



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

*Social Security Act 1991*

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I, Jeff Harmer, Secretary to the Department of Families, Housing, Community Services and Indigenous Affairs, make these Guidelines under subsections 1209N (4) and 1209U (4) of the *Social Security Act 1991*.

Dated

2008

Secretary to the Department of Families, Housing, Community Services and  
Indigenous Affairs

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## Part 1 Preliminary

### 1.1 Name of Guidelines

These Guidelines are the *Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008*.

### 1.2 Commencement

These Guidelines commence on the day after they are registered.

### 1.3 Repeal

The *Social Security (Special Disability Trust) (FaCSIA) Guidelines 2006* are repealed.

### 1.4 Definitions

In these Guidelines:

*Act* means the *Social Security Act 1991*.

*approved provider* has the same meaning as in the *Aged Care Act 1997*.

*residential care service* has the same meaning as in the *Aged Care Act 1997*.

*trust* means a trust that would be a special disability trust if it were not for a contravention of a requirement of Division 1 of Part 3.18A of the Act in relation to the trust.

*waiver notice* has the same meaning as in paragraph 1209U (1) (a) of the Act.

## **Part 2 Trust purpose requirements**

### **Division 2.1 Reasonable care needs**

#### **2.1 Guidelines**

For subsection 1209N (4) of the Act, this Division sets out guidelines for deciding what are, and what are not, reasonable care needs for principal beneficiaries of special disability trusts.

#### **2.2 What are reasonable care needs**

- (1) A care need is a reasonable care need if:
  - (a) the need arises as a direct result of the disability of the principal beneficiary; and
  - (b) the need is for the primary benefit of the principal beneficiary; and
  - (c) the need is met in Australia.
- (2) Subject to subsection (3), the following table sets out examples of what are reasonable care needs.

<b>Item</b>	<b>Examples of what are reasonable care needs</b>
1	Professional care and case management required for, or because of, the principal beneficiary's disability
2	Therapy (including alternative therapy) that is approved, in writing, by a medical practitioner as required for, or because of, the principal beneficiary's disability
3	Specialised food specified by a medical practitioner as essential for the principal beneficiary's health
4	Mobility aids, prostheses and positioning aids required for, or because of, the principal beneficiary's disability
5	Sleeping and sensory aids required for, or because of, the principal beneficiary's disability
6	Personal care aids required for, or because of, the principal beneficiary's disability
7	Pressure care aids required for, or because of, the principal beneficiary's disability
8	Contenance aids required for, or because of, the principal beneficiary's disability
9	Communication devices (including computers) that are essential, or that have been modified, because of the principal beneficiary's disability

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<b>Item</b>	<b>Examples of what are reasonable care needs</b>
10	Modified vehicle, if required for, or because of, the principal beneficiary's disability
11	Modification to vehicle, if required for, or because of, the principal beneficiary's disability
12	Transport required for, or because of, the principal beneficiary's disability
13	Training for transitional or independent living skills of the principal beneficiary
14	Medical needs (including medicines and other items) required for, or because of, the principal beneficiary's disability
15	Health insurance and ambulance cover required for, or because of, the principal beneficiary's disability
16	Specialist and general practitioner services required for, or because of, the principal beneficiary's disability
17	Dental services required for, or because of, the principal beneficiary's disability
18	Surgery required for, or because of, the principal beneficiary's disability
19	The daily care fee charged by an approved provider in relation to the principal beneficiary's care and accommodation in a residential care service provided by the approved provider, and any additional itemised fees which are specifically for the care needs of the principal beneficiary resident in that service.

*Note* Section 15AD of the *Acts Interpretation Act 1901* provides that, where a legislative instrument includes an example of the operation of a provision, the example shall not be taken to be exhaustive.

- (3) However, if an example is inconsistent with a provision of the Act or another provision of this Part, the provision prevails over the example.

**2.3 What are not reasonable care needs**

- (1) A care need is not a reasonable care need if:
- (a) the need would be required by the principal beneficiary whether or not the principal beneficiary had his or her disability; or
  - (b) the need is met outside Australia.
- (2) Subject to subsection (3), the following table sets out examples of what are not reasonable care needs.

