



Australian Government

Department of Families, Community Services  
and Indigenous Affairs



特殊殘障信託 解決相關問題

**Special Disability Trust**

規劃未來：殘障人士

**Getting Things Sorted**

改善澳大利亞民衆的生活



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# 特殊殘障信託 解決相關問題 規劃未來：殘障人士

改善澳大利亞民衆的生活

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# 簡介

## 本手冊涉及哪些內容？

殘障人士家庭，尤其是其父母，經常會問“如果我無法再繼續照顧，該怎麼辦？”。什麼時候都要照顧好殘障人士的利益非常困難，但要事先做好未來安排，則更加困難。

本手冊及《規劃未來——殘障人士》手冊旨在通過解釋各種方案，讓這些事情變得更加簡單。本手冊充分考慮了常見殘障問題及家庭如何通過信託基金幫助來照顧殘障家人，簡要概述了如何更好地規劃未來。此外，本手冊還解釋了**特殊殘障信託 (special disability trusts)**所享受的新收入支持（社會保障和退伍軍人權益）優惠，可以如何幫助您照顧嚴重殘障的家人。

## 使用本手冊前

本手冊內有關收入支持的資料是否適用於您或殘障人士，取決於您是否達到**Centrelink**或**退伍軍人事務部 (Department of Veterans' Affairs, DVA)**的資格要求。設立殘障人士特殊信託基金前，您必須和**Centrelink**或**DVA**核對，確定該信託基金設立之服務對象患有**特殊殘障信託條例**（參見第13頁）中所規定的“嚴重殘障”情況。若該殘障人士不符合“嚴重殘障”的定義，則可能無法享受收入支持優惠。

本手冊是在《**規劃未來——殘障人士**》資料基礎上編制的。您應先閱讀該手冊，因為該手冊：

- ▶ 解釋了有關遺產規劃和高支持需求人士規劃未來的各種方案，包括如何開始規劃未來流程及如何實施這類計劃；
- ▶ 深入探討了在決定計劃實施方式時，個人和家庭可能面臨的各種問題，包括如何獲取法律和財務意見；
- ▶ 介紹監護權、住宿和護理方案如何影響您所能實施的工作；以及
- ▶ 鑒別各類支持及獲取詳細資料的聯繫方式。

本手冊僅提供一般性資料。本手冊對您個人的影響，取決於您個人情況。本手冊哪部分內容最適合或最重要，因家庭的不同而有很大差異。每個殘障人士的能力程度各不相同，這個因素要考慮在內。所能獲取的資源以及家庭成員和殘障人士的觀點，也因個案的不同而存在差異。

未尋求專業法律、會計、財務規劃意見前，切勿全盤複製第3節的《特殊殘障信託契據》。利用特殊殘障信託應作為家庭妥善考慮遺產計劃的組成部分，尤其是為嚴重殘障人士制定的遺產計劃。有關獲取專業意見和其他資料來源的聯繫方式，請參閱《規劃未來——殘障人士》。

## 本手冊概述

第1節“信託和遺囑的相關人員及相關事項”探討信託和遺囑時使用的一些表達方式及其含義，並從受託人和殘障人士的角度簡單介紹信託的運行方式以及一些與信託相關的法律和會計要求、報告義務、稅收事宜。

第2節“特殊殘障信託和社會保障”介紹信託如何開展收入審查和資產審查（享受社會保障或退伍軍人津貼時適用）以及澳大利亞政府特殊殘障信託計劃產生的優惠細節。

第3節“特殊殘障信託契據範本”是一份特殊殘障信託契據範文，內含信託在遵循特殊殘障信託立法要求方面所應設立的必要條款。該範文還提供注釋，解釋這些規定如何發揮作用及其與本手冊其他章節事宜之間的關係。

## 如何編制本手冊的一些考慮因素

### 誰應閱讀本手冊？

由於本手冊探討的大部分問題通常都針對嚴重殘障人士的父母，因此手冊中的“您”主要是指父母。不過，這一原則同樣適用於考慮為嚴重殘障人士帶來利益的其他家庭成員或朋友。

### 問與答

本手冊裡所提的問題都是父母和其他家庭成員在探討涉及殘障人士的遺產規劃時最常提及的問題。

### “殘障”和“嚴重殘障”

由於收入支持優惠涉及本文中（參見第13頁）定義的嚴重殘障人士供給，因此這個術語會在本手冊中反復出現。

但是，即使從立法定義看，即使殘障程度並不嚴重，父母或其他人在考慮設立信託或遺囑作為遺產規劃方法時，仍要考慮眾多相同的問題。

一些殘障人士不借助任何協助，就可完全處理個人財務、護理、住宿事宜，這種情況下可能就沒必要研究本手冊所探討的問題了。

### **收入支持、社會保障和退伍軍人權益**

討論2006年9月20日起開始生效的優惠時，本手冊有時會提及“收入支持”。這些條例同樣適用於退伍軍人事務部 (Department of Veterans' Affairs, DVA) 和 Centrelink 管理的津貼。不過爲了簡化解釋，本手冊主要探討收入支持，利用這個表達方式來涵蓋 Centrelink 管理的社會保障以及 DVA 管理的退伍軍人權益。

#### **“財產”、“金錢”、“資產”**

本手冊裡，人員或信託的財產都稱爲他們的“資產”或“財產”。這裡所指的“財產”指的不僅僅是土地或房產，還包括金錢、股票或其他資產種類。

### **信託和遺囑：做好健在時或去世後的安排**

由於收入支持優惠是通過信託機制來運行的，因此本手冊主要注重信託。

您可以在健在時設立信託，或通過遺囑來設立信託，讓其在您去世後生效。無論您在健在時或通過遺囑來設立信託，所適用的法律條款及所應考慮的因素都完全一樣。

《規劃未來——殘障人士》手冊中對這一點給予了詳細的解釋。



# 第1節

## 信託和遺囑的相關人員及相關事項

信託是指**受託人**（照管或管理信託的人）以及**受益人**（受益於信託的人）之間的法律關係。信託的本質是受託人爲受益人之利益而明智謹慎照管、投資、使用信託財產的法定義務。受益人有權根據信託條款的規定享受信託收益，並有權瞭解信託的相關資料及受託人的運作方式。

本文所探討之信託類型條款通常都在文件中詳細加以規定，如**信託契據**或**遺囑**。

**信託契據**可能很簡單，也可能複雜，這取決於您需要什麼。這份法律文件裡規定：

- ▶ 誰將成爲受託人；
- ▶ 誰將成爲受益人；
- ▶ 受託人向受益人提供收益的時間和方式；
- ▶ 受託人該考慮哪些事情；以及
- ▶ 受託人擁有其他哪些權力和職責。

通過契據設立信託的人通常稱爲**委託人**。出於稅收原因，委託人通常是不會成爲受益人，而且是與該信託沒有其他關係的非關聯方或遠親。

在爲嚴重殘障人士設立的信託裡，該殘障人士可稱爲**主受益人**或**特殊受益人**或**第一受益人**。其他在嚴重殘障人士去世後或不再需要信託幫助時有權分享其遺留部分的受益人通常稱爲**剩餘受益人**。

信託契據也可規定一名**指定人**，該指定人獨立於受託人，可以指定新的受託人或受益人，或對信託條款做出修改，因此通常對信託掌握著重大的控制力。指定人通常由嚴重殘障人士之貢獻信託財產的父母一方或其他近親出任。

貢獻給信託的財產通常稱爲**資本**，信託贏取該資本的**收入**：房產租金、銀行存款利息、股票分紅等。

**全權信託**授權受託人從一系列人員中決定該把收益交給誰、該給他們多少等。

**遺囑信託**是指通過遺囑設立的信託。不過，人們通常將這個術語用於更明確地指代根據擁有稅務規劃優勢的遺囑而設立的特定信託類型。

立遺囑的人稱為**遺囑人**（包括男性和女性，不過立遺囑的女性有時稱為**女遺囑人**）。遺囑指定一名**遺囑執行人**（若是女性，有時稱為**女遺囑執行人**）或多名遺囑執行人，負責在遺囑人去世後執行該遺囑。若遺囑設立了信託，則還會指定一名受託人，受託人既可以和遺囑執行人是同一人，也可以是不同人。

遺囑人在死亡時擁有的財產即為遺囑人的**遺產**。根據遺囑分享遺產的人稱為**受益人**。

## 受託人該做什麼？

信託裡涉及的基本關係就是受託人有責任根據信託條款為受益人的利益履行職責。

若為全權信託，則由受託人決定是否採取行動，若決定採取行動，則由其決定該做什麼，通常不得強迫受託人以某種特定方式來採取行動。您可以通過信託契據或遺囑裡的條款，對這種情況採取某種程度的控制（參見第15頁）。此外也請參閱《*規劃未來——殘障人士*》手冊。

