

MODEL TRUST DEED FOR SPECIAL DISABILITY TRUSTS

PLEASE READ:

This trust deed contains the clauses which are essential for a trust to comply with the requirements of the special disability trust legislation.

This deed can:

- (a) stand alone as a trust deed, or**
- (b) be attached to a Will, or**
- (c) with some modifications, it can be included in your Will.**

It is not necessary to adopt this trust deed in its precise terms. You may want to vary particular provisions. This will not create problems on application if the essential features are retained. Please note: compulsory provisions are not shaded, and optional provisions are shaded (as per this box).

All compulsory provisions must be included in the trust deed to gain the concessions.

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Model trust deed for special disability trusts

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THIS DEED OF TRUST is made on [date] *

PARTIES: *

1. [Settlor Name and address to be advised] ('the settlor').
2. [Name and address to be advised] ('the Trustee').

INTRODUCTION: *

[Commentary: This section and clauses 1 and 2 set the scene for the formal creation of the trust and its basic provisions. If you set up the trust by a Will, these things will be covered in the Will. Definitions of some of the expressions used in the trust are set out in clause 9.3 (page 17 - 18).]

- A. The settlor has decided to create a Trust Fund for the primary purpose of making provision for the care and accommodation of the Principal Beneficiary of the trust, for ancillary purposes and for other purposes primarily for the benefit of the Principal Beneficiary, as described in these terms of trust.

[Commentary: For a trust to exist, it must hold property. The Settlor contributes an initial amount (typically \$10 –see sub-clause D) so that a trust can be established. The Settlor is someone independent of the other parties such as the trustees and/or appointer.]

- B. The intention of the settlor is to establish a Trust Fund that qualifies as a special disability trust, within the meaning of the Social Security Act 1991 or the Veterans' Entitlement Act 1986, whichever is applicable to any Donor and/or the Principal Beneficiary.
- C. The settlor has decided to appoint the Trustee as Trustee of this trust, and the Trustee has consented to become the first Trustee upon the trusts and with and subject to the powers and provisions contained in these terms of trust.

[Commentary: A trustee is a person or corporation who operates the trust. The terms of the trust deed will determine how the trustee will administer the funds held in the trust. The trustee has a duty to act honestly and in the best interests of the beneficiary. The trustee must comply with the terms of the trust deed and relevant state or territory legislation that applies to trustees.]

- D. The settlor has paid or will pay the sum of \$10.00 to commence the trust ('the settled sum').
- E. The parties anticipate that further Contributions will be paid to the Trustee in respect of the trust for the benefit of the Principal Beneficiary.

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PROVISIONS

1 Establishment of Trust

1.1 The Principal Beneficiary

The Principal Beneficiary of the trust is [name and address to be advised] ('the Principal Beneficiary').

[Commentary: The principal beneficiary is defined on page 13 of the Special Disability Trust booklet.]

1.2 Declaration of Trust

The Trustee HEREBY DECLARES that in respect of the trust the Trustee will hold the Trust Fund and the income arising therefrom upon trust during the lifetime of the Principal Beneficiary solely for the benefit of the Principal Beneficiary and with and subject to the powers and obligations contained in the remainder of these terms of trust.

1.3 Name of Trust

The trust shall be known as [Name of Trust] Trust.

1.4 Application of Operative Provisions

Unless the context requires otherwise, the operative provisions set out in the remainder of these terms of trust will apply in respect of the trust established pursuant to these terms of trust.

1.5 Duration of Trust

The trust will end on the earlier of:

- (a) the date of death of the Principal Beneficiary;
- (b) if assets are fully expended on the Principal Beneficiary, the date of such full expenditure; or
- (c) any earlier date as required by law ('the end date').

[Commentary: For example: State law sets out the number of years that a trust may exist.]

1.6 The Appointor

[Commentary: An Appointor can be any person or corporation who is not the Principal Beneficiary or Settlor. An appointor is not responsible for the day-to-day operation of the trust. See the explanation of the role of the appointor on page 17.]

- (a) The initial Appointor[s] of the trust [is/are] [Name and address to be advised] ('the Appointor');
- (b) An Appointor shall have the power to nominate any person or persons or entity to act together with or in his, her or its place and may place such conditions or restrictions on such nomination (and may make such nomination revocable or irrevocable) by any notice in writing to the trustee, or by Will, save that where there is more than one Appointor, an Appointor must obtain from all of the other Appointors the prior written consent to all of the terms of any nomination pursuant to this subclause;

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- (c) A successive Appointor, if the nomination is otherwise silent, shall also have the power to nominate a successor or alternate Appointor as if they were the initial Appointor;
- (d) The Appointor shall exercise their power in accordance with clause 7 and any power of the Appointor may be exercised by the Trustee in the absence of the Appointor at any time.

