C H R I S   S T O K E S   &   A S S O C I A T E S
B a r r i s t e r s   &   S o l i c i t o r s

15 July 2020

TO MEMBERS

Dear Member

SRI BALAMURUGAN DEVASTHANAM TRUST ("THE TRUST")
SAIVA MAHA SABAI OF WESTERN AUSTRALIA INCORPORATED ("THE ASSOCIATION")

The Management Committee of the Association has requested that I circulate to the General Body of Members of the Association a memorandum as to why it is considered in the best interests of the members that the existing trust deed of the Trust be replaced with the Model Private Ancillary Trust Deed (**the Model Deed**).

I have also been asked to address various concerns raised by some members of the Association as to the need for the replacement of the existing deed, and some features of the proposed new trust deed that I recommend ought be adopted.

Background

The present trust deed was established on 1 July 2001 as a voluntary non-profit charitable organisation. Its principal object was to provide a place of worship for Saivites of Western Australia and to conduct its religious services.

Upon establishment of the Trust, members have been making donations from time to time. No tax returns have been lodged by the Trust on the basis that it has tax exempt status.

On 1 December 2012 the *Australian Charities and Not-for-profits Commission Act* came into operation. This required all charitable institutions to be registered with the Australian Charities and Not-for-profit Commission (**the ACNC**) to be eligible for tax concessions in respect of Fringe Benefits Tax and Goods and Services Tax.

The Trust is not currently registered with the ACNC due to an oversight on the part of previous committee members. However it is anticipated that an application for registration will be successful and will ensure benefits paid to Religious Practitioners will be exempt from Fringe Benefits Tax.

Benefits of the Model Deed

The adoption of the Model Deed will substantially assist in the registration process of the trust with the ACNC.

The ATO Public Ancilliary Fund Guidelines (**the Guidelines**) outlines the requirements that the trust rules <u>must</u> include. Unfortunately a number of these mandatory requirements are not present in the existing trust deed. They include the following:

1. The trust deed must provide that the trust deed issues tax deductible receipts to donors. This is provided for in clause 10.7 (b) and (c) of the Model Deed but there is no equivalent in the current deed.

2. The assets of the trust fund must be valued as set out in the Guidelines. This requirement is provided in clause 10.3 of the Model Deed, but there is no equivalent provision in the existing trust deed.

3. The trustee must distribute at least 4% of the fund's net assets during each financial year. This is provided for in clause 4.1 of the Model Deed, whereby the trustee must apply the Trust Fund in accordance with the Guidelines. There is no equivalent provision in the existing trust deed.

4. The trustee must keep proper financial records in accordance with the Guidelines. These include keeping a proper record of all receipts and payments and/or financial transactions of the Trust Fund. This requirement is provided for in clauses 10.4 and 10.5 of the Model Deed. This obligation is also adequately provided for in clause 9.1 of the existing trust deed.

5. The trustee must arrange an annual audit of the financial accounts each financial year and must produce an annual statement to the ATO. This is provided for in clauses 10.1, 10.2 and 10.6 of the Model Deed. The existing deed has no provision requiring the trustee to lodge an annual return with the ATO. Further, clause 9.1 of the existing deed only requires the trustee to maintain proper financial accounts so that they *may* be audited, not that they *must* be audited.

6. The trustee must prepare and maintain a current investment strategy for the fund. There are limits in the Guidelines on the fund investing, including limits on borrowing money in providing security over the fund's assets. An important requirement for the fund is that all investment transactions are conducted at arm’s length from the stakeholders. This is provided for in clause 10.8 of the Model Deed. Clause 7.1 (h) in the existing trust deed gives the trustee the power to invest the trust fund but does not require the trustee to prepare and maintain an investment strategy.

In addition to these requirements, the ATO also requires the trustee to agree, in the approved form, to comply with the rules in the Guidelines. Again, for the obvious reason that the present trust deed was established prior to the enactment of the Guidelines, there is no provision in the current trust deed for the trustee to comply with those guidelines.

Issues raised by certain members

The Management Committee has received a number of e-mail communications from certain members questioning the need for the Model Deed and raising in any event a number of queries on various clauses of that proposed Model Deed. The Committee has already responded to a number of these queries in previous circulars to members.

Below is a summary response to the substantive queries raised:

1. <u>The past tax liabilities of the Trust</u>

   The Association’s accountant Mr Rupert Cheong and its auditor Australian Audit have established with the ATO that the Trust does not have to lodge tax returns and that it has income tax exemption. The proposed adoption of the Model Deed is not to deal with this issue, but to secure registration as a charitable institution with the ACNC to obtain exemption from Fringe Benefits Tax and Goods and Services Tax.

2. <u>Offsetting the Trust's net income against the Trust paying the Association a market rent</u>

It was the Trust's auditor that suggested that the Trust pay the Association a market rent, so as to both utilise the net profits of the Trust and to discharge a loan by the Association to the Trust. The Department of Commerce, in its review of the Association's financial affairs, was concerned as to the size of this loan account.

The Association's accountant Rupert Chong has now completed the competitive rent adjustment of the Trust since the June 2013 financial year.