簡而言之，**受託人的職責是：**

- ▶ 根據信託條款來執行信託；
- ▶ 考慮是否為受益人的利益而使用信託金錢或信託財產及合理頻率；
- ▶ 慎重投資信託財產，並遵循信託裡的指示；
- ▶ 避免信託財產出現不必要的開支或浪費；
- ▶ 必要時（信託開銷時）尋求專業意見（法律、財務、會計、醫療或其他意見）；
- ▶ 記錄資產債務和收入開支的帳目，隨時根據受益人的要求向其解釋說明；以及
- ▶ 若該信託與受益人的收入支持補貼相關，則根據要求，向**Centrelink**或**DVA**提供相關資料。

## 受託人有何權利？

受託人有權：

- ▶ 由信託支付其合理的信託相關開支；
- ▶ 若對自己有何權利存在嚴重疑慮，可要求高等法院提供意見和指示：例如，若信託契據的表達方式含糊不夠明確，或面臨困難選擇可能導致違反信託，或信託可能會要求一些不尋常或奇怪的事情；

- ▶ 若信託契據或遺囑規定要支付受託人報酬，則有權因其工作而收取信託支付的報酬（但倘若受託人是直系親屬，則特殊殘障信託情況不在此例：參見第14頁）。為受託人支付報酬或許非常合理，因為受託人承擔很多責任，他們要花費大量時間和精力決定該做什麼，才符合嚴重殘障人士的最佳利益；以及
- ▶ 若原受託人無法繼續履行職責時，則有權指定補充或替任受託人來接管受託職責。

各州立法規定了受託人的很多權利和義務。

## 受益人擁有什麼權利？

受益人享有的基本權利是讓信託根據其條款接受管理，並有權要求受託人說明清楚。

受益人可以表達其意願，並向受託人求助，但不能強迫受託人採用某種特定方式來履行職責，除非信託契據或遺囑裡有此規定。

受益人有權要求受託人提供清算帳目，但通常不得要求受託人解釋說明其選擇某種決定方式的原因。若受益人認為信託沒有得到妥善執行，受益人可向法院申請援助（不過這通常非常昂貴，應盡可能避免）。殘障受益人可能需要幫助才能使用相關援助。

否則，受益人可期待受益於信託資產，但受託人可能要妥善平衡短期和長期考慮因素，特別是在信託要持續多年的情況下。現在就把全部信託資金用在某個項目上可能很不明智，即使看起來似乎是一個很好的項目；若這樣做會讓受託人未來沒有任何資源。

### 範例

David身體患有殘障，這種狀況預計會隨著年齡的增長而益發嚴重。他有一個信託，由哥哥Michael擔任唯一受託人。該信託擁有一套David目前居住的房子，David想要對部分房子進行時尚裝修。

Michael也同意對房子實施時尚裝修，因為這能讓房子更加美觀舒適。不過，他擔心如果現在就花錢搞房屋修整，以後若需要對房子進行大翻新，讓David繼續在此生活時就沒有足夠的資金了。

作為受託人，Michael決定不翻新房子，這在信託契據內規定的其作為受託人的職權範圍之內，符合受益人最佳利益的原則。

## 信託如何計稅？

由於在稅收角度上，信託被視為獨立的法定結構，因此有自己的稅務責任。受託人有義務根據要求提交納稅申報單並繳納稅款。受託人有權從信託資產中繳納稅款。有時信託業應繳納所得稅。有時由獲取收益的受益人繳納稅款。這些問題很複雜，本文不加以論述。若需要稅務問題的意見，請諮詢專業意見。

信託不能享受個人所享受的免稅額，且信託持有的收益（即沒有分配給受益人或用於受益人的收益）可能要適用較高稅率（最高個人稅率）。但是，通過遺囑設立的信託，即“**真正的傳統類遺囑信託**”，可以適用普通個人稅率。

**本手冊沒有深入探究不同稅務結構的利弊。這屬於專業法律和財務意見的範疇。**

若您在健在時設立特殊殘障信託，就可把自己健在時的信託資產控制在少額水準，把主要資產留到您去世後通過遺囑交付信託，從而應對稅務事宜。這可能會產生其他費用，您應在設立信託前認真考慮。

### **保持信託是否需要其他費用？**

若受託人聘用會計師來編制帳目和納稅申報單，則要支付其工作酬勞。若受託人是一家公司，則還會產生設立並保持公司的法律和會計費用。

這類費用及設立信託所需的法律和其他費用，您應在決定現在或通過遺囑來設立信託前與專業顧問認真考慮；哪些資產要交付信託；以及何時交付信託。

欲知信託詳情，請參閱《**規劃未來——殘障人士**》手冊。

# 第2節

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## 特殊殘障信託和社會保障：特殊殘障信託的通用條例和優惠

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### 概況

澳大利亞的社會保障體系是一種以需求為基礎的體系，旨在為那些無法給自己提供支持的民眾構建一個安全網。為確保該體系能夠在最需要的情況下提供幫助，澳大利亞實施經濟情況調查，該調查內含兩個部分：收入審查和資產審查。

支付給領取人的收入支持補貼額，是根據收入審查和資產審查來計算的。所適用的審查以產生較低收入支持補貼額的審查為準。

根據經濟情況調查，我們對免費提供給第三方和私人信託及公司的補貼實施了特殊的處理條例。

根據您的情況，這些條例可能會很複雜。您應徵求財務和法律意見，瞭解這些條例如何影響您或您已經或準備設立的信託。

欲知詳情，包括補貼標準，請聯繫就近的**Centrelink**客戶服務中心或**DVA**辦事處。您也可以瀏覽[www.centrelink.gov.au](http://www.centrelink.gov.au)或[www.dva.gov.au](http://www.dva.gov.au)線上查閱這些資料。

### 特殊殘障信託優惠

制定有關特殊殘障信託的新立法，目的是降低適用於信託條例所帶來的影響，並鼓勵那些有意為嚴重殘障家人自行做好安排的家庭。全面推行特殊殘障信託立法，旨在規定適用於嚴重殘障人士信託普通經濟情況調查的例外情況。

這些可能是很重大的優惠，讓家庭成員和嚴重殘障人士可以依賴（或不久的將來可以依賴）於社會保障或退伍軍人事務的津貼，或若其將資金轉移入特殊殘障信託時可能就能享受收入支持。

不過，要獲取這些優惠，信託就**必須**嚴格遵守特殊殘障信託條例，本章節下文將解釋如何適用這些條例。最重要的是，信託設立的**唯一目的**必須是為嚴重殘障人士提供**護理和住宿**。設立特殊殘障信託前的第一個步驟應是到**Centerlink**或**DVA**驗證設立該信託所針對的人員是否符合特殊殘障信託條例（參閱第13頁）所規定的“嚴重殘障”範疇。

## 嚴重殘障人士優惠

### 收入審查

- ▶ 特殊殘障信託資產的收益，不得計入對信託收益人的收入審查中。
- ▶ 信託資金中用於支付嚴重殘障人士住宿或護理的金額，不得計為該人士申請收入支持的收入。

### 資產審查

- ▶ 若嚴重殘障人士是特殊殘障信託的受益人，則該信託最高達\$500,000的應稅資產（每年調整一次）不得計入資產審查。這意味著這部分資產不會影響嚴重殘障人士享受收入支持補貼。有關“應評估資產”的意思，請瀏覽[www.centrelink.gov.au](http://www.centrelink.gov.au)查閱通用資產審查條例或聯繫就近的Centrelink客戶服務中心或DVA辦事處。
- ▶ 同時也要扣除嚴重殘障人士的主要居屋，這表明在將超額資產計入主受益人應評估資產前，特殊殘障信託裡可能已有高達\$500,000的應稅資產另加該嚴重殘障人士所居住的房屋。

#### 範例

截止至2007年1月1日前，嚴重殘障受益人Carol的特殊殘障信託資產擁有\$700,000另加一套房屋。適用於資產審查的資產應該是資產審查優惠額（截至2006年9月20日為\$500,000）的“超額”部分：即扣除房屋和\$500,000資產審查優惠額後剩餘的\$200,000。經濟情況調查時，將Carol視為唯一的房屋所有者加以評估。根據Carol的其他應評估收入和資產計算，應降低Carol的收入支持補貼。

- ▶ 特殊殘障信託的資產審查優惠額在2006年9月20日初定為\$500,000，該額度適用於任何時間階段，因此假設資產被開銷，信託達到上限，則優惠額仍然以此為限。
- ▶ 由於資產審查優惠額會每年調整，因此信託所持有的、不會影響嚴重殘障人士收入支持補貼的金額也將每年發生變化。

#### 範例

2006年9月20日的特殊殘障信託裡有\$500,000。2007年7月1日，資產審查優惠額按指數調高至\$510,000。該信託收益\$20,000並支出\$15,000，因此該信託在2007年7月1日持有的資產價值\$505,000。由於應稅資產低於\$510,000的指數額度，因此該信託的任何資產都不用接受資產審查的評估。