1.7 Exclusion of Settlers *

[Commentary: The intention of this provision is to prevent the person who formally sets up the trust from still being seen as the owner of the trust assets and income for tax purposes. To ensure this, the settlor has nothing further to do with the trust. The settlor will often be a more distant family member, who will not have an ongoing role in the operation of the trust.]

Notwithstanding anything express or implied in these terms of trust:

- (a) The trust will be possessed and enjoyed to the entire exclusion of the settlor and of any benefit to the settlor by contract or otherwise, and any resulting trust in favour of the settlor is expressly negated;
- (b) No part of the trust will be paid, lent to, or applied for either the direct or indirect benefit of the settlor in any manner or in any circumstances;
- (c) No power in these terms of trust, or appointment made pursuant to these terms of trust or conferred by law upon the Trustee will be capable of being exercised in such manner that the settlor will or may become entitled, either directly or indirectly, to any benefit in any manner or in any circumstances whatsoever.

2 Administration of the Trust

[Commentary: This clause expresses some of the major points required of special disability trusts: the restriction to care and accommodation, payments not to be made to immediate family for care and repairs and maintenance, and the paramount importance of the person with the disability as the focus of the trust.]

2.1 Primary and Other Purposes of the Trust

- (a) The Trustee must hold the Trust Fund and the income derived in each accounting period on trust and pay or apply all or any part of the income and all or any part of the Trust Fund for the primary purpose and for other purposes primarily for the benefit of the Principal Beneficiary, as defined in the remainder of this clause;
- (b) No part of the income or the Trust Fund may be used for any payment of Immediate Family Members or a Child of the Principal Beneficiary including:
 - (i) the provision of care services; or
 - (ii) repair and maintenance of accommodation for the Principal Beneficiary;
- (c) The operation of sub-clause (a) does not preclude the Trustee from applying any part of the income or the Trust Fund for an ancillary purpose to the primary purpose.

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(d) For the purpose of this deed the 'primary purpose' means the reasonable care and accommodation of the Principal Beneficiary as determined by the Trustee from time to time but:

- (i) shall not include such daily living costs or expenses of the Principal Beneficiary that do not relate to reasonable care and accommodation needs;
- (ii) shall not include expenditure which is primarily for the direct or indirect benefit of any other person; and

[Commentary: This sub-paragraph does not include situations where the residence of the principal beneficiary provides an incidental benefit to their partner.]

- (iii) must be in accordance with any requirement or determination made by the Secretary from time to time;

(e) For the purpose of this deed 'other purposes' primarily for the benefit of the Principal Beneficiary means the purposes primarily for the benefit of the Principal Beneficiary as determined by the Trustee from time to time but:

- (i) shall not include expenditure which is primarily for the direct or indirect benefit of any other person; and
- (ii) must be in accordance with any requirement or determination made by the Secretary from time to time.

(f) For the purpose of these terms of trust, 'ancillary purpose' means a purpose that is necessary or desirable to achieve the primary purpose of the trust.

2.2 Priority of Principal Beneficiary

[Commentary: This clause is intended to ensure that the trustee considers what is in the best interest of the person with a severe disability.]

In carrying out their responsibilities under this clause, the Trustee is required:

- (a) to have regard to the nature and severity of the Principal Beneficiary's condition as well as the current and future care needs of the Principal Beneficiary;
- (b) to ensure the interests of the Principal Beneficiary are to take precedence over any interest or expectancy as to net income or capital of any Donor or Specified Beneficiary; and
- (c) to review the needs of the Principal Beneficiary at least annually and wherever possible, consult with the Principal Beneficiary's immediate caregiver and the Principal Beneficiary.

[Commentary: A more frequent consultation period may be preferable.]

2.3 Right of Occupation

With respect to all real property contributed to the Trust Fund by a Donor or acquired by the Trustee, in which the Principal Beneficiary lives ('the Residence'):

- (a) the Principal Beneficiary shall have a personal right of occupation in respect of the Residence for as long as they wish for their lifetime; and

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(b) the Residence may be sold and the proceeds used to acquire a substituted Residence to which the provisions of this sub-clause may apply, provided that in exercising their power pursuant to this paragraph, the Trustee shall act to achieve the primary purpose, other purposes primarily for the benefit of the Principal Beneficiary and ancillary purposes of the trust, and have regard to the priority of the Principal Beneficiary as set out in the preceding sub-clauses.