<b>Item</b>	<b>Examples of what are not reasonable care needs</b>
1	Food other than food specified by a medical practitioner as essential for the principal beneficiary's health

<b>Item</b>	<b>Examples of what are not reasonable care needs</b>
2	Toiletries such as toothpaste, toilet paper, soap, shampoo, sanitary pads and tampons
3	Medical needs (including medicines, vitamins and minerals) that are not required for, or because of, the principal beneficiary's disability
4	Vehicle maintenance and vehicle-related expenses other than those required for, or because of, the principal beneficiary's disability
5	Vehicle registration and insurance
6	Petrol for vehicle
7	Recreation and leisure activities
8	Computer except if the computer is essential for communication because of the principal beneficiary's disability
9	Communication devices unless modified because of the principal beneficiary's disability
10	Family care provided by a family member of the principal beneficiary
11	Therapy that is not required for, or because of, the principal beneficiary's disability or that is not approved in writing by a medical practitioner

*Note* Section 15AD of the *Acts Interpretation Act 1901* provides that, where a legislative instrument includes an example of the operation of a provision, the example shall not be taken to be exhaustive.

- (3) However, if an example is inconsistent with a provision of the Act or another provision of this Part, the provision prevails over the example.

## **Division 2.2 Reasonable accommodation needs**

### **2.4 Guidelines**

For subsection 1209N (4) of the Act, this Division sets out guidelines for deciding what are, and what are not, reasonable accommodation needs for principal beneficiaries of special disability trusts.

### **2.5 What are reasonable accommodation needs**

- (1) An accommodation need is a reasonable accommodation need if:
- (a) the need arises as a direct result of the disability of the principal beneficiary; or
  - (b) the need meets the requirements of subsection (2) or (3).
- (2) The need to pay for property, or for an interest in property, is a reasonable accommodation need if the property or interest is acquired or rented:
- (a) from a person who is not an immediate family member of the principal beneficiary; and
  - (b) for the accommodation needs of the principal beneficiary.

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- (3) The need to pay rates and taxes on a property is a reasonable accommodation need if the property:
- (a) is owned by a special disability trust; and
  - (b) is used for the accommodation of the principal beneficiary of the special disability trust.
- (4) Subject to subsection (5), the following table sets out examples of what are reasonable accommodation needs.

<b>Item</b>	<b>Examples of what are reasonable accommodation needs</b>
1	Modification to the principal beneficiary's place of residence arising from his or her disability
2	Maintenance of the principal beneficiary's place of residence that would not have been required if the principal beneficiary did not have the disability
3	Payment for the purchase the principal beneficiary's place of residence if the payment is not made to an immediate family member of the principal beneficiary
4	Payment of rental for the principal beneficiary's place of residence if the payment is not made to an immediate family member of the principal beneficiary
5	Payment of accommodation bond for the principal beneficiary if the payment is not made to an immediate family member of the principal beneficiary
6	Any itemised fees which specifically relate to the accommodation of the principal beneficiary residing in a residential care service provided by an approved provider.

*Note* Section 15AD of the *Acts Interpretation Act 1901* provides that, where a legislative instrument includes an example of the operation of a provision, the example shall not be taken to be exhaustive.

- (5) However, if an example is inconsistent with a provision of the Act or another provision of this Part, the provision prevails over the example.

**2.6 What are not reasonable accommodation needs**

- (1) Subject to subsection (2), an accommodation need is not a reasonable accommodation need if the need would be required by the principal beneficiary whether or not the principal beneficiary had his or her disability.
- (2) Subsection (1) does not apply to the need to pay for property, or for an interest in property, if the property or interest is acquired or rented:
- (a) from a person who is not an immediate family member of the principal beneficiary; and
  - (b) for the accommodation needs of the principal beneficiary.

- (3) Subject to subsection (4), the following table sets out examples of what are not reasonable accommodation needs.

<b>Item</b>	<b>Examples of what are not reasonable accommodation needs</b>
1	Ordinary maintenance and upkeep of the principal beneficiary's place of residence
2	Payment of utilities charges in connection with the principal beneficiary's place of residence

*Note* Section 15AD of the *Acts Interpretation Act 1901* provides that, where a legislative instrument includes an example of the operation of a provision, the example shall not be taken to be exhaustive.

- (4) However, if an example is inconsistent with a provision of the Act or another provision of this Part, the provision prevails over the example.



## Part 3                      **Waiver of contravention of requirements**

### 3.1            **Guidelines**

For subsection 1209U (4) of the Act, this Part sets out guidelines for deciding:

- (a) whether or not to give waiver notices to trustees of trusts; and
- (b) what conditions to include in waiver notices; and
- (c) the periods during which waiver notices are to have effect.