## 嚴重殘障人士直系親屬優惠

### 捐贈優惠

- ▶ 任何人都可以捐贈給特殊殘障信託。不過，殘障人士主受益人及其配偶只有在該捐贈資產屬於下列情況時才能捐贈：
  - 屬於主受益人根據遺囑而獲取的資產；或
  - 主受益人領取的公積金和死亡撫恤金；且這些資金在主受益人收取後三年內轉入該信託。
- ▶ 任何捐贈給信託的資產，無論來自直系親屬或其他人，都必須不帶任何附加條件，且不得期待能夠獲取任何補貼或利益作為回報。
- ▶ 捐贈優惠只提供給如下直系親屬：
  - 領取社會保障退休金並達到退休金年齡；或
  - 領取公務員退休金且達到退伍軍人退休金年齡；或
  - 領取退伍軍人收入支持補助，並達到領取該補貼的年齡。
- ▶ 嚴重殘障人士的“直系親屬”是指：
  - 父母（包括養父母和繼父母）；
  - 未滿18周歲之嚴重殘障人士的法定監護人，以及在該嚴重殘障人士未滿18周歲時擔任其法定監護人的人員；
  - 祖父母；以及
  - 兄弟姐妹（包括收養兄弟姐妹和繼兄弟姐妹，以及同父異母或同母異父之兄弟姐妹）。
- ▶ 捐贈優惠適用於最高達\$500,000（不根據指數進行調整）的捐贈資產。要享受這一優惠，您必須是領取相關合格補貼的直系親屬，並應將您利用這一優惠的意圖告知Centrelink或DVA。若該優惠全部使用完畢，則直系親屬追加的捐贈資產應根據正常捐贈條例加以徵稅。
- ▶ 非直系親屬捐贈的資產或直系親屬超過捐贈優惠部分的捐贈資產，應根據正常捐贈條例加以徵稅。

### 範例

David有一個特殊殘障信託。他的父母分別是65歲的Paul和63歲的Lucy，他們都領取養老金。2006年設立信託時，他們向信託捐贈了\$300,000。到2012年，大部分資金都已用於護理和住宿，於是Paul和Lucy又向信託捐贈了\$300,000。捐贈優惠適用於首筆捐贈額以及第二筆捐贈額中的\$200,000。因此，超額的\$100,000要根據正常捐贈條例加以徵稅。

- ▶ 未達到合格年齡的直系親屬（及其未達到合格年齡的配偶）可以向特殊殘障信託捐贈資產，並可以在日後達到合格年齡時享受這一優惠，前提是該捐贈優惠額度還沒用完。這意味著可以在申領養老金或相關退伍軍人補貼前，將資產放入信託長達5年時間，並在領取收入支持時這些資產仍然不用接受經濟情況調查範疇。若您在達到合格年齡前已經領取收入支持，則這些捐贈金額將根據正常捐贈條例進行計算，直至您達到合格年齡。

### 範例

Greg身患嚴重殘障，58歲的父親John為他設立了特殊殘障信託。2006年10月1日，John向該信託捐贈\$500,000。John由於未達到領取養老金年齡，無法向Centrelink申請捐贈優惠。

2011年6月1日，John又向該信託捐贈\$500,000。自John於2006年首次捐贈以來，該信託沒有收到其他任何捐贈。

2013年，John年滿65歲，開始申請養老金。由於在申請養老金前，其2006年的捐贈資產已超過5年，因此這筆資產不予考慮。2011年的捐贈資產處在申請前5年時間內，且其是直系親屬，因此這筆捐款可以享受捐贈優惠。這樣，在社會保障經濟情況調查時其2011年的捐款不予計算。

### 範例

我們對上面的例子做一點變動：2012年，Greg的祖母Marie在Greg的信託裡投入\$200,000。Marie目前領取養老金。由於Marie是直系親屬，她的捐款符合捐贈優惠的條件。Marie可享受捐贈優惠。

2013年，John年滿65歲，開始申請養老金。申請養老金時，其所能享受的捐贈優惠是\$300,000。2011年John的\$500,000捐款部分符合捐贈優惠。2011年捐款中剩餘的\$200,000按正常捐贈條例加以徵稅。

### 範例

我們再對上面的例子做一點變動：若2012年的捐款來自一個親密的家庭友人Paul（而不是Greg的祖母），則其捐款不能享受捐贈優惠，因為Paul不是直系親屬。那麼John就能享受全部優惠利益。

- ▶ 捐贈優惠適用於每個特殊殘障信託。若一個家庭裡有兩個孩子符合條件，達到合格年齡的直系親屬可享受的捐贈優惠為每個特殊殘障信託各為高達\$500,000。

## 特殊殘障信託條例詳情

特殊殘障信託立法執行了政府的意圖，即鼓勵那些想要為嚴重殘障家人自行做好準備的家庭。有些條例看起來有點局限性。但是，其意圖在於預防人們將信託用於支持嚴重殘障人士之外的其他用途，並防止利用這些優惠用於以獲取收入支持為目的，而不是為嚴重殘障人士提供額外資源。

下文的問與答涵蓋了您在判斷特殊殘障信託是否適合您和家庭情況前應該考慮的一些事情。欲知所需考慮的問題詳情，請參閱《社會保障法指南》([http://www.facsia.gov.au/guides\\_acts/ssg/ssg-rn.html](http://www.facsia.gov.au/guides_acts/ssg/ssg-rn.html))，或聯繫就近的Centrelink客戶服務中心。

## 誰是“嚴重殘障”人士？

**嚴重殘障人士**是指16周歲以上的如下人士：

- ▶ 能夠享受殘障支持津貼（《社會保障法》）或能夠享受勞動能力喪失服務補貼或勞動能力喪失收入支持補貼（《退伍軍人權益法》）；
- ▶ 因其殘障，不能按相關最低薪水標準工作且不太可能工作；
- ▶ 以及存在下列情況之一的人士：
  - 生活在為殘障人士提供護理服務、且根據聯邦、州和領地之間的協議享受撥款（全額或部分）的機構、療養院或集體療養院；或
  - 其殘障狀況為在其只有一名護理人員時，該護理人員就能享受護理人員補貼或津貼。

若屬於《社會保障法》規定“深度殘障兒童”範疇，則16歲以下人士也可視為**嚴重殘障人士**。

設立特殊殘障信託前的第一個步驟應是到Centerlink或DVA驗證設立該信託所針對的人員是否符合特殊殘障信託條例所規定的“嚴重殘障”範疇。

欲知這些檢查含意詳情：

- ▶ 若為Centrelink補貼，請聯繫13 10 21預約或聯繫就近的Centrelink客戶服務中心；
- ▶ 若為DVA補貼，請致電1800 550 462、電郵至Trusts&Companies@dva.gov.au或郵遞至PO Box 21, Woden ACT 2606聯繫信託及公司團隊 (Trusts & Companies Team)。

## 嚴重殘障人士能否擁有一個以上的特殊殘障信託？

不能。每位嚴重殘障人士只能有一個特殊殘障信託，因此若已有特殊殘障信託存在，則其他額外的信託都不能享受特殊殘障信託優惠。

## 何謂“合理住宿和護理需求”？

特殊殘障信託的唯一目的是滿足嚴重殘障人士的合理住宿和護理需求。

《社會保障法》裡對合理住宿和護理需求的範圍做了規定。其指導原則是特殊殘障信託只能用於支付如下費用：

- ▶ 嚴重殘障人士的住宿費用；以及

- ▶ 由於殘障情況而產生的額外護理費用；以及
- ▶ 額外開支，如專業受託人費用以及投資和會計費用。

除了住宿以外：

- ▶ 信託只能用於由於殘障而產生的必要開支；以及
- ▶ 特殊殘障信託不能用於支付非殘障人士正常需要購買的物品費用或正常日常開支。這些費用應由其收入支持補貼或其他資產或收入來承擔。

每個個案裡何謂合理，這取決於殘障程度和相關人員的需求。對某個嚴重殘障人士而言屬於合理範疇，對其他人而言並不一定就合理。**最重要的考慮因素是殘障受益人由於殘障而產生哪些住宿和護理的需求。**

欲知合理護理和住宿費用詳情，請參閱《社會保障法指南》。這些準則會隨著時間的推移而不斷發展。受託人應瞭解這些條例，並掌握最新資料，從而瞭解特定人員的特殊殘障信託可以做什麼及不可以做什麼。

### 信託能否支付報酬給提供服務的家庭成員？

不能。信託**不能**用於支付報酬給提供護理和住宿的直系家庭成員：

- ▶ 信託不能支付報酬給為受益人提供護理之直系家庭成員或受益人之子女；
- ▶ 信託不能支付報酬給為受益人住宿提供維護服務之直系家庭成員或受益人之子女；
- ▶ 信託不能用錢向直系家庭成員或受益人之子女購買或租賃房產，包括‘祖母公寓’(granny flats)。

(欲知“直系家庭成員”的定義，請參閱第11頁。)

### 我該如何準備護理和住宿以外的事情？

若您想為嚴重殘障人士做好準備，讓其獲取“住宿和護理”之外的其他資源，如度假、電視、CD播放機、服飾或普通傢俱（由於殘障問題可能沒必要），您應單獨做好準備。這些物品不能由特殊殘障信託來支付費用。

