

Part 3.18A—Private financial provision for certain people with disabilities

Division 1—Special disability trusts

1209L What is a *special disability trust*?

A trust is a *special disability trust* if the following requirements of this Division are complied with:

- (a) the beneficiary requirements (see section 1209M);
- (b) the trust purpose requirements (see section 1209N);
- (c) the trust deed requirements (see section 1209P);
- (d) the trustee requirements (see section 1209Q);
- (e) the trust property requirements (see section 1209R);
- (f) the reporting requirements (see section 1209S);
- (g) the audit requirements (see section 1209T).

Note: The Secretary may waive one or more requirements in certain circumstances (see section 1209U).

1209M Beneficiary requirements

Single beneficiary rule

- (1) The trust must have no more than one beneficiary (the *principal beneficiary*), not including any residuary beneficiary.

Impairment or disability conditions

- (2) If the principal beneficiary has reached 16 years of age:
 - (a) the beneficiary must:
 - (i) have an impairment that would qualify the person for disability support pension; or
 - (ii) be receiving invalidity service pension under Part III of the Veterans' Entitlements Act; or
 - (iii) be receiving income support supplement granted on the ground set out in subparagraph 45A(1)(b)(iii) of the Veterans' Entitlements Act; and

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- (b) the beneficiary must:
 - (i) have a disability that would, if the person had a sole carer, qualify the carer for carer payment or carer allowance; or
 - (ii) be living in an institution, hostel or group home in which care is provided for people with disabilities, and for which funding is provided (wholly or partly) under an agreement, between the Commonwealth, the States and the Territories, nominated by the Secretary under subsection (3); and
- (c) the beneficiary must have a disability as a result of which he or she is not working, and has no likelihood of working, for a wage that is at or above the relevant minimum wage.

Note: For *relevant minimum wage*, see subsection 23(1).

- (3) The Secretary may, by legislative instrument, nominate an agreement for the purpose of subparagraph (2)(b)(ii).
- (4) If the principal beneficiary is under 16 years of age, he or she must be a profoundly disabled child within the meaning of section 197.

Living beneficiary rule

- (5) A trust stops being a special disability trust when the principal beneficiary dies.

Single trust rule

- (6) A trust is not a special disability trust for a particular principal beneficiary if, at the time of its creation, there is already another trust in existence for that person that is:
 - (a) a special disability trust; or
 - (b) a special disability trust within the meaning of the Veterans' Entitlements Act.

1209N Trust purpose requirements

Sole purpose—care and accommodation for principal beneficiary

- (1) Subject to this section, the sole purpose of the trust during the lifetime of the principal beneficiary, as provided by the trust deed

for the trust, must be to meet reasonable care and accommodation needs of the beneficiary.

Note: The provision of care and accommodation for the principal beneficiary is also dealt with at section 1209R.

- (2) The trust may have purposes, ancillary to the purpose mentioned in subsection (1), that are necessary or desirable to facilitate the achievement of that purpose.

Reasonable care and accommodation needs

- (3) If guidelines are made under subsection (4), for the purposes of this section the reasonable care and accommodation needs of a principal beneficiary of a special disability trust must be decided in accordance with the guidelines.
- (4) The Secretary may, by legislative instrument, make guidelines for deciding what are, and what are not, reasonable care and accommodation needs for principal beneficiaries of special disability trusts.

1209P Trust deed requirements

Compliance with determination

- (1) If a determination is made under subsection (2), the trust deed for the trust must comply with the determination.
- (2) The Secretary may, by legislative instrument, determine one or more of the following:
 - (a) the form of the trust deed required for a special disability trust;
 - (b) provisions which must be included in the trust deed;
 - (c) the form of those provisions;
 - (d) provisions which cannot be included in the trust deed.

Contravention of trust deed

- (3) A person must not contravene a provision of the trust deed that is required by this section to be included in the deed (whether or not the provision is required to be included in any particular form).

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1209Q Trustee requirements

- (1) A trustee of the trust who is an individual must:
 - (a) be an Australian resident; and
 - (b) not have been convicted at any time (including a time before the commencement of this section) of any of the following offences:
 - (i) an offence of dishonest conduct against, or arising out of, a law of the Commonwealth, a State, a Territory or a foreign country;
 - (ii) an offence against, or arising out of, this Act, the Administration Act or the Veterans' Entitlement Act; and
 - (c) not have been disqualified at any time (including a time before the commencement of this section) from managing corporations under the *Corporations Act 2001*.
- (2) In addition, if a trustee of the trust is a corporation, subsection (1) applies to each director of the trustee.

