 sets out guidelines for what would not be considered to be a reasonable accommodation need for the principal beneficiary of a Special Disability Trust. Subsection 2.6(1) provides that an accommodation need that is for the principal beneficiary and is not purchased, acquired or rented from an immediate family member will always be a reasonable accommodation need, whether or not it is related to the principal beneficiary’s specific disability. It will only be in a case where the accommodation need is purchased, acquired or rented from an immediate family member that it will be necessary to establish a connection between the accommodation need and the needs of the principal beneficiary as a result of his or her specific disability. If there is no such connection then the accommodation need would not be considered to be a reasonable accommodation need for the purposes of subsection 1209N(4).

Subsection 2.6(3) sets out a number of examples of things that are not reasonable accommodation needs in regard to a principal beneficiary, in the event that subsection 2.6(1) does apply in a particular case. This should not be considered to be an exhaustive list of all possible examples. However, subsection 2.6(4) provides that in the event that one of the examples in 2.6(3) is inconsistent with the Act or with a provision of the Guidelines, then the Act or the provision of the Guidelines will prevail.

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. 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 sole purpose of providing for the reasonable care and accommodation needs 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 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 (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, he should also consider imposing a condition on the trustees of that trust that if they no longer comply with any other conditions imposed by him that the waiver notice will no longer have effect.
Subsection 3.3(2) provides that, in relation to a trust created prior to 20 September 2006, 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 him a Statutory Declaration stating the matters set out in subsection 3.3(3).

Subsection 3.3(3) provides that if the Secretary requires the trustees of a trust to provide him with a Statutory Declaration under subsection 3.3(2) then the Statutory Declaration must state the following matters:

a) That the trust is a protective trust. A “protective trust” is well-known as a common law concept and does not require a definition in general terms. It is a trust that is set up for the protection and care of a disabled person and cannot be ended by that person.

b) That the trust and the trustees will comply with all matters listed in Division 1 of Part 3.18A of the Act, including, in particular:

- That the trust has no more than one beneficiary, excluding any residuary beneficiary;
- That the beneficiary of the trust meets the requirements under subsection 1209M(2) or (4) of the Act;
- That the sole purpose of the trust is to meet the reasonable care and accommodation needs of the trust’s beneficiary; and
- 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 20 September 2006 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 20 September 2006, where the trust deed cannot be varied.
Consultation

The Department of Education, Employment and Workplace Relations, the Department of Veteran’s Affairs, Centrelink and the Department of Health and Ageing were consulted in the making of this Instrument, to ensure a co-ordinated approach in respect of payments under the Act for which they have responsibility.

Regulatory Impact Analysis

This instrument does not require a Regulatory Impact Statement (RIS) and/or a Business Cost Calculator Figure. This instrument is not regulatory in nature, will not impact on business activity, and will have no, or minimal, compliance costs or competition impact. It is not expected that any compliance costs will be incurred by business (against the nine categories listed) as a result of this instrument.

Changes from previous instrument

Aside from some minor technical and consequential amendments, the only differences between this instrument and the Social Security (Special Disability Trust) (FaCSIA) Guidelines 2006 is an additional example of what constitutes a ‘reasonable care need’ (in subsection 2.2(2)) and an additional example of what constitutes ‘a reasonable accommodation need’ (in subsection 2.5(4)).