您可以另設信託：即通過信託契據或遺囑設立特殊殘障信託來承擔護理和住宿費用，並設立另一個更一般化的信託來承擔其他費用。

或者，您無需設立特殊殘障信託，而是設立一個通用型信託。您應思考不同考慮因素的重要性，並考慮該如何平衡或確立這些因素的先後順序。這些考慮因素包括：

- ▶ 收入支持權益；

- ▶ 需要受託人提供“合理護理和住宿”之外的廣泛福利；
- ▶ 您已安排未來住房和護理的程度；
- ▶ 未來需要多少資金來承擔這些安排；
- ▶ 您有多少財產可以處置；以及
- ▶ 受託人要對安排加以處理的費用和複雜程度。

## 所有信託是否都符合成為特殊殘障信託的條件？

不能。立法規定，信託必須滿足規定要求。因此信託的條款必須滿足這些要求，不能在任何實質方面與之相抵觸：“所有信託”不會都符合成為特殊殘障信託的條件。

但是，這並非意味著信託不能自行制定個性化規定，前提是要符合這些規定要求。“信託契據範文”（參閱第3節）只是：一份範文，而非強制性文件格式。您和顧問無需嚴格遵循其全部條款。您可以對其進行修改來適應個人的情況，前提是信託仍能與立法要求保持一致。我們對第3節的特殊殘障信託契據範文做了標記，表明哪些規定屬於強制性（無陰影），哪些屬於可選條款（陰影部分）。

若信託要成為特殊殘障信託，則必須要遵循這份特殊殘障信託契據範文的一些強制性條款，因此您不能給這些條款“打折扣”，您只能對其進行修改，使信託條款更加具體明確。

例如，您可能不想泛泛地將這些信託資產用於住宿和護理，而是想更具體地規定信託資產的使用方式。因此您可以在信託契據裡規定，信託資產只能用於支付以集體療養院形式存在的住宿。這樣的信託仍然可以成為特殊殘障信託，因為該信託的目的仍是要滿足合理的護理或住宿需求。

其他一些信託條款並不是特殊殘障信託條例明確規定的。例如，特殊殘障信託契據範文第2.2款規定了受託人可以協商的人員：**受託人必須“至少每年審查一次主受益人的需求，並與主受益人的直系護理人員和主受益人本人（若有此可能）進行協商”**。該條款亦可概括（如任何主要服務機構）或具體（如指定的朋友或醫療顧問）提及可以與嚴重殘障人士其他家庭成員及其生活中其他人士進行協商，或都不與這些人協商（不過如果都不與這些人協商，可能會更難確保受託人會考慮最符合嚴重殘障人士之利益的方面）。

## 誰可以成為特殊殘障信託的受託人？

只要符合立法要求（信託契據範文第5.1款：參閱第29頁），任何人都可以成為受託人，包括父母、直系家庭成員、會計師、律師、企業受託人和州立受託人。《社會保障法指南》規定了這些立法要求。此外，各州也出臺了監督受託人責任的法律。

## 捐贈給特殊殘障信託的資產是否有規定限制？

有。兩類資產不能捐贈給信託：

- ▶ 受益人獲取的補償金（如，機動車事務傷害索賠金）；
- ▶ 受益人自己（或其配偶）貢獻出的財產，除非這些財產是通過遺囑繼承而來或在轉入信託前三年內獲取的公積金和死亡撫恤金。

這些條例旨在保持對補償金的現行處理方式，並預防嚴重殘障人士爲了達到收入支持的條件而將自有財產投入特殊殘障信託，而不是將這些財產直接用於個人支持之目的。

## 若有人未遵守這些條例，該怎麼辦？

若未能遵守這些條例，則信託就不再成爲特殊殘障信託，且主受益人可能會喪失收入支持優惠。您還應注意，這還會對捐贈人的收入支持權益產生影響。

但是，Centrelink/DVA有權力來排除一些違反行爲。這取決於這種違反行爲的嚴重程度、是否故意及持續時間、所違反的規定、違反或不違反會如何影響嚴重殘障人士的利益。

## 若特殊殘障信託不再成爲這類信託，該怎麼辦？

嚴重殘障受益人去世後，這種信託就不再成爲特殊殘障信託。此外，若違反條例規定也會使之不再成爲特殊殘障信託。

信託的規定應注明信託殘餘財產該如何處置。例如，參閱特殊殘障信託契據範文第4款（第28頁）。

若信託契據有規定，則信託資金捐贈人可注明自己希望捐贈資金而產生的盈餘財產該如何處置。例如，可以退還給他們（若他們仍然健在）或交給執行者根據其遺囑要求來處置。或者可指定其子女、其他家庭成員或慈善機構來獲取自己的份額。

這些資產可以退還給捐贈人，這種情況下這些資產應接受經濟情況調查，這可能會影響其收入支持權益。

若該信託在其將財產轉入信託後五年內終止或不再成爲特殊殘障信託，則這些財產要受捐贈條例的管轄，這可能會影響將財產捐給信託之人士的收入支持權益。

## 好了，我已經考慮了所有這些條例。我是否該設立特殊殘障信託？

這個問題的答案完全取決於您的個人情況以及您所獲取的專業意見。不過，從一般角度而言，請考慮這些問題：

- ▶ 若殘障人士身患的不是“嚴重”殘障（參閱第13頁），則不能設立“特殊殘障信託”；
- ▶ 若您或嚴重殘障人士都沒有依賴（或可能不用依賴）收入支持，則設立特殊殘障信託可能無法享受任何權益；
- ▶ 若您或嚴重殘障人士確實或可能要依賴收入支持，但您可能要提供用於護理和住宿的資產水平對這些權益不會產生任何影響，則設立特殊殘障信託可能無法享受任何權益。這可能是因為您沒有足夠的金錢來用於護理和住宿，或者因為您已經做好安排，無需額外大量的資金；
- ▶ 若護理和住宿的金錢需求可能性不大，則可能不適合把大量的金錢投入特殊殘障信託，因為這種信託不能用於其他目的，且會帶來稅務後果（例如，若累計收入超過開支）和持續的會計開支；
- ▶ 若您希望嚴重殘障人士可以將資金用於更廣泛的用途，而不僅僅限於護理和住宿，則特殊殘障信託可能不適合，或只能成爲您所應設立的安排中的一個部分。

然而，倘若：

- ▶ 收入支持確實對您或嚴重殘障人士非常重要；
- ▶ 殘障狀況很嚴重，資格得到Centrelink或DVA的確認；
- ▶ 您所提供的資金會對嚴重殘障人士目前或在您去世後的護理和住宿安排發揮作用；
- ▶ 這些資金足以影響嚴重殘障人士的收入支持權益或您的權益（根據捐贈條例）；

那麼特殊殘障信託可能就有助於更好地為嚴重殘障家人做好規劃未來。

這種情況下，請尋求專業意見，並考慮運行這種信託來實現您的願景及做好規劃未來。



# 第3節

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## 特殊殘障信託契據範文

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下文的信託契據內含信託必須遵守特殊殘障信託立法要求的條款。

這份契據可單獨作為信託契據或附於遺囑後，作為遺囑普通條款而產生的信託條款，或者對其做些修改後（下文做了一般性說明）將其融入遺囑中。

您無需一字不差地採用這份信託契據。您可能想要更改某些特定條款。只要保留必要的要素（參閱第13-16頁），那麼這就不會給特殊殘障信託條例的適用帶來問題。我們對下一節的特殊殘障信託契據範文做了標記，表明哪些規定屬於強制性（無陰影），哪些屬於可選條款（陰影部分）。

因此，您在編制信託契據或考慮更改信託契據範文時要向熟悉特殊殘障信託條例的顧問諮詢專業的法律或財務意見，這非常重要。

若您不熟悉信託和法律文件，這份信託契據看起來可能就有點複雜，雖然我們已儘量採用“易懂英語”來草擬這份契據。理解這份契據的關鍵在於認真緩慢閱讀各項條款，必要時還要查閱相關定義（第35-36頁的第9.3款）。若信託契據仍然不夠清楚，您可能要和律師或財務顧問討論。

# Model trust deed for special disability trusts

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\* Omit if trust established under a Will

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**THIS DEED OF TRUST** is made on [date] \*

**PARTIES: \***

1. [Settlor Name and address to be advised] ('the settlor').
2. [Name and address to be advised] ('the Trustee').

**INTRODUCTION: \***

[Commentary: This section and clauses 1 and 2 set the scene for the formal creation of the trust and its basic provisions. If you set up the trust by a Will, these things will be covered in the Will. Definitions of some of the expressions used in the trust are set out in clause 9.3 (page 35).]

- A. The settlor has decided to create a Trust Fund for the purpose of making provision for the care and accommodation of the Principal Beneficiary of the trust, as described in these terms of trust.

