

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Social Services

*Social Security Act 1991*

*Social Security (Attribution of Assets) Principles 2017*

### **Summary**

Section 1209E of the ***Social Security Act 1991*** (the Social Security Act) provides that the Secretary may formulate principles to be complied with by him or her when making decisions under a number of provisions of the Social Security Act, including subsections 1208E(2), 1208G(6) and 1208H(1).

The purpose of this instrument is to set out decision-making principles that the Secretary must comply with in making determinations under sections 1208E, 1208G and 1208H of the Social Security Act. These determinations relate to modifying the way in which Part 3.18 of the Social Security Act would otherwise maintain the assets and liabilities of a company or trust against a social security customer.

The Principles commence on 1 April 2017 following the cessation of the *Social Security (Attribution of Assets) Principles 2001* on that date.

The *Social Security (Attribution of Assets) Principles 2001* cease operation on 1 April 2017 due to the sunset provisions in the *Legislation Act 2003*.

### **Background**

Part 3.18 of the Social Security Act specifies the means test treatment of private companies and private trusts. The provisions in Part 3.18 aim to ensure that people who hold their assets in private companies or private trusts receive comparable treatment under the means test to those 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.

Sections 1208E, 1208G and 1208H of the Social Security Act set out various rules relating to the way in which the assets and liabilities of a company or trust will be maintained against a customer as a result of the trusts and companies measure. These decision-making principles will assist the Secretary in modifying the application of those general rules, where this is necessary.

### **Commencement**

This instrument commences on 1 April 2017.

### **Consultation**

Consultation regarding this instrument was undertaken with the Department of Human Services.

## Regulation Impact Statement (RIS)

This instrument is not regulatory in nature and will have no regulatory impact on individuals, business, activity or competition.

### Explanation of the provisions

#### *Part 1*

**Section 1** of the Principles states the name of the instrument and **section 2** states that the Principles commence on 1 April 2017. **Section 3** contains interpretation provisions. **Section 4** sets out the purpose of the instrument.

#### *Part 2*

**Section 5** sets out the purpose of Part 2 of the instrument. This is to provide decision-making principles that can be used in making a determination, under subsection 1208E(2), that a particular asset of a company or trust should be excluded from being maintained against attributable stakeholders of that company or trust for social security purposes.

**Section 6** provides, in effect, that where an individual, who is not an attributable stakeholder of a particular company or trust, has made a genuine transfer of capital to the company or trust, then the Secretary must consider the extent to which part of this capital should be an excluded asset in relation to the attributable stakeholders of the company or trust. In so doing, the Secretary needs to have regard to the value of the capital transferred, the value of the shares or units received by the individual in return and the extent to which the value of the capital is not expressly required to be disregarded. A genuine transfer of capital occurs where an individual over 18 transfers capital to a company or trust and receives fair consideration of shares or units in the company or trust in return as well as obtaining a legal or equitable right to dividends or distributions as well as a share of the capital of the trust or company if it were to be wound up.

#### *Part 3*

**Section 7** sets out the purpose of Part 3 of the instrument. This is to provide decision-making principles that can be used in making a determination, under subsection 1208G(6), that a charge or encumbrance, that exists in relation to assets of a company or trust, should not be allowed, or only allowed in part, to reduce the value of the company's or trust's assets for social security purposes.

**Section 8** provides that in determining whether a charge or encumbrance, that exists in relation to assets of a company or trust, should not be allowed, or only allowed in part, to reduce the value of the company's or trust's assets for social security purposes, the Secretary should look at whether the transaction that resulted in the creation of the charge or encumbrance was an 'arms length transaction' and the other matters listed at section 10.

**Section 9** sets out criteria that the Secretary can use in determining whether a particular transaction, that gave rise to a charge or encumbrance over assets of a company or trust, was an 'arms length transaction' for the purposes of section 8. These criteria include whether the transaction was for the purposes of the business activities of the company or trust, whether the transaction was in writing, signed by all parties and witnessed by an independent person, whether each party to the transaction was at least 18 years old or at least 16 years old and either in a full-time occupation or in receipt of a social security entitlement, and finally, whether the transaction is made for an arm's length amount (as defined in section 1207A). These criteria, together with the matters listed at section 10, are aimed at helping the Secretary to determine whether a loan is genuine, rather than a part of a contrived family arrangement.

**Section 10** provides other matters that the Secretary needs to take into account in deciding whether a charge or encumbrance, that exists in relation to assets of a company or trust, should not be allowed, or only allowed in part, to reduce the value of the company's or trust's assets for social security purposes. These matters include whether the individual, and his or her spouse, is or are the only attributable stakeholder/s of the company or trust, the relationships between the parties to the transaction and the nature and circumstances of the transaction.

#### *Part 4*

**Section 11** sets out the purpose of Part 4 of the instrument. This is to provide decision-making principles that can be used in making a determination, under subsection 1208H(1), that where a company or trust has borrowed money, without there being a charge or encumbrance over any assets of the company or trust, then the value of a specified asset of the company or trust can be reduced by all, or a part of, the value of the loan for social security purposes.

**Section 12** provides that in determining whether the value of a loan, that is not secured over assets of the company or trust, should be allowed, or allowed in part, to reduce the value of an asset of the company or trust, for social security purposes, the Secretary must take into account whether the loan transaction was an 'arms length transaction' and the other matters listed at section 14.

**Section 13** sets out criteria that the Secretary can use in determining whether a particular loan transaction, was an 'arms length transaction' for the purposes of section 12. These criteria include whether the transaction was for the purposes of the business activities of the company or trust, whether the transaction was in writing, signed by all parties and witnessed by an independent person, whether each party to the transaction was at least 18 years old or at least 16 years old and either in a full-time occupation or in receipt of a social security entitlement, and finally, whether the transaction is made for an arm's length amount (as defined in section 1207A). These criteria, together with the matters listed at section 14 are aimed at helping the Secretary to determine whether a loan is genuine, rather than a part of a contrived family arrangement.

**Section 14** provides other matters that the Secretary needs to take into account in deciding whether the value of a loan, that is not secured over assets of the company or trust, should be allowed, or allowed in part, to reduce the value of an asset of the company or trust, for social security purposes. These matters include whether the individual, and his or her spouse, is or are the only attributable stakeholder/s of the company or trust, the relationships between the parties to the transaction, the nature and circumstances of the transaction and also whether the loan is secured over an asset that is not owned by the company or trust.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Social Security (Attribution of Assets) Principles 2017**

The Principles are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the legislative instrument**

Sections 1208E, 1208G and 1208H of the *Social Security Act 1991* (the Act) allow for the Secretary to disregard certain assets and liabilities when determining the total assets for a controlled private trust or a controlled private company.

This instrument specifies the principles that the Secretary must comply with when deciding to disregard an asset or liability. These may be disregarded where there has been a genuine injection of capital into the trust or company, or the liability arose from genuine arm's length transaction.

A determination under section 1208E, 1208G or 1208H of the Act ensures the trust or company's attributable assets do not include any assets that belong to a non-attributable stakeholder.

#### **Human rights implications**

The Principles engage the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system.

The social security scheme must provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

The Principles are compatible with human rights as they ensure a person's current resources are appropriately assessed for the purposes of ascertaining the person's assessable income for means testing purposes under Part 3.18 of the Act.

#### **Conclusion**

The Principles are compatible with human rights as they do not raise any human rights issues.

**Finn Pratt AO PSM**

**Secretary**

**Department of Social Services**