

Understanding Special Disability Trusts

Special Disability Trusts are relatively new trust instruments under Commonwealth social security laws, with beneficiaries being entitled to certain concessions from 20 September 2006.¹ The number of Special Disability Trusts are slowly increasing although unconfirmed figures estimate the number of current, active registered “Special Disability Trusts” to be approximately 160 nationally² and approximately 30 in Queensland.³

There has been varying success for persons intending to set up a Special Disability Trust.

CGJ [2012] QCAT 603

In late 2012, an administrator made an application to the Queensland Civil and Administrative Tribunal to be removed as administrator as he had set up a special disability trust for his daughter and he intended to transfer her assets into the trust and subsequently manage her financial affairs, utilising the trust instrument.⁴ The application was dismissed as the transfer of the adult’s own assets was contrary to the terms of the special disability trust deed and would also constitute a conflict transaction by the administrator.⁵ Senior Member Endicott found that:

“The purposes and effect of a special disability trust is to permit family members to contribute their money for the support of a person with a disability and in doing so to **quarantine the money from the impact of the assets test of Centrelink (emphasis added)**. It is not the purpose of a special disability trust to enable an adult with a disability to quarantine the assets of that person from the assets test of Centrelink.”⁶

The elements of a Special Disability Trust

A Special Disability Trust is an instrument created by immediate family members in order to maintain and provide for the future care of a person with a severe disability.⁷

The elements of the Trust are:

¹ Australian Government Department of Social Services website, “Special Disability Trusts” accessed 20 June 2014: <http://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/special-disability-trusts>

² ABN Lookup website accessed 28 June 2014:
<http://www.abr.business.gov.au/SearchByName.aspx?SearchText=%22Special+Disability+Trust%22&Postcode=ALL&StateOptions=1%2c0%2c0%2c0%2c0%2c0%2c0%2c0%2c0&NameOptions=0%2c0%2c0%2c0%2c1%2c0%2c0&SearchWidth=&MaxResults=0>

³ ABN Lookup website accessed 28 June 2014:
<http://www.abr.business.gov.au/SearchByName.aspx?SearchText=%22Special+Disability+Trust%22&Postcode=ALL&StateOptions=1%2c0%2c0%2c0%2c0%2c0%2c0%2c0%2c0&NameOptions=0%2c0%2c0%2c0%2c1%2c0%2c0&SearchWidth=&MaxResults=0>

⁴ CGJ [2012] QCAT 603.

⁵ CGJ [2012] QCAT 603.

⁶ CGJ [2012] QCAT 603 at [10] per Endicott SM.

⁷ Australian Government Department of Human Services website, “Special Disability Trusts” accessed 20 June 2014: <http://www.humanservices.gov.au/customer/services/centrelink/special-disability-trusts>

- One primary beneficiary – see s1209M(1) of the *Social Security Act 1991* (Cth) who is:
 - at least 16 years of age;⁸
 - would qualify for the disability support pension or receiving a pension under the *Veterans' Entitlements Act (Cth)*;⁹ and
 - is either living in an institution, hostel or group home care or alternatively is cared for privately where there carer qualifies for a carer payment or allowance;¹⁰ and
 - the beneficiary is not working and has no likelihood of working for more than 7 hours or week or is working in accordance with the Commonwealth program – supported wage system;¹¹

or

 - where the primary beneficiary is under 16 years of age and has a severe disability or severe medical condition.¹²
- One Special Disability Trust per person;¹³
- The Special Disability Trust concludes on the death of the primary beneficiary;¹⁴
- The trustee must be - see s1209Q of the *Social Security Act 1991* (Cth):
 - If an individual:
 - An Australian resident;¹⁵ and
 - Not be convicted of any dishonest conduct or an offence under the *Veterans' Entitlements Act* or be disqualified from managing corporations under the *Corporations Act 2001* (Cth);¹⁶

or

 - If a corporation:
 - Where the above requirements apply equally to each Director;¹⁷
- The Trust Deed must comply with the statutory purpose outlined in s1209N of the *Social Security Act 1991* (Cth) which include, inter alia:
 - "...to meet reasonable care and accommodation needs of the beneficiary."¹⁸

⁸ s1209M(2) of the *Social Security Act 1991* (Cth).

⁹ s1209M(2)(a) of the *Social Security Act 1991* (Cth).

¹⁰ s1209M(2)(b) of the *Social Security Act 1991* (Cth).