2.4 Power to Accumulate Income

The Trustee may, in any Accounting Period, accumulate and retain as much of the income of the Trust Fund, if any, as is required to achieve the primary purpose, other purposes primarily for the benefit of the Principal Beneficiary or ancillary purposes of the trust during that Accounting Period, as an addition to the Trust Fund.

[Commentary: This clause allows the trustee to decide to save some of the income each year rather than having to distribute it all. This gives the trustee flexibility in administering the trust assets and income. There may be tax issues relating to accumulation of income so the trustee should get professional advice before making a decision.

Paying income from a special disability trust for the care and accommodation needs of the principal beneficiary with a severe disability will not affect that person's income support entitlements.]

3 Trust Property Requirements

3.1 Contributions

The Trustee may accept Contributions from anyone who is eligible to be a Donor.

[Commentary: These provisions regulate the sources of the funds of the trust, consistent with Social Security and DVA rules. In particular, they prevent the person with a severe disability from providing funds to their 'own' trust except in limited circumstances.]

3.2 Non-acceptable Contributions

The Trustee shall not accept any of the following:

- (a) Contributions made by the Settlor other than the settled sum *;
- (b) conditional Contributions by any Donor;

[Commentary: This means that a donor cannot control how their gift is used. For example, if a person gives a property to the trust they cannot demand that the trust not sell the property. Once a gift has been made to the trust, it is the trustee who will decide how to use the trust assets for the care and accommodation needs of the beneficiary. This does not, however, stop the donor nominating to whom their proportion of the trust assets should be distributed when the trust comes to an end. See clause 4.2 (page 11)]

- (c) any asset transferred to the trust by the Principal Beneficiary or the Principal Beneficiary's Partner unless:
 - (i) the asset is all or part of a bequest, or a superannuation death benefit; and

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- (ii) the bequest or superannuation death benefit was received not more than three years before the transfer;
- (d) any Compensation received by or on behalf of the Principal Beneficiary; or
- (e) any Contribution that would cause the Trustee to be in breach of the specific requirements set out in these terms of trust.

[Commentary: Clauses 3.3, 3.4 and 3.5 (page 9) are intended to prevent the trust channelling assets back to the family, or undertaking other transactions with closely related parties, which might take the focus of the trust away from providing care or accommodation for the person with a severe disability and which would infringe the special disability trust rules.]

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3.3 Restrictions on Use of Trust Funds

- (a) The Trust Fund or any of the income of the Trust Fund cannot be used to purchase or lease property from an Immediate Family Member or a Child of the Principal Beneficiary, even if that property is to be used for the Principal Beneficiary's accommodation;

[Commentary: For example, the trust could not buy the property from an immediate family member. However, the immediate family member could give the property to the trust.]

- (b) For the purpose of this sub-clause, 'property' includes:
 - (i) a right to accommodation for life in a residence; and
 - (ii) a life interest in a residence;
- (c) The total value of income and assets of the Trust which may be applied for the purposes of the Trust consisting or other purposes primarily for the benefit of the Principal Beneficiary must not exceed the value if any specified in a determination (if any) under subsection 1209RA(3) of the Social Security Act.

3.4 Prohibition on Borrowing

The trustee must not borrow money, whether from a related or non-related party.

3.5 Further Prohibitions with regard to Related Parties

[Commentary: The objectives of the trust fund are to pay for the principal beneficiary's care and accommodation costs and for other matters primarily for the benefit of the Principal Beneficiary. Lending funds to the related parties is not consistent with this objective.]

- (a) The Trustee must not;
 - (i) lend from or give any other financial assistance using the Trust Fund or the income of the Trust Fund to; or
 - (ii) intentionally acquire, except by way of a Contribution, property (other than a listed security acquired at market value) from; or
 - (iii) employ, engage or pay any agent, contractor or professional person for any services in relation to the trust fund or the Principal Beneficiary who is; or

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- (iv) enter into an uncommercial transaction with any person who is;
a related party;
- (b) For the purposes of this clause, 'related party' means:
- (i) the Settlor *;
 - (ii) the Trustee, other than a Professional Trustee for the purposes of paragraph 5.1(a)(iii);
 - (iii) a Donor;
 - (iv) the Principal Beneficiary;
 - (v) the Appointor;
 - (vi) an Immediate Family Member;
 - (vii) a parent or a sibling of anyone in any of the preceding sub-paragraphs of this paragraph;
 - (viii) a descendant of anyone in any of the preceding sub-paragraphs of this paragraph;
 - (ix) a Partner of anyone in any of the preceding sub-paragraphs of this paragraph; or
 - (x) any entity (other than widely held entities) of which anyone in the any of the preceding sub-paragraphs of this paragraph is a director, shareholder, trustee or holds the power to appoint a director or trustee.