1209R Trust property requirements

- (1) The assets of the trust must not include any asset transferred to the trust by the principal beneficiary of the trust, or the principal beneficiary's partner, unless:
 - (a) the transferred asset is all or part of a bequest, or of a superannuation death benefit; and
 - (b) the transferor received the bequest or superannuation death benefit not more than 3 years before transferring the transferred asset.
- (2) The assets of the trust must not include any compensation received by or on behalf of the principal beneficiary.
- (3) The trust must not be used to pay an immediate family member, or a child, of the principal beneficiary for the provision to the beneficiary of:
 - (a) care services; or
 - (b) services for the repair or maintenance of the beneficiary's accommodation.

Note: For *immediate family member*, see subsection 23(1).

- (4) The trust must not be used to purchase or lease property from an immediate family member, or a child, of the principal beneficiary, even if the property is to be used for the beneficiary's accommodation.

Note: For *immediate family member*, see subsection 23(1).

- (5) In this section:

child, of a principal beneficiary, means the natural child, adopted child or step-child of the beneficiary (no matter how old the child or step-child is).

property includes:

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

1209S Reporting requirements

- (1) The trustees of the trust must, on or before 31 March each year, give the Secretary written financial statements about the trust in relation to the financial year ending on 30 June in the previous year.
- (2) The financial statements must be prepared by:
- (a) if a determination is made under subsection (4) that requires such financial statements to be prepared by a person with stated qualifications—such a person; or
 - (b) whether or not such a determination is made—a person approved by the Secretary for the purpose.
- (3) If a determination is made under subsection (4) that requires financial statements to include information of a stated kind, the financial statements must include information of that kind.
- (4) The Secretary may, by legislative instrument, make determinations for the purposes of this section.

Section 1209T

1209T Audit requirements

Trustee duties

- (1) The trustees of the trust must, within a reasonable time after receiving a request under subsection (3):
 - (a) cause an audit of the trust to be carried out in relation to the period mentioned in subsection (2); or
 - (b) if, at the time of the request for the audit, an audit (the ***earlier requested audit***) of the trust had already been carried out, or was being carried out, for the purpose of this section in relation to that period—give a copy of the report of the earlier requested audit to the person making the request.

Audit period

- (2) The audit must relate to:
 - (a) the financial year ending on the 30 June last preceding the request; or
 - (b) if a determination is made under subsection (7) that provides for a different period—that period.

Who may request audit

- (3) The following persons may request an audit of the trust for the purposes of this section:
 - (a) the principal beneficiary;
 - (b) an immediate family member of the principal beneficiary;
 - (c) a person who is, under the law of the Commonwealth, a State or a Territory, the legal guardian or financial administrator of the principal beneficiary;
 - (d) a person who is otherwise acting as the principal beneficiary's guardian on a long-term basis;
 - (e) the Secretary.

Note: For ***immediate family member***, see subsection 23(1).

Copies of audit report

- (4) If an audit report for a trust is given to the trustees for the purpose of subsection (1), the trustees must, within a reasonable time, give a copy of the report to:

- (a) the person requesting the audit; and
- (b) if the guardian or administrator mentioned in paragraph (3)(c) did not request the audit—the guardian or administrator; and
- (c) if the Secretary did not request the audit—the Secretary.

Auditor qualifications and required information

- (5) The audit must be prepared by:
 - (a) if a determination is made under subsection (7) that requires such audits to be prepared by a person with stated qualifications—such a person; or
 - (b) whether or not such a determination is made—a person approved by the Secretary for the purpose.
- (6) If a determination is made under subsection (7) that requires audits requested under this section to include information of a stated kind, the audit must include information of that kind.
- (7) The Secretary may, by legislative instrument, make determinations for the purposes of this section.

1209U Waiver of contravention of this Division

- (1) A contravention of a requirement of this Division concerning a particular matter, in relation to a trust that would be a special disability trust if it were not for the contravention, does not prevent the trust being a special disability trust if:
 - (a) the Secretary, by written notice (a *waiver notice*) to the trustees, waives the requirement as it concerns that matter; and
 - (b) in a case where the waiver notice requires the trustees to comply with any conditions relating to the matter—the trustees comply with those conditions within the time or times (if any) stated in the waiver notice.
- (2) A waiver notice has effect, subject to any conditions mentioned in paragraph (1)(b):
 - (a) from:
 - (i) the time of the contravention; or

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- (ii) if the waiver notice states a time for the start of its period of effect that is after the time of the contravention—the stated time; and
 - (b) if the waiver notice states a time for the end of its period of effect—until the stated time.
- (3) If guidelines are made under subsection (4), a decision in relation to giving a waiver notice to the trustees of the trust must be made in accordance with the guidelines.
- (4) The Secretary may, by legislative instrument, make guidelines for deciding any or all of the following:
 - (a) whether or not to give waiver notices to trustees of trusts;
 - (b) what conditions to include in waiver notices;
 - (c) the periods during which waiver notices are to have effect.

