

EXPLANATORY STATEMENT

Social Security (Means Test Treatment of Private Trusts — Excluded Trusts) Declaration 2005

Summary

Subsection 1207P(4) of the *Social Security Act 1991* (the Act) provides that the Secretary may, by writing, declare that a trust in a specified class of trusts is an excluded trust for the purposes of section 1207P. This Instrument repeals the former Instrument made under this provision and makes a new Instrument.

The attached Instrument specifies classes of trusts that are excluded trusts.

The effect of a trust being an excluded trust is that the assets and income of such a trust will not be attributed to an individual for the purposes of ascertaining the person's assets or income for means-testing purposes under Part 3.18 of the Act. However, a trust excluded under this instrument may still be assessed as an asset of a person for social security purposes under any other part of the Act.

This Instrument removes “court-ordered trusts” as a class of excluded trust for the purposes of Part 3.18 of the Act. This amendment is to make it clear that “court-ordered trusts” should now be assessed under Part 3.18 of the Act.

Background

The *Social Security and Veterans' Entitlements Legislation Amendment (Private Trusts and Private Companies – Integrity of Means Testing) Act 2000* amended the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to give effect to a measure in the Government's 2000-2001 Budget to revise the means test treatment of private companies and private trusts.

The measure aims to ensure that clients who hold their assets in private companies or private trusts receive comparable treatment under the means test to those clients who hold their assets directly. The assets and income of the structure will be attributed to the person or persons who control the company or trust, or to the person or persons who were the source of the capital or corpus of the company or trust.

One of the conditions for attributing an asset or the income of a trust to an individual under the Act is that the trust is a “designated private trust”. Subsection 1207P(1) provides that a trust is a designated private trust if certain criteria are satisfied. One of these criteria is that “the trust is not an excluded trust”. In short, a designated private trust cannot be an excluded trust.

The Instrument, therefore, excludes certain classes of trusts from the ambit of the definition of designated private trust with the result that the assets and income of such an excluded trust will not be attributed, under Part 3.18 of the Act, to the individual for means-testing purposes. A trust excluded under this instrument may still be assessed as an asset of a person for social security purposes under any other part of the Act.

Explanation of the provisions

Part 1

Section 1 of the Principles states the name of the disallowable instrument and section 2 states that the instrument commences on the day after registration pursuant to the *Legislative Instruments Act 2003*. Section 3 sets out the purpose of the instrument. Section 4 contains interpretation provisions. In particular, the term “community purpose” is defined to mean a purpose that is intended to benefit primarily the members of a particular community or group.

Part 2

Subsection 5(1) specifies that each trust that meets the requirements of subsection 5(2) is an excluded trust. Where the sole or dominant purpose of a trust is to receive, manage and distribute property transferred to it, directly or indirectly, by a government body (as defined in section 4), for a community purpose, then the trust is an excluded trust. Similarly, where the sole or dominant purpose of a trust is to receive, manage and distribute income generated from the use of indigenous-held land, for a community purpose, then, likewise, that trust is an excluded trust. A trust will also be an excluded trust if it holds, manages or disposes of indigenous-held land for a community purpose. An excluded trust is only excluded from the ambit of Part 3.18 of the Act by operation of this instrument.

Section 6 specifies that a fixed trust created before 7:30pm (A.C.T. time) on 9 May 2000 will be an excluded trust for the purposes of Part 3.18 of the Social Security Act, unless the trust deed has been varied, or property (other than income generated by the trust) has been transferred into the trust, after that time.

Consultation

Consultation regarding the removal of “court-ordered trusts” as a class of excluded trust for the purposes of Part 3.18 of the Act was undertaken with the Department of Veterans’ Affairs as that Department administers legislation which incorporates similar rules relating to the treatment of trusts and companies as that provided by the Act. The Department of Employment and Workplace Relations and the Department of Education, Science and Training were also consulted to ensure a co-ordinated approach to the administration of “court-ordered trusts” in respect of payments under the Act for which they now have responsibility.

The Instrument is of a minor nature and does not substantially alter existing arrangements. The Instrument clarifies the situation which has been raised in regard to “court-ordered trusts”. “Court-ordered trusts” will now be assessed under the trusts and companies legislation rather than being assessed under the general assets test definition in section 11 of the Act. The change does not in any way alter the intent or spirit of the relevant legislation. Public consultation was therefore seen as unnecessary.

Retrospectivity

None.