
Trustee Corporations Association of Australia

**Submission to Senate Standing
Committee on Community Affairs**

Special Disability Trusts

June 2008

Introduction

The Trustee Corporations Association (TCA) is the peak representative body for the trustee corporations industry in Australia. It represents 17 organisations, comprising all 8 regional Public Trustees and the great majority of the 10 private statutory trustee corporations (see Attachment).

We are pleased to provide comments to the Senate Community Affairs Committee's Inquiry into Special Disability Trusts.

Our members have a long history of managing people's financial affairs, including for those in the community who lack the capacity to do so themselves, such as minors and persons deemed *non compos mentis*.

The legislation under which trustee corporations operate requires them to have substantial capital and insurance, and to demonstrate high levels of expertise and diligence in carrying out their fiduciary functions.

Each year our members:

- write or revise about 60,000 wills
- administer about 10,000 deceased estates

TCA members currently manage assets for:

- 10,000 clients under power of attorney or other agency arrangements
- 35,000 clients under court and tribunal orders
- the beneficiaries of 20,000 various other trusts

Comments

The TCA has been very supportive of the SDT initiative. However, from the outset we expressed some reservations about the potential attractiveness of the new facility given the restrictive conditions attached.

Our concerns appear to have been borne out by the fact that very few SDTs had been established as at the end of 2007. We would note, however, that our members have reported an increase in the number of enquiries received about SDTs in recent months.

Based on our members' experience since the introduction of SDTs in 2006, we believe that the following factors have acted as barriers to more families establishing SDTs for dependents with severe disabilities.

Complexity of the arrangements

Our feedback is that the average person finds the complexity of the SDT arrangements very daunting and discourages them from pursuing this matter on behalf of a severely disabled dependent.

Higher Centrelink / DVA means test thresholds for those people are often seen as a much simpler approach.

Another more preferable approach suggested, given the changes to superannuation laws last year, can be to contribute funds into the disabled person's superannuation fund as part of the \$1million cap, and then commence a tax-free income stream.

Lack of adequate assets

It is often the case that the parents / carers do not have sufficient assets to offend against current Centrelink / disability support pension or Veterans Affairs thresholds.

Therefore, the SDT option is not seen as relevant.

Definition of 'severe disability'

We acknowledge that the concessions involved in the SDT arrangements are being offered on a targeted basis.

However, it seems that the definition of 'severe disability' in s1209M(2) of the *Social Security Act 1991* and s52ZZZWA(2) of the *Veterans' Entitlements Act 1986* may be overly-restrictive, and thereby limiting the number of people who might potentially benefit from the concessions.

Also, the Social Security guidelines seem to be slanted more towards addressing the problems of severe physical disability rather than mental impairment.

Providing adequately for a person with mental disability has particular difficulties over and above those for a person with physical disability.

Mental illness is on the increase and is a reason that many people in the community are receiving a disability pension. However, by virtue of the often episodic nature of such an illness and the fact that sufferers may do part time or casual work, they find it difficult to qualify for an SDT.

Reasonable care and accommodation needs

We acknowledge that eligible expenditure of an SDT is meant to be restricted to the 'reasonable' care and accommodation needs which arise as a direct result of the beneficiary's disability.

However, in our members' experience, an overly-narrow application of this policy is a key factor in discouraging the establishment of SDTs.

One issue that has been raised is the inability to apply SDT funds towards living expenses, rent etc where the beneficiary resides with or rents from family members or carers.

We would note that there has been some 'progress' in respect of nursing homes (which is where most severely disabled people encountered by our members reside. Centrelink initially would not allow funds from an SDT to be used to pay nursing home fees, on the basis that these are usually 'composite' – ie: covering accommodation, care, food, building maintenance, garden care, cleaning of buildings and individual rooms etc – rather than itemised, and it is impossible to differentiate what would be directly associated with the disability.

However, the Government eventually agreed that the daily care fee charged by all 'accredited' facilities could be paid from an SDT.

Establishing two trusts for the severely disabled person - one that meets the narrow SDT parameters and another that can be used for more general expenses – is sometimes suggested as the solution.

However, this is usually seen as an inefficient and costly approach, to be avoided if possible.

If families with a severely disabled dependent decide to set up only one trust, most people seem to feel that a simple discretionary trust, rather than an SDT, is the most appropriate option.

Alternative approaches to address this barrier might involve:

- requiring that at least, say, 90% of expenditure must meet the present 'reasonable care and accommodation' guidelines,
- allowing the trustee to make a declaration each year as to the proportion of the SDT's outlays that met the present guidelines and thus qualify for the concessions, or

- adopting a less restrictive definition of 'reasonable care and accommodation'.

Taxation issues

An SDT generally will be a long term vehicle, in that it will operate to provide for the disabled beneficiary's needs for many years.

However, it is very difficult, if not impossible, for a trustee to match the income earned by an SDT in a given year with the amount expended on eligible care and accommodation during that same period.

The beneficiary's special needs will often increase over time.

Trust income, on the other hand, will reflect a combination of the level (and composition) of the trust corpus and returns from (fluctuating) financial markets.

A major concern is that it appears the beneficiary is not entitled to the income of the trust when it exceeds expenses. This implies that the undistributed income of an SDT will be taxed at 45%, even though it can only be used in the future for care and accommodation.

Hence, beneficiaries who ordinarily would not pay any income tax (due to the tax free status of their disability support pension, rebates etc) would find themselves effectively subject to the highest marginal rate on unexpended trust income.

We feel that a more appropriate approach might be to treat an SDT in the same manner as a compensation trust, where the trust and the beneficiary are taxed as one using the beneficiary's tax rate.

It has also been suggested that a lack of exemptions in relation to Capital Gains Tax, Land Tax and Stamp Duty is another factor that makes SDTs less attractive.

We believe that an ATO ruling on taxation of SDTs would be helpful.

Limit of one SDT per beneficiary

It is sometimes suggested that the limitation of only having one SDT per beneficiary is a barrier, ie if more than one testator / donor wants to set up an SDT for the same beneficiary.

Lack of flexibility

Members feel that the inflexibility of an SDT is a major issue on the basis that it may be imprudent for a trustee to so severely restrict how trust funds can be applied, given the trustee's duty to act in the best interests of the beneficiary at all times.

For any excess income in a particular year not to be available for other pressing needs of the beneficiary is undesirable.

There is much more to providing for a disabled person than ensuring they have 'reasonable accommodation and care'. They should have access to things which are beneficial to their overall wellbeing.

Incorporating the model trust deed into a will

Our members feel that embedding an SDT deed into a will may not be an appropriate approach as the beneficiary's circumstances could change significantly by the time the testator dies.

A better approach appears to be to include a provision in the will giving the trustee the discretion to establish an SDT if this is seen as being in the disabled person's best interests after the death of the testator.

Members report that this latter approach is receiving increased attention from clients.

Attachment

TCA Members

- ANZ Trustees Ltd
- Australian Executor Trustees Ltd
- Elders Trustees Ltd
- Equity Trustees Ltd
- National Australia Trustees Ltd
- Perpetual Ltd
- Public Trustee for the ACT
- Public Trustee New South Wales
- Public Trustee for the Northern Territory
- The Public Trustee of Queensland
- Public Trustee South Australia
- The Public Trustee Tasmania
- Public Trustee Western Australia
- Sandhurst Trustees Ltd
- State Trustees Ltd
- Tasmanian Perpetual Trustees Ltd
- Trust Company Ltd