[Commentary: For a trust to exist, it must hold property. The Settlor contributes an initial amount (typically \$10 –see sub-clause D) so that a trust can be established. The Settlor is someone independent of the other parties such as the trustees and/or appointer.]

- B. The intention of the settlor is to establish a Trust Fund that qualifies as a special disability trust, within the meaning of the Social Security Act 1991 or the Veterans' Entitlement Act 1986, whichever is applicable to any Donor and/or the Principal Beneficiary.

- C. The settlor has decided to appoint the Trustee as Trustee of this trust, and the Trustee has consented to become the first Trustee upon the trusts and with and subject to the powers and provisions contained in these terms of trust.

[Commentary: A trustee is a person or corporation who operates the trust. The terms of the trust deed will determine how the trustee will administer the funds held in the trust. The trustee has a duty to act honestly and in the best interests of the beneficiary. The trustee must comply with the terms of the trust deed and relevant state or territory legislation that applies to trustees.]

- D. The settlor has paid or will pay the sum of \$10.00 to commence the trust ('the settled sum').

- E. The parties anticipate that further Contributions will be paid to the Trustee in respect of the trust for the benefit of the Principal Beneficiary.

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\* Omit if trust established under a Will

# PROVISIONS

## 1 Establishment of Trust

### 1.1 The Principal Beneficiary

The Principal Beneficiary of the trust is [name and address to be advised] ('the Principal Beneficiary').

[Commentary: The principal beneficiary is the severely disabled person as defined on page 13.]

### 1.2 Declaration of Trust

The Trustee HEREBY DECLARES that in respect of the trust the Trustee will hold the Trust Fund and the income arising therefrom upon trust during the lifetime of the Principal Beneficiary solely for the benefit of the Principal Beneficiary and with and subject to the powers and obligations contained in the remainder of these terms of trust.

### 1.3 Name of Trust

The trust shall be known as [Name of Trust] Trust.

### 1.4 Application of Operative Provisions

Unless the context requires otherwise, the operative provisions set out in the remainder of these terms of trust will apply in respect of the trust established pursuant to these terms of trust.

### 1.5 Duration of Trust

The trust will end on the earlier of:

- (a) the date of death of the Principal Beneficiary;
- (b) if assets are fully expended on the Principal Beneficiary, the date of such full expenditure; or
- (c) any earlier date as required by law ('the end date').

[Commentary: For example: State law sets out the number of years that a trust may exist.]

### 1.6 The Appointor

[Commentary: An Appointor can be any person or corporation who is not the Principal Beneficiary or Settlor. An appointor is not responsible for the day-to-day operation of the trust. See the explanation of the role of the appointor on pages 5, 32–33.]

- (a) The initial Appointor[s] of the trust [is/are] [Name and address to be advised] ('the Appointor');
- (b) An Appointor shall have the power to nominate any person or persons or entity to act together with or in his, her or its place and may place such conditions or restrictions on such nomination (and may make such nomination revocable or irrevocable) by any notice in writing to the trustee, or by Will, save that where there is more than one Appointor, an Appointor must obtain from all of the other Appointors the prior written consent to all of the terms of any nomination pursuant to this subclause;

- (c) A successive Appointor, if the nomination is otherwise silent, shall also have the power to nominate a successor or alternate Appointor as if they were the initial Appointor;
- (d) The Appointor shall exercise their power in accordance with clause 7 and any power of the Appointor may be exercised by the Trustee in the absence of the Appointor at any time.

## 1.7 Exclusion of Settlers \*

[Commentary: 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. The settlor will often be a more distant family member, who will not have an ongoing role in the operation of the trust.]

### ***Notwithstanding anything express or implied in these terms of trust:***

- (a) The trust will be possessed and enjoyed to the entire exclusion of the settlor and of any benefit to the settlor by contract or otherwise, and any resulting trust in favour of the settlor is expressly negated;
- (b) No part of the trust will be paid, lent to, or applied for either the direct or indirect benefit of the settlor in any manner or in any circumstances;
- (c) No power in these terms of trust, or appointment made pursuant to these terms of trust or conferred by law upon the Trustee will be capable of being exercised in such manner that the settlor will or may become entitled, either directly or indirectly, to any benefit in any manner or in any circumstances whatsoever.

## 2 Administration of the Trust

[Commentary: This clause expresses some of the major points required of special disability trusts: the restriction to care and accommodation, payments not to be made to immediate family for care and repairs and maintenance, and the paramount importance of the person with the disability as the focus of the trust.]

### 2.1 Sole Purpose of Trust

- (a) The Trustee must hold the Trust Fund and the income derived in each accounting period on trust and pay or apply all or any part of the income and all or any part of the Trust Fund for the sole purpose, as defined in the remainder of this clause;
- (b) No part of the income or the Trust Fund may be used for any payment of Immediate Family Members or a Child of the Principal Beneficiary including:
  - (i) the provision of care services; or
  - (ii) repair and maintenance of accommodation for the Principal Beneficiary;
- (c) The operation of sub-clause (a) does not preclude the Trustee from applying any part of the income or the Trust Fund for an ancillary purpose.

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\* Omit if trust established under a Will

- (d) For the purpose of this deed the 'sole purpose' means the reasonable care and accommodation of the Principal Beneficiary as determined by the Trustee from time to time but:
- (i) shall not include such daily living costs or expenses of the Principal Beneficiary that do not relate to reasonable care and accommodation needs;
  - (ii) shall not include expenditure which is primarily for the direct or indirect benefit of any other person; and
- [Commentary: This sub-paragraph does not include situations where the residence of the principal beneficiary provides an incidental benefit to their partner.]
- (iii) must be in accordance with any requirement or determination made by the Secretary from time to time;
- (e) For the purpose of these terms of trust, 'ancillary purpose' means a purpose that is necessary or desirable to achieve the sole purpose of the trust.

## 2.2 Priority of Principal Beneficiary

[Commentary: This clause is intended to ensure that the trustee considers what is in the best interest of the person with a severe disability.]

In carrying out their responsibilities under this clause, the Trustee is required:

- (a) to have regard to the nature and severity of the Principal Beneficiary's condition as well as the current and future care needs of the Principal Beneficiary;
- (b) to ensure the interests of the Principal Beneficiary are to take precedence over any interest or expectancy as to net income or capital of any Donor or Specified Beneficiary; and
- (c) to review the needs of the Principal Beneficiary at least annually and wherever possible, consult with the Principal Beneficiary's immediate caregiver and the Principal Beneficiary.

[Commentary: A more frequent consultation period may be preferable.]

## 2.3 Right of Occupation

With respect to all real property contributed to the Trust Fund by a Donor or acquired by the Trustee, in which the Principal Beneficiary lives ('the Residence'):

- (a) the Principal Beneficiary shall have a personal right of occupation in respect of the Residence for as long as they wish for their lifetime; and
- (b) the Residence may be sold and the proceeds used to acquire a substituted Residence to which the provisions of this sub-clause may apply, provided that in exercising their power pursuant to this paragraph, the Trustee shall act to achieve the sole and ancillary purposes of the trust, and have regard to the priority of the Principal Beneficiary as set out in the preceding sub-clauses.

## 2.4 Power to Accumulate Income

The Trustee may, in any Accounting Period, accumulate and retain as much of the income of the Trust Fund, if any, as is required to achieve the sole or ancillary purposes of the trust during that Accounting Period, as an addition to the Trust Fund.

[Commentary: This clause allows the trustee to decide to save some of the income each year rather than having to distribute it all. This gives the trustee flexibility in administering the trust assets and income. There may be tax issues relating to accumulation of income so the trustee should get professional advice before making a decision.

Paying income from a special disability trust for the care and accommodation needs of the principal beneficiary with a severe disability will not affect that person's income support entitlements.]

## 3 Trust Property Requirements

### 3.1 Contributions

The Trustee may accept Contributions from anyone who is eligible to be a Donor.

[Commentary: These provisions regulate the sources of the funds of the trust, consistent with Social Security and DVA rules. In particular, they prevent the person with a severe disability from providing funds to their 'own' trust except in limited circumstances.]

### 3.2 Non-acceptable Contributions

The Trustee shall not accept any of the following:

- (a) Contributions made by the Settlor other than the settled sum \*;
- (b) conditional Contributions by any Donor;

[Commentary: This means that a donor cannot control how their gift is used. For example, if a person gives a property to the trust they cannot demand that the trust not sell the property. Once a gift has been made to the trust, it is the trustee who will decide how to use the trust assets for the care and accommodation needs of the beneficiary. This does not, however, stop the donor nominating to whom their proportion of the trust assets should be distributed when the trust comes to an end. See clause 4.2.]

- (c) any asset transferred to the trust by the Principal Beneficiary or the Principal Beneficiary's Partner unless:
  - (i) the asset is all or part of a bequest, or a superannuation death benefit; and
  - (ii) the bequest or superannuation death benefit was received not more than three years before the transfer;
- (d) any Compensation received by or on behalf of the Principal Beneficiary; or
- (e) any Contribution that would cause the Trustee to be in breach of the specific requirements set out in these terms of trust.