Division 2—Income of special disability trusts

1209V Attribution of income

- (1) For the purposes of this Act, an amount of income that a special disability trust derives is taken not to be income received by any individual.

Note: For *special disability trust*, see section 1209L.

- (2) This section has effect despite Division 7 of Part 3.18 and any other provisions of this Act.

1209X Income amounts from special disability trusts

An income amount that the principal beneficiary of a special disability trust receives is not income of the beneficiary for the purposes of this Act to the extent that consideration for the income amount was provided by a distribution from the trust.

Note 1: For *income amount*, see section 8.

Note 2: For *special disability trust*, see section 1209L.

Division 3—Assets of special disability trusts

1209Y Attribution of assets

- (1) For the purposes of this Act, the assets of a special disability trust are not to be included in the assets of the principal beneficiary of the trust.

Note: For *special disability trust*, see section 1209L.

- (2) However, this section does not apply to the extent that the value of the assets owned by the trust exceeds the trust's asset value limit.

- (3) The *asset value limit* of a special disability trust is \$500,000.

Note: This amount is indexed annually on 1 July (see sections 1191 to 1194).

- (4) For the purposes of subsection (2), disregard the value of any right or interest of the trust in the principal home of the principal beneficiary of the trust.

Note: For *principal home*, see subsections 11(5) to (7).

- (5) This section has effect despite Division 8 of Part 3.18 and any other provisions of this Act.

Division 4—Transfers to special disability trusts

1209Z Effect of certain transfers to special disability trusts

- (1) If a person transfers an asset (the *transferred asset*) to a special disability trust, the transfer is taken not to be a disposal of the asset (within the meaning of section 1123) if:
- (a) the person is an immediate family member of the principal beneficiary of the trust; and
 - (b) the person, or the person's partner:
 - (i) is receiving a social security pension and has reached pension age; or
 - (ii) is receiving a service pension and has reached pension age within the meaning of the Veterans' Entitlements Act; or
 - (iii) is receiving income support supplement and has reached qualifying age within the meaning of subsection 45A(2) of the Veterans' Entitlements Act; and
 - (c) the person receives no consideration, and is not entitled to any consideration, for the transfer; and
 - (d) the transfer is unconditional; and
 - (e) the value of the transferred asset does not exceed \$500,000; and
 - (f) in a case where there has already been a transfer to which this section has applied (an *exempt transfer*), by that person or any other person, to the trust or any other special disability trust that had the same principal beneficiary—the sum of:
 - (i) the values of all of the assets transferred, by exempt transfers that have already been made, to the trust or any other special disability trust that had the same principal beneficiary; and
 - (ii) the value of the transferred asset;does not exceed \$500,000.

Note 1: For *special disability trust*, see section 1209L.

Note 2: For *immediate family member*, see subsection 23(1).

Note 3: For *pension age* (except for the purposes of subparagraph (1)(b)(ii) of this section), see subsections 23(5A) to (5D).

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Division 4 Transfers to special disability trusts

Section 1209ZA

Note 4: For *social security pension, service pension* and *income support supplement*, see subsection 23(1).

(2) This section has effect subject to sections 1209ZA and 1209ZD.

(3) In this section:

other special disability trust includes a special disability trust within the meaning of the Veterans' Entitlements Act.

value, of an asset transferred to a special disability trust, means the market value of the asset at the time of the transfer.

1209ZA The effect of exceeding the \$500,000 limit

(1) If section 1209Z would apply to a transfer of an asset except for the fact that the value of the transferred asset exceeds \$500,000, that section does not prevent the transfer from being a disposal or disposition of the asset, but the amount of the disposal or disposition is taken to be the amount of the excess.

(2) If:

(a) section 1209Z would apply to a transfer of an asset but for the fact that the sum of:

(i) the values of all of the exempt transfers that have already been made to the trust or any other special disability trust that had the same principal beneficiary; and

(ii) the value of the transferred asset; exceeds \$500,000; and

(b) that sum would not exceed \$500,000 if the value of the transferred asset were disregarded;

that section does not prevent the transfer from being a disposal of the asset, but the amount of the disposal or disposition is taken to be the amount of the excess referred to in paragraph (a).