¹¹ s1209M(2)(c) of the *Social Security Act 1991* (Cth).

¹² s1209M(2)(4); (4A) of the *Social Security Act 1991* (Cth).

¹³ s1209M(6) of the *Social Security Act 1991* (Cth).

¹⁴ s1209M(5) of the *Social Security Act 1991* (Cth).

¹⁵ s1209Q(1)(a) of the *Social Security Act 1991* (Cth).

¹⁶ s1209Q(1)(b) of the *Social Security Act 1991* (Cth).

¹⁷ s1209Q(2) of the *Social Security Act 1991* (Cth).

¹⁸ s1209N(1) of the *Social Security Act 1991* (Cth).

- The Trust Deed must comply with the trust deed requirements set out in s1209P of the *Social Security Act 1991* (Cth). Note the Australian Government Department of Social Services has released a Model Trust Deed for Special Disability Trusts;¹⁹
- The Trust Deed must comply with strict trust property requirements – see s1209R of the *Social Security Act 1991* (Cth) which include, inter alia:
 - That the trust asset is all or part of a bequest or a superannuation death benefit;²⁰
 - The trust assets do not include any compensation received by or on behalf of the principal beneficiary;²¹
 - The trust assets are not used to pay an immediate family member or a child of the primary beneficiary for the provision of care services or accommodation;²²
 - The trust is not used to purchase or lease property from an immediate family member or a child of the primary beneficiary, even if the property is used for the beneficiary's accommodation;²³

A special disability trust also has specific reporting²⁴ and audit²⁵ requirements.

The benefits of a Special Disability Trust

The Australian Government Department of Social Services website has set out the taxation benefits of a Special Disability Trust, which are summarised below:

- “allow capital gains tax exemption for any asset donated to a Special Disability Trust;
- allow capital gains tax main residence exemption for Special Disability Trusts;
- allow capital gains tax exemption for the recipient of the beneficiary's main residence, if disposed of within two years of the beneficiary's death;
- ensure equivalent taxation treatment amongst Special Disability Trusts established under different Acts;
- unexpended income of a Special Disability Trust is taxed at the beneficiary's personal income tax rates, rather than the highest marginal tax rate;
- a beneficiary of a Special Disability Trust can work up to seven hours a week at or above the relevant minimum wage;
- the Trust can pay for the beneficiary's medical expenses, including private health fund membership, and the maintenance expenses of the Trust's property; and

¹⁹ The Model Trust Deed for Special Disability Trusts may be accessed:
http://www.dss.gov.au/sites/default/files/documents/12_2012/sdt_model_trust_deed_december2012_v1.0.pdf

²⁰ s1209R(1) of the *Social Security Act 1991* (Cth).

²¹ s1209R(2) of the *Social Security Act 1991* (Cth).

²² s1209R(3) of the *Social Security Act 1991* (Cth).

²³ s1209R(4) of the *Social Security Act 1991* (Cth).

²⁴ s1209S of the *Social Security Act 1991* (Cth).

²⁵ s1209T of the *Social Security Act 1991* (Cth).

- the Trust can spend up to \$10,000 in a financial year on discretionary items not related to the care and accommodation needs of the beneficiary of the trust, ie for items relating to a beneficiary's health, wellbeing, recreation, independence and social inclusion."²⁶

Note the Queensland Office of State Revenue has set out that in certain circumstances, duty will not be charged "on the following transactions involving an eligible home under a special disability trust:

- a transfer or an agreement to transfer the home to the trustee;
- the creation of the trust;
- a trust acquisition in the trust."²⁷

Conclusion

The above is intended to assist in establishing a Special Disability Trust. For more information please see the Australian Government Department of Human Services²⁸ and the Australian Government Department of Social Service.²⁹

Louise Pennisi BA/LLB (UQ), GradDipLP (QUT), LLM (QUT), TEP
Policy Solicitor,
Queensland Law Society
28 June 2014

²⁶ Australian Government Department of Social Services website, "Special Disability Trusts" accessed 20 June 2014: <http://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/special-disability-trusts>

²⁷ Queensland Office of State Revenue website, "Trust Exemptions" accessed 28 June 2014: <https://www.osr.qld.gov.au/duties/transfer-duty/exemptions-and-concessions/trust-exemptions.shtml>

²⁸ <http://www.humanservices.gov.au/customer/services/centrelink/special-disability-trusts>

²⁹ <http://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/special-disability-trusts>