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- Omit if trust established under a Will

3.6 Prohibition on Lending to Principal Beneficiary

[Commentary: The objectives of the trust fund are to pay for the principal beneficiary's care and accommodation costs and for other matters primarily for the benefit of the Principal Beneficiary. Lending funds to the principal beneficiary or their partner is not consistent with this objective.]

The Trustee must not lend any of the Trust Fund or any of the income of the Trust Fund to the Principal Beneficiary or the Principal Beneficiary's Partner.

3.7 Donor Register

[Commentary: Keeping a record of the donors is important for establishing who receives the assets of the trust when it comes to an end. It can also be used to advise Centrelink of the contributions made to the trust.]

The Trustee must maintain a register of all Donors to the Trust Fund in accordance with Schedule A.

4 End of Trust

[Commentary: This provision regulates the winding up of the trust when it is no longer required or otherwise comes to an end. It allows the people who contribute assets to receive back their contributions, on a proportional basis, or to nominate someone else to whom the assets should be transferred. A parent of the beneficiary with a severe disability could nominate their other children or their grandchildren, for example. There may be issues under the gifting rules for someone who contributed assets if the trust comes to an end within 5 years of the contribution. In that case, you may need to obtain advice. This may also be a consideration in deciding whom to nominate to receive any assets, which become available at the end of the trust.]

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4.1 Balance of Trust at the End Date

- (a) If, at the end date, after the payment of all taxes and expenses, the Trust Fund has not been fully expended on the purposes of the trust, or the income has not been fully allocated, the property of the Trust Fund and any unallocated income ('the balance of the Trust') shall be dealt with in accordance with the remainder of this clause;
- (b) If there is more than one Donor to the Trust Fund, the trustee shall identify each Donor's Contributions to the Trust Fund;
 - (i) calculate the percentage of each Donor's Contributions to the overall Contributions to the Trust Fund; and
 - (ii) apply the percentage to the balance of the Trust to determine the balance of each Donor's Contribution ('the Donor's Contribution Balance');
- (c) On the end date, the settled sum shall be deemed a Contribution made:
 - (i) If only one Donor, by the Donor; or
 - (ii) If more than one Donor, by the Donor who made the largest Contribution; or
 - (iii) If more than one made the equal largest Contribution, equally between those Donors.

4.2 Distribution of Trust Property at the End Date

- (a) The Trustee anticipates that a Donor may make a nomination at the time of contribution regarding the distribution of all or part of his, her or its Contribution Balance at the end date;
- (b) During the term of the trust:
 - (i) a Donor who is an individual may alter his or her nomination by making a subsequent valid nomination during the Donor's lifetime; and
 - (ii) a Donor that is an entity (such as the trustee of a deceased estate, the trustee of any other trust or a corporation) may alter its nomination by making a subsequent valid nomination for as long as the entity exists;and the Trustee shall only have regard to the last valid nomination made by the Donor;
- (c) For any such nomination or subsequent nomination to be valid, the nomination must be:
 - (i) in the form set out in Schedule B;
 - (ii) submitted in writing to the Trustee; and
 - (iii) formally accepted by the Trustee in writing, and an endorsement by the Trustee on the form is sufficient for this purpose;

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- (d) The Trustee may in its absolute discretion, refuse to accept a nomination or a subsequent nomination;
- (e) Where a Donor has nominated his or her estate, or where a Donor's Contribution Balance is to be dealt with under the terms of the Donor's last Will, an individual Donor is not required to notify the Trustee of any change to his or her last Will;

[Commentary: Note: alteration of a nomination once the trust is established may have state duty, capital gains tax and other tax consequences for the trust.]

- (f) At the end date, the Trustee shall distribute the Donor's Contribution Balance to the Specified Beneficiary in accordance with the Donor's last valid nomination in Schedule B;
- (g) If, with regard to all or any part of the Donor's Contribution Balance, the Donor has not made a valid nomination, or if any Specified Beneficiary cannot receive a distribution, the Trustee shall distribute that part of the Donor's Contribution Balance to the Donor, if living at the end date, or if not living, to the legal personal representative of the Principal Beneficiary.

5 The Trustee

5.1 Qualifications of the Trustee

[Commentary: The requirement for at least two trustees is aimed at protecting the principal beneficiary.]