### 3.2            **Whether or not to give waiver notices**

The Secretary may decide to give a waiver notice to the trustees of a trust if the Secretary is satisfied of the following matters:

- (a) the requirement of Division 1 of Part 3.18A of the Act that has been contravened in relation to the trust is a requirement in 1 of the following provisions of the Act:
  - (i) for a trust created before 20 September 2006 in relation to which the trust deed cannot be varied — section 1209N, section 1209P or subsection 1209S (1) or (3) of the Act;
  - (ii) for any other trust — section 1209N or subsection 1209S (1) or (3) of the Act;
- (b) the contravention of the requirement of Division 1 of Part 3.18A of the Act to which the waiver notice relates does not involve fraudulent conduct;
- (c) for a contravention of a requirement in subsection 1209S (1) of the Act — the contravention was not caused by the trustees;
- (d) for 1 or more contraventions of a requirement to only use income that the trust derives and the assets of the trust for the purposes mentioned in subsection 1209N (1) or (2) of the Act:
  - (i) the total use of income that the trust derives and assets of the trust for a purpose other than:
    - (A) to meet reasonable care and accommodation needs of the principal beneficiary; or
    - (B) for purposes, ancillary to meeting the reasonable care and accommodation needs of the principal beneficiary, that are necessary or desirable to facilitate the meeting of those needs;

does not amount to more than \$5 000 for the financial year during which the contravention or contraventions occurred; and

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- (ii) having regard to all the circumstances, including the nature of the contravention or contraventions and the frequency of contraventions, the requirement should be waived.

**3.3 Conditions to include in waiver notices**

- (1) In deciding what conditions to include in a waiver notice that is to be given to the trustees of a trust, the Secretary must consider the need to include a condition that the waiver notice ceases to have effect if the trustees cease to comply with a condition that is included in the waiver notice after the time or times stated in the waiver notice for complying with the condition.
- (2) In deciding what conditions to include in a waiver notice that is to be given to the trustees of a trust created before 20 September 2006 in relation to which the trust deed cannot be varied, the Secretary must consider the need to include a condition requiring the trustees to give the Secretary a statutory declaration made by the trustees stating the matters mentioned in subsection (3).
- (3) A statutory declaration must state the following matters:
  - (a) that the trust is a protective trust;
  - (b) that the trustees will comply with Division 1 of Part 3.18A of the Act, including the following requirements:
    - (i) that the trust has no more than 1 beneficiary, not including any residuary beneficiary;
    - (ii) that the beneficiary of the trust meets the requirements of subsection 1209M (2) or (4) of the Act;
    - (iii) that the sole purpose of the trust is to meet reasonable care and accommodation needs of the beneficiary of the trust;
    - (iv) that the trust complies with a determination made by the Secretary under subsection 1209P (2) of the Act.

**3.4 Periods during which waiver notices have effect — trusts other than trusts created before 20 September 2006 with a trust deed that cannot be varied**

- (1) This section applies to:
  - (a) a trust created before 20 September 2006 (other than a trust in relation to which the trust deed cannot be varied); and
  - (b) a trust created on or after 20 September 2006.
- (2) The period during which a waiver notice in relation to a trust may have effect is a period of not more than 3 months from the time the notice has effect under paragraph 1209U (2) (a) of the Act.

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- (3) The Secretary may, on application made by the trustees of the trust, extend the period of effect of a waiver notice (other than a waiver notice given in relation to a contravention of a requirement in subsection 1209S (1) of the Act) for further periods of up to 3 months only if the total period during which the waiver notice would have effect would not exceed 12 months.

**3.5 Periods during which waiver notices have effect — trusts created before 20 September 2006 with a trust deed that cannot be varied**

- (1) This section applies to a trust created before 20 September 2006 in relation to which the trust deed cannot be varied.
- (2) The period during which a waiver notice in relation to a trust (other than a waiver notice given in relation to a contravention of a requirement in subsection 1209S (1) of the Act) may have effect is:
- (a) if the notice does not state a time for the end of its period of effect — an indefinite period from the time the notice has effect under paragraph 1209U (2) (a) of the Act; or
  - (b) in any other case — from the time the notice has effect under paragraph 1209U (2) (a) of the Act until the time stated in the notice for the end of its period of effect in accordance with paragraph 1209U (2) (b) of the Act.
- (3) A waiver notice given in relation to a trust in respect of a contravention of a requirement in subsection 1209S (1) of the Act may have effect during a period of not more than 3 months from the time the notice has effect under paragraph 1209U (2) (a) of the Act.