[Commentary: Clauses 3.3, 3.4 and 3.5 are intended to prevent the trust channelling assets back to the family, or undertaking other transactions with closely related parties, which might take the focus of the trust away from providing care or accommodation for the person with a severe disability and which would infringe the special disability trust rules.]

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\* Omit if trust established under a Will

### 3.3 Restrictions on Use of Trust Funds

- (a) The Trust Fund or any of the income of the Trust Fund cannot be used to purchase or lease property from an Immediate Family Member or a Child of the Principal Beneficiary, even if that property is to be used for the Principal Beneficiary's accommodation;

[Commentary: For example, the trust could not buy the property from an immediate family member. However, the immediate family member could give the property to the trust.]

- (b) For the purpose of this sub-clause, 'property' includes:

- (i) a right to accommodation for life in a residence; and
- (ii) a life interest in a residence.

### 3.4 Prohibition on Borrowing

The trustee must not borrow money, whether from a related or non-related party.

### 3.5 Further Prohibitions with regard to Related Parties

[Commentary: The objective of the trust fund is to pay for the principal beneficiary's care and accommodation costs. Lending funds to the related parties is not consistent with this objective.]

- (a) The Trustee must not;

- (i) lend from or give any other financial assistance using the Trust Fund or the income of the Trust Fund to; or
- (ii) intentionally acquire, except by way of a Contribution, property (other than a listed security acquired at market value) from; or
- (iii) employ, engage or pay any agent, contractor or professional person for any services in relation to the trust fund or the Principal Beneficiary who is; or
- (iv) enter into an uncommercial transaction with any person who is;

a related party;

- (b) For the purposes of this clause, 'related party' means:

- (i) the Settlor\*;
- (ii) the Trustee, other than a Professional Trustee for the purposes of paragraph 5.1(a)(iii);
- (iii) a Donor;
- (iv) the Principal Beneficiary;
- (v) the Appointor;
- (vi) an Immediate Family Member;
- (vii) a parent or a sibling of anyone in any of the preceding sub-paragraphs of this paragraph;
- (viii) a descendant of anyone in any of the preceding sub-paragraphs of this paragraph;
- (ix) a Partner of anyone in any of the preceding sub-paragraphs of this paragraph; or
- (x) any entity (other than widely held entities) of which anyone in the any of the preceding sub-paragraphs of this paragraph is a director, shareholder, trustee or holds the power to appoint a director or trustee.

---

\* Omit if trust established under a Will

### 3.6 Prohibition on Lending to Principal Beneficiary

[Commentary: The objective of the trust fund is to pay for the principal beneficiary's care and accommodation costs. Lending funds to the principal beneficiary or their partner is not consistent with this objective.]

The Trustee must not lend any of the Trust Fund or any of the income of the Trust Fund to the Principal Beneficiary or the Principal Beneficiary's Partner.

### 3.7 Donor Register

[Commentary: Keeping a record of the donors is important for establishing who receives the assets of the trust when it comes to an end. It can also be used to advise Centrelink of the contributions made to the trust.]

The Trustee must maintain a register of all Donors to the Trust Fund in accordance with Schedule A.

## 4 End of Trust

[Commentary: This provision regulates the winding up of the trust when it is no longer required or otherwise comes to an end. It allows the people who contribute assets to receive back their contributions, on a proportional basis, or to nominate someone else to whom the assets should be transferred. A parent of the beneficiary with a severe disability could nominate their other children or their grandchildren, for example. There may be issues under the gifting rules for someone who contributed assets if the trust comes to an end within 5 years of the contribution. In that case, you may need to obtain advice. This may also be a consideration in deciding whom to nominate to receive any assets, which become available at the end of the trust.]

### 4.1 Balance of Trust at the End Date

- (a) If, at the end date, after the payment of all taxes and expenses, the Trust Fund has not been fully expended on the purposes of the trust, or the income has not been fully allocated, the property of the Trust Fund and any unallocated income ('the balance of the Trust') shall be dealt with in accordance with the remainder of this clause;
- (b) If there is more than one Donor to the Trust Fund, the trustee shall identify each Donor's Contributions to the Trust Fund;
  - (i) calculate the percentage of each Donor's Contributions to the overall Contributions to the Trust Fund; and
  - (ii) apply the percentage to the balance of the Trust to determine the balance of each Donor's Contribution ('the Donor's Contribution Balance');
- (c) On the end date, the settled sum shall be deemed a Contribution made:
  - (i) If only one Donor, by the Donor; or
  - (ii) If more than one Donor, by the Donor who made the largest Contribution; or
  - (iii) If more than one made the equal largest Contribution, equally between those Donors.

## 4.2 Distribution of Trust Property at the End Date

- (a) The Trustee anticipates that a Donor may make a nomination at the time of contribution regarding the distribution of all or part of his, her or its Contribution Balance at the end date;
- (b) During the term of the trust:
  - (i) a Donor who is an individual may alter his or her nomination by making a subsequent valid nomination during the Donor's lifetime; and
  - (ii) a Donor that is an entity (such as the trustee of a deceased estate, the trustee of any other trust or a corporation) may alter its nomination by making a subsequent valid nomination for as long as the entity exists;

and the Trustee shall only have regard to the last valid nomination made by the Donor;

- (c) For any such nomination or subsequent nomination to be valid, the nomination must be:
  - (i) in the form set out in Schedule B;
  - (ii) submitted in writing to the Trustee; and
  - (iii) formally accepted by the Trustee in writing, and an endorsement by the Trustee on the form is sufficient for this purpose;
- (d) The Trustee may in its absolute discretion, refuse to accept a nomination or a subsequent nomination;
- (e) Where a Donor has nominated his or her estate, or where a Donor's Contribution Balance is to be dealt with under the terms of the Donor's last Will, an individual Donor is not required to notify the Trustee of any change to his or her last Will;

[Commentary: Note: alteration of a nomination once the trust is established may have state duty, capital gains tax and other tax consequences for the trust.]

- (f) At the end date, the Trustee shall distribute the Donor's Contribution Balance to the Specified Beneficiary in accordance with the Donor's last valid nomination in Schedule B;
- (g) If, with regard to all or any part of the Donor's Contribution Balance, the Donor has not made a valid nomination, or if any Specified Beneficiary cannot receive a distribution, the Trustee shall distribute that part of the Donor's Contribution Balance to the Donor, if living at the end date, or if not living, to the legal personal representative of the Principal Beneficiary.

## 5 The Trustee

### 5.1 Qualifications of the Trustee

[Commentary: The requirement for at least two trustees is aimed at protecting the principal beneficiary.]

- (a) The Trustee must:
  - (i) in relation to an individual:

- (1) be an Australian resident;
  - (2) not have been convicted of an offence against or arising out of a law of the Commonwealth, a State, Territory or a foreign country, being an offence of dishonest conduct;
  - (3) not have been convicted of an offence against or arising out of the Social Security Act, the Administration Act or the Veterans' Entitlement Act; and
  - (4) not have been disqualified at any time from managing corporations under the Corporations Act 2001;
- (ii) in relation to a corporation, be a corporation with two or more directors who comply with the requirements of sub-paragraph 5.1(a)(i); or
  - (iii) be a Professional Trustee who complies with the requirements of sub-paragraphs 5.1(a)(i) or 5.1(a)(ii);
- (b) If at any time the Trustee is not a corporation or a Professional Trustee, there must be two or more individuals acting jointly as Trustee.

## 5.2 Resignation of Trustee

Any Trustee may resign office by notice in writing given to the other Trustees and the Appointor (if any) and such resignation shall take effect upon such notice being given.

## 5.3 Trustee's remuneration

- (a) Any Trustee who is a Trustee Corporation shall be entitled to make all such usual and proper charges for both professional and other services in the administration of this Trust Fund and for the trustee's time and trouble as the trustee would have been entitled to make if not a Trustee and so employed;
- (b) Any trustee who is a Professional Trustee other than a Trustee Corporation, will be entitled to charge and be paid all professional or other charges for any business or act done by him or her, or his or her firm, in connection with the special disability fund hereof including acts which a trustee could have done personally as if he or she were not such a trustee.

[Commentary: You can make broader provisions about remuneration to trustees if you wish, subject to the limitations on payments to immediate family members and having regard to the sole purpose of the trust.]

## 5.4 Delegation of Powers

The Trustee may in writing delegate the exercise of all or any of the powers or discretion hereby conferred on the trustee to any other person or persons and may execute any powers of attorney or other instrument necessary to give effect to such purpose, however the Trustee (including the delegate) must at all times satisfy the requirements in sub-clause 5.1 regarding the qualifications of the Trustee.

[Commentary: The power of delegation operates in situations where the trustee is unable to act – for example, where the trustee has gone away for a time, or has been hospitalised for a short time but decisions need to be made about the operation of the trust. This clause should be used where the trustee does not want to resign, or should not be forced to resign, but is unable to exercise their duties for a definite period of time.]