- (a) The Trustee must:
 - (i) in relation to an individual:
 - (1) be an Australian resident;
 - (2) not have been convicted of an offence against or arising out of a law of the Commonwealth, a State, Territory or a foreign country, being an offence of dishonest conduct;
 - (3) not have been convicted of an offence against or arising out of the Social Security Act, the Administration Act or the Veterans' Entitlement Act; and
 - (4) not have been disqualified at any time from managing corporations under the Corporations Act 2001;
 - (ii) in relation to a corporation, be a corporation with two or more directors who comply with the requirements of sub-paragraph 5.1(a)(i); or
 - (iii) be a Professional Trustee who complies with the requirements of sub-paragraphs 5.1(a)(i) or 5.1(a)(ii);
- (b) If at any time the Trustee is not a corporation or a Professional Trustee, there must be two or more individuals acting jointly as Trustee.

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5.2 Resignation of Trustee

Any Trustee may resign office by notice in writing given to the other Trustees and the Appointor (if any) and such resignation shall take effect upon such notice being given.

5.3 Trustee's remuneration

- (a) Any Trustee who is a Trustee Corporation shall be entitled to make all such usual and proper charges for both professional and other services in the administration of this Trust Fund and for the trustee's time and trouble as the trustee would have been entitled to make if not a Trustee and so employed;
- (b) Any trustee who is a Professional Trustee other than a Trustee Corporation, will be entitled to charge and be paid all professional or other charges for any business or act done by him or her, or his or her firm, in connection with the special disability fund hereof including acts which a trustee could have done personally as if he or she were not such a trustee.

[Commentary: You can make broader provisions about remuneration to trustees if you wish, subject to the limitations on payments to immediate family members and having regard to the primary purpose and other purposes primarily for the benefit of the Principal Beneficiary of the trust.]

5.4 Delegation of Powers

The Trustee may in writing delegate the exercise of all or any of the powers or discretion hereby conferred on the trustee to any other person or persons and may execute any powers of attorney or other instrument necessary to give effect to such purpose, however the Trustee (including the delegate) must at all times satisfy the requirements in sub-clause 5.1 regarding the qualifications of the Trustee.

[Commentary: The power of delegation operates in situations where the trustee is unable to act – for example, where the trustee has gone away for a time, or has been hospitalised for a short time but decisions need to be made about the operation of the trust. This clause should be used where the trustee does not want to resign, or should not be forced to resign, but is unable to exercise their duties for a definite period of time.]

5.5 Extent of Trustee Responsibility

No Trustee shall be responsible for any loss or damage occasioned by the exercise of any discretion or power hereby or by law conferred on the Trustee or by failure to exercise any such discretion or power where the Trustee has acted honestly and reasonably.

[Commentary: This clause limits the trustees' liability for mistakes or action which cause loss to the trust. The trustees will only be liable for acting knowingly and deliberately wrongly. This gives the trustees protection from many possible complaints, and confirms the trustees' freedom of action. However, if you want the trustees to be subject to stricter control, you can alter this clause to suit your requirements.]

5.6 Liability and Indemnity

[Commentary: This gives the trustees the right to be covered by the trust for any expenses or liabilities they incur from acting as trustees.]

Provided the Trustee has acted honestly and reasonably, the Trustee shall be entitled:

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- (a) to be reimbursed and indemnified for all costs and expenses (including legal costs and state duty) incurred in relation to establishing, operating, administering, amending, terminating and winding up the Trust Fund; and
 - (b) to be indemnified out of the assets for the time being comprising the Trust Fund against liabilities incurred by it in the execution or attempted execution or as a consequence of the failure to exercise any of the trusts authorities powers and discretions hereof or by virtue of being the Trustee of the trust;
- but shall have no recourse against the Principal Beneficiary or any of the Donors or Specific Beneficiaries to meet such indemnity.

6 Management of Trust Funds

[Commentary: These provisions require the trustee to act prudently in managing the trust assets and investments.]

6.1 Powers of Trustee

- (a) The Trustee shall have such powers as are necessary to carry out their responsibilities under these terms of trust and to fulfil the primary purpose, other purposes primarily for the benefit of the Principal Beneficiary ancillary purposes, and may nominate any specific powers that they may require, save that the Trustees must at all times administer the fund in accordance with the relevant Act governing Trustees, the Social Security Act, the Administration Act and the Veterans' Entitlements Act, and these terms of trust;
- (b) Without limiting the generality of the above sub-clause, the Trustee shall have the specific power to open an account with a financial institution.

6.2 Standard of Care

The Trustee must, in managing the Trust Fund and the income generated from the Trust Fund (including exercising a power of investment):

- (a) if the Trustee's profession, business or employment is or includes acting as a Trustee or investing money on behalf of other persons, exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
- (b) if the Trustee is not engaged in such a profession, business or employment, exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.