(3) This section has effect subject to section 1209ZD.

(4) In this section:

other special disability trust includes a special disability trust within the meaning of the Veterans' Entitlements Act.

value, of an asset transferred to a special disability trust, means the market value of the asset at the time of the transfer.

1209ZB Transfers by the immediate family members prior to reaching pension age etc.

- (1) If:
- (a) an immediate family member of the principal beneficiary of a special disability trust transfers an asset to the trust; and
 - (b) at the time of the transfer, neither the immediate family member nor the partner of the immediate family member is a person who:
 - (i) is receiving a social security pension and has reached pension age; or
 - (ii) is receiving a service pension and has reached pension age within the meaning of the Veterans' Entitlements Act; or
 - (iii) is receiving income support supplement and has reached qualifying age within the meaning of subsection 45A(2) of the Veterans' Entitlements Act;

the immediate family member is taken for the purposes of this Division only to transfer the asset to the trust at the earliest time at which subparagraph (b)(i), (ii) or (iii) applies to the immediate family member or partner.

Note 1: For *immediate family member*, see subsection 23(1).

Note 2: For *special disability trust*, see section 1209L.

Note 3: For *pension age* (except for the purposes of subparagraph (1)(b)(ii) of this section), see subsections 23(5A) to (5D).

Note 4: For *social security pension*, *service pension* and *income support supplement*, see subsection 23(1).

- (2) However, if under subsection (1) transfers of assets to the trust by different immediate family members are taken to have been made on the same day, the transfers are taken to have been made on that day in the order in which they would have been taken to be made but for this Division.

Note: For *immediate family member*, see subsection 23(1).

- (3) This section does not affect the operation of Part 3.12 or any other provision of this Act outside of this Division.

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1209ZC Transfers by principal beneficiaries or partners

- (1) If a person transfers an asset to a special disability trust, the transfer is taken not to be a disposal of the asset (within the meaning of section 1123) if:
- (a) the person is the principal beneficiary of the trust, or the principal beneficiary's partner; and
 - (b) the person receives no consideration, and is not entitled to any consideration, for the transfer; and
 - (c) the transfer is unconditional.

Note 1: For *special disability trust* see section 1209L.

Note 2: Section 1209R limits the circumstances in which the principal beneficiary or the principal beneficiary's partner can transfer assets to the trust.

- (2) This section has effect subject to section 1209ZD.

1209ZD Cessation of special disability trusts

- (1) If:
- (a) a special disability trust ceases to exist or ceases to be a special disability trust; and
 - (b) a person had transferred an asset to the trust during the period of 5 years immediately preceding the cessation; and
 - (c) section 1209Z, 1209ZA or 1209ZC applied to the transfer;
- then the transfer is taken, after the cessation, to be a disposal or disposition of the asset that occurred at the time of the transfer.

- (2) The amount of the disposal or disposition is taken to be the amount worked out using the formula:

$$\left(\text{Asset value} \times \frac{\text{Final value of trust assets}}{\text{Initial value of trust assets}} \right) + \text{Subsection 1209ZA(2) amount}$$

where:

asset value means:

- (a) if section 1209Z or 1209ZC applied to the transfer—the value of the asset at the time of the transfer; or
 - (b) if subsection 1209ZA(1) applied to the transfer—\$500,000;
- or

- (c) if subsection 1209ZA(2) applied to the transfer—the difference between the value of the asset at the time of the transfer and the amount that was taken under that subsection to be the amount of the disposal or disposition of the asset.

final value of trust assets means the value of all of the assets of the trust at the time of the cessation.

initial value of trust assets means the value of all of the assets of the trust at the time of the transfer.

subsection 1209ZA(2) amount means the amount (if any) that was taken under subsection 1209ZA(2) to be the amount of the disposal or disposition of the asset.

- (3) If the special disability trust ceases to exist, or ceases to be a special disability trust, because the principal beneficiary dies, the value of the asset at the time of the transfer is taken for the purposes of this section to be the value of so much (if any) of the asset as has not been returned to the person who had transferred the asset to the trust.
- (4) This section does not affect the application of section 1209Z, 1209ZA or 1209ZC to the transfer prior to the cessation.

1209ZE Effect of this Division

This Division (other than section 1209ZB) has effect despite Division 2 of Part 3.12 and any other provisions of this Act.