## 5.5 Extent of Trustee Responsibility

No Trustee shall be responsible for any loss or damage occasioned by the exercise of any discretion or power hereby or by law conferred on the Trustee or by failure to exercise any such discretion or power where the Trustee has acted honestly and reasonably.

[Commentary: This clause limits the trustees' liability for mistakes or action which cause loss to the trust. The trustees will only be liable for acting knowingly and deliberately wrongly. This gives the trustees protection from many possible complaints, and confirms the trustees' freedom of action. However, if you want the trustees to be subject to stricter control, you can alter this clause to suit your requirements.]

## 5.6 Liability and Indemnity

[Commentary: This gives the trustees the right to be covered by the trust for any expenses or liabilities they incur from acting as trustees.]

Provided the Trustee has acted honestly and reasonably, the Trustee shall be entitled:

- (a) to be reimbursed and indemnified for all costs and expenses (including legal costs and state duty) incurred in relation to establishing, operating, administering, amending, terminating and winding up the Trust Fund; and
- (b) to be indemnified out of the assets for the time being comprising the Trust Fund against liabilities incurred by it in the execution or attempted execution or as a consequence of the failure to exercise any of the trusts authorities powers and discretions hereof or by virtue of being the Trustee of the trust;

but shall have no recourse against the Principal Beneficiary or any of the Donors or Specified Beneficiaries to meet such indemnity.

## 6 Management of Trust Funds

[Commentary: These provisions require the trustee to act prudently in managing the trust assets and investments.]

### 6.1 Powers of Trustee

- (a) The Trustee shall have such powers as are necessary to carry out their responsibilities under these terms of trust and to fulfil the sole and ancillary purposes, and may nominate any specific powers that they may require, save that the Trustees must at all times administer the fund in accordance with the relevant Act governing Trustees, the Social Security Act, the Administration Act and the Veterans' Entitlements Act, and these terms of trust;
- (b) Without limiting the generality of the above sub-clause, the Trustee shall have the specific power to open an account with a financial institution.

### 6.2 Standard of Care

The Trustee must, in managing the Trust Fund and the income generated from the Trust Fund (including exercising a power of investment):

- (a) if the Trustee's profession, business or employment is or includes acting as a Trustee or investing money on behalf of other persons, exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
- (b) if the Trustee is not engaged in such a profession, business or employment, exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.

### 6.3 Investment Strategy

The Trustee must formulate and give effect to an investment strategy, for the purpose of satisfying and fulfilling the sole purpose as defined in clause 2. Subject to these needs, the investment strategy must have regard to:

- (a) the risk involved in making, holding and realising, and the likely return from, the Trust Fund's investments having regard to its objectives and its expected cash flow requirements;
- (b) the composition of the Trust Fund's investments as a whole including the extent to which the investments are diverse or involve the Trust in being exposed to risks from inadequate diversification;
- (c) the effect of the proposed investment in relation to the tax liability of the trust;
- (d) the liquidity of the Trust Fund's investments having regard to its expected cash flow requirements; and
- (e) the ability of the Trust Fund to discharge its existing and prospective liabilities.

## 7 Appointment and Removal of Trustee

[Commentary: This clause shows the role of the appointor to control future changes of trustee. It also provides the means to resolve any deadlocks between the trustees, avoiding the need for court proceedings. You may adopt other means of dealing with any disputes.]

- (a) Subject to sub-clause 5.1, the Appointor may at any time by writing:
  - (i) remove from office any Trustee (other than a Trustee appointed by the Court);
  - (ii) appoint a new or additional Trustee; or
  - (iii) appoint a replacement Trustee for any Trustee who resigns as Trustee or ceases to be Trustee under any provision of these terms of trustor law;
- (b) If any Trustee forms the opinion that a deadlock exists in relation to the administration of the trust, the Trustees shall then be deemed to have resigned from their office and the Appointor, or if no Appointor, the resigning Trustees shall appoint a Professional Trustee (who is not a resigning Trustee) in accordance with this clause.

## 8 Reporting & Audit Requirements

### 8.1 Keep Accounts

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.

### 8.2 Financial Statements & Reporting

[Commentary: The financial statements make up a financial report, which details the assets and liabilities, and income and expenditure of the trust.]

- (a) As soon as practicable after the end of each Accounting Period, the Trustee must prepare or cause to be prepared written financial statements showing the financial position of the trust at the end of that Accounting Period;
- (b) The financial statements must:
  - (i) where the Trustee is or includes a Trustee Corporation, be prepared in accordance with all regulatory and legislative requirements applying to a Trustee Corporation; or
  - (ii) otherwise, be prepared by a member of the Institute of Chartered Accountants in Australia, CPA Australia or the National Institute of Accountants, who is not an Immediate Family Member of the Principal Beneficiary;
- (c) The Trustee must, on or before 31 March each year, forward to the Secretary the financial statements in relation to the previous financial year.

### 8.3 Audit Requirements

[Commentary: An audit is a formal examination of the trust's accounts and financial position by an independent party. It may also check on compliance with applicable laws, regulations and Centrelink and DVA requirements.]

- (a) An audit of the trust may be requested for the previous financial year ended on 30 June or other period as determined by legislative instrument pursuant to the Social Security Act or the Veterans' Entitlements Act by:
  - (i) the Principal Beneficiary;
  - (ii) an Immediate Family Member;
  - (iii) a legal guardian or financial administrator of the Principal Beneficiary (under Commonwealth, State or Territory law);
  - (iv) a person acting as guardian for the Principal Beneficiary on a long-term basis; or
  - (v) the Secretary;
- (b) If an audit request is received, the Trustee must within a reasonable time:
  - (i) cause an audit of the trust to be carried out unless already carried out for the relevant time period; and
  - (ii) provide a copy of the audit report to the person requesting the audit, to any guardian or administrator and to the Secretary;

- (c) The audit must be in accordance with the requirements of any legislative instrument made pursuant to 1209T(7) of the Social Security Act or 52ZZWG(7) of the Veterans' Entitlements Act;
  - (i) where the Trustee is or includes a Trustee Corporation, be carried out in accordance with all regulatory and legislative requirements applying to a Trustee Corporation; or
  - (ii) otherwise, be carried out by a member of the Institute of Chartered Accountants in Australia, CPA Australia or the National Institute of Accountants, who is not an Immediate Family Member of the Principal Beneficiary or the person who prepared the Financial Statements.

## 9 Miscellaneous

### 9.1 Waiver of Contravention

[Commentary: This sub-clause gives the trustees the power to seek approval from Centrelink or DVA for the trust to continue as a special disability trust if the rules for special disability trusts have been infringed in some way.]

The Trustee shall have the power to:

- (a) seek a waiver of contravention from the Secretary in relation to contravention of any requirement of the Social Security Act or the Veterans' Entitlements Act by the trust which would disqualify the trust from being a special disability trust under the Social Security Act or the Veterans' Entitlements Act, if not for the contravention; and
- (b) take the necessary steps to comply with any conditions imposed by the Secretary by way of a waiver notice under section 1209U of the Social Security Act or section 52AAWH of the Veterans' Entitlements Act and any related legislative instrument made pursuant to these sections.

### 9.2 Amending the Trust

[Commentary: Another important role for the appointor.]

- (a) Save as provided in this sub-clause the terms of these terms of trust shall not be capable of being revoked added to or varied;
- (b) If there is for the time being an Appointor, the Trustee with the consent in writing of the Appointor, may at any time and from time to time by Deed amend the provisions whether of these terms of trust or of any Deed executed pursuant to this sub-clause but so that such amendment:
  - (i) shall be made only if it would not cause the trust to become non-compliant with the requirements of Part 3.18A of the Social Security Act or Division 11B of the Veterans' Entitlements Act in relation to special disability trusts; and
  - (ii) does not infringe any law against perpetuities; and
  - (iii) shall be made only if it is not made in favour of or for the benefit of or so as to result in any benefit to the settlor; and

- (iv) does not affect the beneficial entitlement to any amount allocated for or otherwise vested in the Principal Beneficiary prior to the date of the amendment.
- (c) The operation of this sub-clause shall not prevent:
  - (i) the Trustee accepting a nomination in accordance with subsection 4.2; and
  - (ii) the Trustee exercising its powers of nomination in accordance with sub-clause 6.1.

### 9.3 Definitions

In these terms of trust unless the context otherwise requires the following expressions shall have the following meanings:

'accounting period' means such period as the Trustee may from time to time determine to be an accounting period and subject to any contrary determination by it means such period of twelve months ending on the 30th day of June in each year PROVIDED firstly that the period commencing on the date of these terms of trust and ending on the 30th day of June next shall be an accounting period and secondly that the period commencing on the first day of July prior to the end date and ending on the end date shall be an accounting period.

'the Administration Act' means the Social Security (Administration) Act 1999 (Cth).

'the Appointor' means the person or persons named in these terms of trust, subject to any appointment to the contrary made in accordance with sub-clause 1.6.

