

EXPLANATORY STATEMENT

Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2013

Summary

The *Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2013* (the Determination) is made under subsections 1209P(2), 1209S(4) and 1209T(7) of the *Social Security Act 1991* (the Act) and makes minor technical amendments to the *Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2011*. The minor technical amendments involve changes to the definition of “Australian Accounting Standards” and “Australian Auditing Standards” used in the Determination to better reflect the terms used.

Subsection 1209P(2) of the Act provides that the Secretary to the Department of Families, Housing, Community Services and Indigenous Affairs may 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. Subsection 1209S(4) of the Act sets out certain matters in regard to the annual financial reports of a trust. Finally, subsection 1209T(7) of the Act 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

Subsection 1.1 sets out the name of the Determination.

Subsection 1.2 provides that the Determination commences on 1 July 2013.

Subsection 1.3 revokes the *Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2011*. The revocation of the *Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2011* does not affect the validity of the trust deeds, annual financial reports or audits made in compliance with that Determination.

Subsection 1.4 defines various terms that are used in the Determination.

Changes to definitions in the revoked *Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2011*.

The definitions of the terms *Australian Accounting Standards* and *Australian Auditing Standards* have been revised from the *Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2011*. The word ‘adopted’ has been removed from both definitions as the word ‘issued’ is sufficient. In addition the incorrect reference to ‘Australian Accounting Standards’ has been removed from the definition of *Australian Auditing Standards*.

The remaining terms are as they were in the previous determination. The term model trust deed is described as the document titled, ‘Model Trust Deed for Special Disability Trusts’ published by the Department of Families, Housing, Community Services and Indigenous Affairs, as existing on 1 January 2011. The ‘Model Trust Deed for Special Disability Trusts’ is available on the Internet – see www.fahcsia.gov.au.

Subsection 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

Subsection 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.

Subsection 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)).

Subsection 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

Subsection 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.

Subsection 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.

Subsection 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.

Subsection 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

Subsection 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 the audit request.

Subssection 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 or 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.

Subsection 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, the Department of Veterans' Affairs and the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education were consulted by electronic communication in the making of this Determination, to ensure a co-ordinated approach.

Regulation Impact Statement

A Regulation Impact Statement is not required for this Determination because this Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2013

The *Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2013* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Determination makes minor technical amendments to the *Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaHCSIA) Determination 2011* (The 2011 Determination). The 2011 Determination was made due to legislative changes which were made to the special disability trust provisions in the social security law, by the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Act 2011*.

The minor technical amendments involve changes to the definition of "Australian Accounting Standards" and "Australian Auditing Standards" used in the Determination to better reflect the terms used.

Human rights implications

The Determination engages the following human rights:

- the right to social security as recognised in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and
- the right to an adequate standard of living in Article 11 of ICESCR and Article 28 of the Convention on the Rights of Persons with Disabilities (CPRD).

The Determination promotes these rights by providing the structure of a “Special Disability Trust” under the social security law.

The effect of a trust being considered a “Special Disability Trust” under the social security law is that a certain amount of income from the trust can be used for the benefit of the principal beneficiary (but for purposes other than the primary purposes of the trust which is to meet reasonable care and accommodation needs of the beneficiary) while not being considered ordinary income for social security assessment purposes. This means that the beneficiary of the trust will potentially have more income to meet their needs before it affects their social security entitlement.

Conclusion

The Determination is compatible with human rights because it promotes the right to social security and the right to an adequate standard of living.

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