6.3 Investment Strategy

The Trustee must formulate and give effect to an investment strategy, for the purpose of satisfying and fulfilling the primary purpose and other purposes primarily for the benefit of the Principal Beneficiary as defined in clause 2. Subject to these needs, the investment strategy

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must have regard to:

- (a) the risk involved in making, holding and realising, and the likely return from, the Trust Fund's investments having regard to its objectives and its expected cash flow requirements;
- (b) the composition of the Trust Fund's investments as a whole including the extent to which the investments are diverse or involve the Trust in being exposed to risks from inadequate diversification;
- (c) the effect of the proposed investment in relation to the tax liability of the trust;
- (d) the liquidity of the Trust Fund's investments having regard to its expected cash flow requirements; and
- (e) the ability of the Trust Fund to discharge its existing and prospective liabilities.

7 Appointment and Removal of Trustee

[Commentary: This clause shows the role of the appointor to control future changes of trustee. It also provides the means to resolve any deadlocks between the trustees, avoiding the need for court proceedings. You may adopt other means of dealing with any disputes.]

- (a) Subject to sub-clause 5.1, the Appointor may at any time by writing:
 - (i) remove from office any Trustee (other than a Trustee appointed by the Court);
 - (ii) appoint a new or additional Trustee; or
 - (iii) appoint a replacement Trustee for any Trustee who resigns as Trustee or ceases to be Trustee under any provision of these terms of trustor law;
- (b) If any Trustee forms the opinion that a deadlock exists in relation to the administration of the trust, the Trustees shall then be deemed to have resigned from their office and the Appointor, or if no Appointor, the resigning Trustees shall appoint a Professional Trustee (who is not a resigning Trustee) in accordance with this clause.

8 Reporting & Audit Requirements

8.1 Keep Accounts

The Trustee must keep or cause to be kept proper accounts in respect of all receipts and payments on account of the Trust Fund and all dealings connected with the Trust Fund.

8.2 Financial Statements & Reporting

[Commentary: The financial statements make up a financial report, which details the assets and liabilities, and income and expenditure of the trust.]

- (a) As soon as practicable after the end of each Accounting Period, the Trustee must prepare or cause to be prepared written financial statements showing the financial position of the trust at the end of that Accounting Period;
- (b) The financial statements must:

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- (i) where the Trustee is or includes a Trustee Corporation, be prepared in accordance with all regulatory and legislative requirements applying to a Trustee Corporation; or
 - (ii) otherwise, be prepared by a member of the Institute of Chartered Accountants in Australia, CPA Australia or the National Institute of Accountants, who is not an Immediate Family Member of the Principal Beneficiary;
- (c) The Trustee must, on or before 31 March each year, forward to the Secretary the financial statements in relation to the previous financial year.

8.3 Audit Requirements

[Commentary: An audit is a formal examination of the trust's accounts and financial position by an independent party. It may also check on compliance with applicable laws, regulations and Centrelink and DVA requirements.]

- (a) An audit of the trust may be requested for the previous financial year ended on 30 June or other period as determined by legislative instrument pursuant to the Social Security Act or the Veterans' Entitlements Act by:
 - (i) the Principal Beneficiary;
 - (ii) an Immediate Family Member;
 - (iii) a legal guardian or financial administrator of the Principal Beneficiary (under Commonwealth, State or Territory law);
 - (iv) a person acting as guardian for the Principal Beneficiary on a long-term basis; or
 - (v) the Secretary;
- (b) If an audit request is received, the Trustee must within a reasonable time:
 - (i) cause an audit of the trust to be carried out unless already carried out for the relevant time period; and
 - (ii) provide a copy of the audit report to the person requesting the audit, to any guardian or administrator and to the Secretary;
- (c) The audit must be in accordance with the requirements of any legislative instrument made pursuant to 1209T(7) of the Social Security Act or 52ZZWG(7) of the Veterans' Entitlements Act;
 - (i) where the Trustee is or includes a Trustee Corporation, be carried out in accordance with all regulatory and legislative requirements applying to a Trustee Corporation; or
 - (ii) otherwise, be carried out by a member of the Institute of Chartered Accountants in Australia, CPA Australia or the National Institute of Accountants, who is not an Immediate Family Member of the Principal Beneficiary or the person who prepared the Financial Statements.

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9 Miscellaneous

9.1 Waiver of Contravention

[Commentary: This sub-clause gives the trustees the power to seek approval from Centrelink or DVA for the trust to continue as a special disability trust if the rules for special disability trusts have been infringed in some way.]