'Child' in relation to a Principal Beneficiary has the meaning given to it by section 1209R of the Social Security Act and section 52ZZZWE(5) of the Veterans' Entitlements Act.

'Compensation' has the meaning given to it under Part 1.2 of the Social Security Act and under Division 5A of the Veterans' Entitlements Act.

'Contributions' are money, investments and other assets, donations, gifts, endowments, trust distributions and other forms of financial assistance paid or transferred by a Donor on an unconditional basis and accepted by the Trustee as additions to the Trust.

'Donor' means any person who makes a Contribution to the Trust Fund, but who is not the Settlor.

'Immediate family member' has the meaning given by section 23 (1) of the Social Security Act and section 5Q(1) of the Veterans' Entitlements Act.

'Invest' means employ funds in a manner permitted by these terms of trust and 'investment' shall have a corresponding meaning.

'Partner' has the meaning given by section 4(1) of the Social Security Act and section 5E(1) of the Veterans' Entitlements Act, whichever is applicable.

'Professional Trustee' means:

- (a) a Trustee Corporation; or
- (b) an Australian Legal Practitioner within the meaning of the (NSW) Legal Profession Act 2004 or the equivalent within its legislative equivalent in other Australian States or Territories.

'the Principal Beneficiary' means the person named in these terms of trust as the principal beneficiary and who fulfils the requirements set out in section 1209M of the Social Security Act or 52ZZZWA of the Veterans' Entitlements Act.

'Secretary' has the meaning given by section 23 of the Social Security Act and section 5Q of the Veterans' Entitlements Act.

'the Social Security Act' means the Social Security Act 1991 (Cth).

'Specified Beneficiary' means a person or entity nominated to receive a residuary benefit in accordance with the procedures set out in clause 4 and Schedule B.

'the Trustee' means the Trustee or Trustees for the time being of this Trust (as named in these terms of trust) whether original, additional or substituted.

'the Trust Fund' means:

- (a) the settled sum;
- (b) all moneys and other property of any description whatsoever paid or transferred to and accepted by the Trustee as additions to the Trust Fund;
- (c) the accumulation of net income as provided for in sub-clause 2.4;
- (d) all accretions to the Trust Fund;
- (e) the investments and property from time to time representing the moneys property accumulations accretions and additions or any part or parts thereof respectively.

'Trustee Corporation' means:

- (a) a corporate body authorised by and regulated under the (NSW) Trustee Companies Act 1964 or its equivalent in other Australian States or Territories to carry on business as a trustee company; and
- (b) the Public Trustee created by the (NSW) Public Trustee Act 1913 or its equivalent in other Australian States or Territories.

'Uncommercial Transaction' means the provision of a financial or other benefit on terms which:

- (a) would not be reasonable in the circumstances if the benefit were provided under an agreement arrangement between independent parties dealing at an arm's length with each other in relation to the transaction; or
- (b) are more favourable to the party to the transaction (not being the Trustee) than the terms referred to in paragraph (a) of this definition;

and which a reasonable person in the position of the Trustee would not have entered into having regard to all relevant circumstances.

'Veterans' Entitlement Act' means the Veterans' Entitlements Act 1986 (Cth).

## 9.4 Interpretation

In these terms of trust:

- (a) The singular includes the plural and vice versa, each gender includes the other genders and references to persons include corporations and other legal persons;

- (b) References to any statute shall include any statutory amendment or re-enactment thereof or statutory provisions substituted therefore;
- (c) Headings are inserted for ease of reference and do not form part of these terms of trust and shall not affect the construction of these terms of trust;
- (d) If by reason of the inclusion of any word, description or provision in these terms of trust, all or any part of these terms of trust would be invalid, then these terms of trust is to be construed as if the word, description or provision were not included in these terms of trust.

## 9.5 Applicable Law

These terms of trust are governed by the laws of [State/Territory to be inserted].

SAMPLE

[Commentary: Note: these execution clauses are not required if the trust is established by Will.  
A will must be executed in accordance with the formalities in the relevant law governing Wills.]

**EXECUTED AS A DEED**

**SIGNED SEALED AND DELIVERED** by ]  
**[SETTLOR]** ] .....  
in [State] in the presence of: ]

.....  
Witness

**EXECUTED by [TRUSTEE CO] PTY LTD**  
(ACN [number]) in accordance with the  
Corporations Act:

..... **Director**  
..... Director/Secretary

**SIGNED SEALED AND DELIVERED** by ]  
**[TRUSTEE]** ] .....  
in [State] in the presence of: ]

.....  
Witness

**SIGNED SEALED AND DELIVERED** by ]  
**[TRUSTEE]** ] .....  
in [State] in the presence of: ]

.....  
Witness

# Schedule A

## Special Disability Trust Asset Register

**Donor One**

Full Name:		
Address:		
Contribution description	Market value of Contribution at time of transfer	Date of Contribution

**Donor Two**

Full Name:		
Address:		
Contribution description	Market value of Contribution at time of transfer	Date of Contribution

## Schedule B

### Nomination of Specified Beneficiary Form

**[If a Donor wishes to make a nomination, this form is to be completed when the Donor makes their initial contribution. This nomination will apply to subsequent contributions made by the same Donor]**

Donor Name: .....

Address: .....

#### To the trustee:

**Upon the end of the trust, I nominate the following person or persons to receive my Donor's Contribution balance:** [Note: Repeat the alternatives below as required]

- | Specified Beneficiary  | % Contribution Balance |
|--|------------------------|
| <input type="checkbox"/> <b>Myself, or if I am deceased, then my legal personal representative.</b> [Note: the Will of the donor, or the intestacy laws as they apply to the donor's estate, will govern the distribution in this case.]   | ..... %                |
| <input type="checkbox"/> <b>The legal personal representative of the Principal Beneficiary.</b> [Note: the Will of the Principal Beneficiary, or the intestacy laws as they apply to the Principal Beneficiary's estate, will govern the distribution in this case.]                                       |                        |
| <input type="checkbox"/> <b>a) My</b><br>[husband/wife/partner/child/niece/nephew/friend]<br>[full name] of [address].   | ..... %                |
| <b>b) If on the end date, [name] is not surviving, then the children of [name] who are surviving, and if more than one as tenants in common in equal shares.</b>   | ..... %                |
| <b>c) If on the end date, no person specified in two preceding paragraphs is surviving, then the legal personal representative of [name].</b>  | ..... %                |
| <input type="checkbox"/> <b>In accordance with any directions I may leave in my last Will that are specific as to the distribution of my Donor's contribution balance of this trust.</b> [Note: If no directions are included in the Will, the default provisions as set out in subclause 4.2 will apply.] | ..... %                |

[Full name of charity, and if applicable, ACN or ARBN] of ..... %  
[address of charity].

[Note: Always include if there are any gifts to charities] **With respect to any distribution to a charitable organisation pursuant to this nomination:**

a) if the organisation cannot receive a gift, then that gift shall be made to the charitable organisation in Australia that the trustees consider most nearly fulfils the objects I intend to benefit; and

b) the receipt of the authorised officer for the time being, of the organisation benefiting under this clause shall be sufficient discharge to the trustees.

Other ..... %

Signed:

\_\_\_\_\_

[Donor]

[Witness]

Dated:

Dated:



# 第4節

## 結束語

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認真考慮您想為殘障子女或其他殘障家人準備些什麼。

擬定您的願景並開始計劃要如何設立信託。

徵求意見，並認真考慮您個人情況的意義。

要從整體觀點來考慮稅務和收入支持問題，瞭解什麼才是殘障子女或其他殘障家人的妥善遺產規劃。

考慮特殊殘障信託是否對您的個人情況有所用處。

做出決定並加以實施。

### 作者介紹

#### Stephen Booth

Stephen Booth是Coleman & Greig律師事務所的合夥人。他在為殘障人士（尤其是智力障礙人士）父母提供遺產規劃和遺囑及其他殘障相關法律事務的意見方面，有20多年的從業經驗。他向很多父母團體和殘障人士組織提供意見，並積極參與智力障礙權利服務處 (Intellectual Disability Rights Service) (新州) 和公民代言組織的工作。

Stephen還為智障人士的父母編制了一份立遺囑指南，並為一份律師手冊編寫幾個章節，指導律師在這一領域的執業工作。

#### Allan Swan

在職業生涯中，Allan的工作時間分為：

- ▶ Moores Legal律師事務所負責人，負責這一遺產領域的執業工作；
- ▶ 規劃和結構；
- ▶ 專業組織、專業執業機構的講演者；
- ▶ 社區團體；以及
- ▶ 遺產規劃、信託和相關課題的作者和教師。

他在遺產規劃領域的興趣最初源自家庭經歷（包括家庭農場）及其個人在智障兒童家庭的親身經歷——他已故的妹妹Janice出生時患有身體和智力障礙，而他的嫂子Heather一生都要與一系列障礙作鬥爭，包括極低的視力和相對嚴重的自閉症。



# 特殊殘障信託 解決相關問題： 規劃未來： 殘障人士

FaCSIA 04:55.0705