The Trustee shall have the power to:

- (a) seek a waiver of contravention from the Secretary in relation to contravention of any requirement of the Social Security Act or the Veterans' Entitlements Act by the trust which would disqualify the trust from being a special disability trust under the Social Security Act or the Veterans' Entitlements Act, if not for the contravention; and
- (b) take the necessary steps to comply with any conditions imposed by the Secretary by way of a waiver notice under section 1209U of the Social Security Act or section 52AAAWH of the Veterans' Entitlements Act and any related legislative instrument made pursuant to these sections.

9.2 Amending the Trust

[Commentary: Another important role for the appointor.]

- (a) Save as provided in this sub-clause the terms of these terms of trust shall not be capable of being revoked added to or varied;
- (b) If there is for the time being an Appointor, the Trustee with the consent in writing of the Appointor, may at any time and from time to time by Deed amend the provisions whether of these terms of trust or of any Deed executed pursuant to this sub-clause but so that such amendment:
 - (i) shall be made only if it would not cause the trust to become non-compliant with the requirements of Part 3.18A of the Social Security Act or Division 11B of the Veterans' Entitlements Act in relation to special disability trusts; and
 - (ii) does not infringe any law against perpetuities; and
 - (iii) shall be made only if it is not made in favour of or for the benefit of or so as to result in any benefit to the settlor; and
 - (iv) does not affect the beneficial entitlement to any amount allocated for or otherwise vested in the Principal Beneficiary prior to the date of the amendment.
- (c) The operation of this sub-clause shall not prevent:
 - (i) the Trustee accepting a nomination in accordance with subsection 4.2; and
 - (ii) the Trustee exercising its powers of nomination in accordance with sub-clause 6.1.

9.3 Definitions

In these terms of trust unless the context otherwise requires the following expressions shall have the following meanings:

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'accounting period' means such period as the Trustee may from time to time determine to be an accounting period and subject to any contrary determination by it means such period of twelve months ending on the 30th day of June in each year PROVIDED firstly that the period commencing on the date of these terms of trust and ending on the 30th day of June next shall be an accounting period and secondly that the period commencing on the first day of July prior to the end date and ending on the end date shall be an accounting period.

'the Administration Act' means the *Social Security (Administration) Act 1999* (Cth).

'the Appointor' means the person or persons named in these terms of trust, subject to any appointment to the contrary made in accordance with sub-clause 1.6.

'Child' in relation to a Principal Beneficiary has the meaning given to it by section 1209R of the Social Security Act and section 52ZZZWE(5) of the Veterans' Entitlements Act.

'Compensation' has the meaning given to it under Part 1.2 of the Social Security Act and under Division 5A of the Veterans' Entitlements Act.

'Contributions' are money, investments and other assets, donations, gifts, endowments, trust distributions and other forms of financial assistance paid or transferred by a Donor on an unconditional basis and accepted by the Trustee as additions to the Trust.

'Donor' means any person who makes a Contribution to the Trust Fund, but who is not the Settlor.

'Immediate family member' has the meaning given by section 23 (1) of the Social Security Act and section 5Q(1) of the Veterans' Entitlements Act.

'Invest' means employ funds in a manner permitted by these terms of trust and 'investment' shall have a corresponding meaning.

'Partner' has the meaning given by section 4(1) of the Social Security Act and section 5E(1) of the Veterans' Entitlements Act, whichever is applicable.

'Professional Trustee' means:

(a) a Trustee Corporation; or

(b) an Australian Legal Practitioner within the meaning of the (NSW) Legal Profession Act 2004 or the equivalent within its legislative equivalent in other Australian States or Territories.

'the Principal Beneficiary' means the person named in these terms of trust as the principal beneficiary and who fulfils the requirements set out in section 1209M of the Social Security Act or 52ZZZWA of the Veterans' Entitlements Act.

'Secretary' has the meaning given by section 23 of the Social Security Act and section 5Q of the Veterans' Entitlements Act.

'the Social Security Act' means the *Social Security Act 1991* (Cth).

'Specified Beneficiary' means a person or entity nominated to receive a residuary benefit in accordance with the procedures set out in clause 4 and Schedule B.

'the Trustee' means the Trustee or Trustees for the time being of this Trust (as named in these terms of trust) whether original, additional or substituted.

'the Trust Fund' means:

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- (a) the settled sum;
- (b) all moneys and other property of any description whatsoever paid or transferred to and accepted by the Trustee as additions to the Trust Fund;
- (c) the accumulation of net income as provided for in sub-clause 2.4;
- (d) all accretions to the Trust Fund;
- (e) the investments and property from time to time representing the moneys property accumulations accretions and additions or any part or parts thereof respectively.

'Trustee Corporation' means:

- (a) a corporate body authorised by and regulated under the (NSW) Trustee Companies Act 1964 or its equivalent in other Australian States or Territories to carry on business as a trustee company; and
- (b) the Public Trustee created by the (NSW) Public Trustee Act 1913 or its equivalent in other Australian States or Territories.

'Uncommercial Transaction' means the provision of a financial or other benefit on terms which:

- (a) would not be reasonable in the circumstances if the benefit were provided under an agreement arrangement between independent parties dealing at an arm's length with each other in relation to the transaction; or
- (b) are more favourable to the party to the transaction (not being the Trustee) than the terms referred to in paragraph (a) of this definition;

and which a reasonable person in the position of the Trustee would not have entered into having regard to all relevant circumstances.

'Veterans' Entitlement Act' means the *Veterans' Entitlements Act 1986* (Cth).

9.4 Interpretation

In these terms of trust:

- (a) The singular includes the plural and vice versa, each gender includes the other genders and references to persons include corporations and other legal persons;
- (b) References to any statute shall include any statutory amendment or re-enactment thereof or statutory provisions substituted therefore;
- (c) Headings are inserted for ease of reference and do not form part of these terms of trust and shall not affect the construction of these terms of trust;
- (d) If by reason of the inclusion of any word, description or provision in these terms of trust, all or any part of these terms of trust would be invalid, then these terms of trust is to be construed as if the word, description or provision were not included in these terms of trust.

9.5 Applicable Law

These terms of trust are governed by the laws of [State/Territory to be inserted].

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[Commentary: Note: these execution clauses are not required if the trust is established by Will. A will must be executed in accordance with the formalities in the relevant law governing Wills.]

EXECUTED AS A DEED

SIGNED SEALED AND DELIVERED by]
[SETTLOR]]
in [State] in the presence of:]

.....
Witness

EXECUTED by [TRUSTEE CO] PTY LTD

(ACN [number]) in accordance with the
Corporations Act:

..... **Director**

..... Director/Secretary

SIGNED SEALED AND DELIVERED by]
[TRUSTEE]]
in [State] in the presence of:]

.....
Witness

SIGNED SEALED AND DELIVERED by]
[TRUSTEE]]
in [State] in the presence of:]

.....
Witness

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Schedule A

Special Disability Trust Asset Register

Donor One

Full Name:		
Address:		
Contribution description	Market value of Contribution at time of transfer	Date of Contribution

Donor Two

Full Name:		
Address:		
Contribution description	Market value of Contribution at time of transfer	Date of Contribution

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Schedule B

Nomination of Specified Beneficiary Form

[If a Donor wishes to make a nomination, this form is to be completed when the Donor makes their initial contribution. This nomination will apply to subsequent contributions made by the same Donor]

Donor Name:

Address:

To the trustee:

Upon the end of the trust, I nominate the following person or persons to receive my Donor's Contribution balance: [Note: Repeat the alternatives below as required]

	Specified Beneficiary	% Contribution Balance
<input type="checkbox"/>	Myself, or if I am deceased, then my legal personal representative. [Note: the Will of the donor, or the intestacy laws as they apply to the donor's estate, will govern the distribution in this case.]%
<input type="checkbox"/>	The legal personal representative of the Principal Beneficiary. [Note: the Will of the Principal Beneficiary, or the intestacy laws as they apply to the Principal Beneficiary's estate, will govern the distribution in this case.]%
<input type="checkbox"/>	a) My [husband/wife/partner/child/niece/nephew/friend] [full name] of [address].%
	b) If on the end date, [name] is not surviving, then the children of [name] who are surviving, and if more than one as tenants in common in equal shares.	
	c) If on the end date, no person specified in two preceding paragraphs is surviving, then the legal personal representative of [name].	
<input type="checkbox"/>	In accordance with any directions I may leave in my last Will that are specific as to the distribution of my Donor's contribution balance of this trust. [Note: If no directions are included in the Will, the default provisions as set out in subclause 4.2 will apply.]%

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[Full name of charity, and if applicable, ACN or ARBN] of%
[address of charity].

[Note: Always include if there are any gifts to charities] **With respect to any distribution to a charitable organisation pursuant to this nomination:**

a) if the organisation cannot receive a gift, then that gift shall be made to the charitable organisation in Australia that the trustees consider most nearly fulfils the objects I intend to benefit; and

b) the receipt of the authorised officer for the time being, of the organisation benefiting under this clause shall be sufficient discharge to the trustees.

Other%

Signed:

[Donor]

[Witness]

Dated:

Dated:

Deed amended as at 1 January 2011