3. <u>The Association's DGR Application</u>

The Association operates the Saivite Building Fund. It receives "deductible gift recipient" (**or DGR**) status on the basis that the fund is only used for approved expenditures and is not transferred to any other accounts (the Dewasthanam Trust Account or the SMS Operating Account). Current education activities include having a full time priest providing up to 20hrs per week to the general public, providing education on shrines for observing cultural and religious practices, meditation, regular religious festivals and cultural programs, and weekly religion classes etc.

It is absolutely critical that the Association's building fund is not used for religious and/or worship purposes. The Trust was established to keep the religious Pooja and worship activities at arm's length from the Association's Building Fund activities.

Accordingly, the Association owns all the buildings, fixed assets and some other movable assets such as the canteen pots and pans etc. It pays all the utility bills for the facility, is responsible for obtaining immigration visas and work permits for priests, and has the employment contracts with priests. The Association then recovers from the Trust a component of the priests' wages and associated expenditures in respect of religious activities, and has required the Trust to pay competitive rent for use of the Association's premises as from 1 July 2013.

Presently any surplus profits of the Trust cannot be donated to the Association's Building Fund, as there is no provision under the existing trust deed for this to be done.

However under the Model Deed the trustee may apply the trust fund to any Eligible Entity - see clause 4.1 of the Model Deed. The Saivite Building Fund is such an Eligible Entity.

4. <u>The Trust's exposure to pay GST</u>

As already stated, once the Trust is registered with the ACNC it will be exempt from payment of either GST or FBT.

Some members have suggested that there is very little GST being supplied by the Trust and that the Model Deed will not eliminate the existing exposure to either income tax or GST. This is suggested as a reason why there is no need to establish a new Trust or to adopt the Model Deed.

This is incorrect.

The issue of income tax does not arise as the Trust presently has tax-exempt status. However GST does arise on any services charged by the Trust as the existing GST turnover threshold for the Trust is $75,000 and the financial accounts of the Trust show that this threshold was exceeded in the 2018 and 2019 financial years. Any need for the Trust to be concerned about paying GST will be removed if it is registered with the ACNC.

5. Option of winding up the Trust and operating separate account books in the Association for religious activities.

   This cannot be done. The religious worship activities **must** be conducted at an arm's-length from the Saivite Building Fund activities, for the building fund to maintaining its DGR status.

6. Compliance by the Association with the DGR status

   Some members ask how the Trust will qualify for charitable tax exempt status for its religious activities when the Association is struggling to meet its own requirements for DGR status on the Building Fund.

   I am instructed that the Association is having no difficulty complying with the DGR requirements. It employs a full-time priest providing up to 20 hours per week of education to the general public, including education as to shrines for observing culture and religious practices, meditation, regular religious festivals and cultural programs, and weekly religion classes.

   Further the Association has the approval of the ATO to build an amenities building, a hostel block and accommodation for the resident priest, including land purchases if required. These buildings will be constructed in phases, with the date of completion of the total project dependent on the time taken to raise the necessary funds.

7. Variation of existing trust rather than replacement with new trust

   Some members have asked why, if the Temple must be operated under a Trust separate from the Association's educational activities, the existing trust deed cannot simply be amended.

   The Association Committee remains of the view that it is preferable to wind up and the existing trust assets be vested in a new trust. Nevertheless, in view of the strong views of some members, it is now proposing to regularise the matter by amending the existing trust deed by replacing it with the Model Deed that complies with all the requirements of the ATO and the ACNC.

8. The Role of Major Donors and Responsible Persons

   Some members have questioned whether Major Donors may have the power to take over control of the trust under the Model Deed. They have also questioned whether Responsible Persons could take control of the trust.

   Both these concerns have no basis.

   The Model Deed provides that there must be at least one Responsible Person on the Management Committee – see clause 6.1 (b). That 'Responsible Person' cannot be a Major Donor, a Major Donor being a person who has donated more than $10,000.

These are the only roles of a Major Donor and a Responsible Person. They have no other roles or power under the Model Deed.

Request by some members for "Iron clad" requirements in the new trust deed

Some members have stated that to support a variation of the existing trust they would need the following "ironclad" clauses:

- "The Trustee must be the Association in perpetuity, and the identity of the Trustee cannot be changed by the Management Council or even by the members".

  The Management Committee notes that the Association will be the trustee under the Model Deed. As Trustee, it is the Association, not the Management Committee, that will have the legal right to vary or vest the trust with the support of 75% of the members.

  However neither the existing deed nor the Model Deed can, or should, remove the right of the Association (by its members) choosing to change the Trustee should it wish to do so.

- "The sole beneficiary must be the Association"

  The beneficiaries of the existing Trust Deed are Saivities, defined as persons who believe in Saivam, a branch of Hindu religion originating in South India and who follow its teaching.

  The trust is a discretionary trust which means that no individual beneficiary or group of beneficiaries has any vested interest in, or entitlement to, any of the Trust Fund.

  Under the Model Deed the trustee must pay or apply the Trust fund solely to Eligible Entities which must include Saivites. The definition of Eligible Entities must include complying with the objectives of applying the funds

  Some members are insisting that the Model Deed 'must' have the Association as the sole beneficiary. However the Association is not the sole beneficiary under the existing deed. Under the existing deed the trustee must administer the fund exclusively for the benefit of the Saivities (see clause 3.1 of the existing deed) but there is no reference in the existing deed to the Association as the beneficiary.

- "Any alteration to the beneficiary must be approved by 80% of the members".

  Under the existing trust deed any alteration to the deed must be approved by 80% of the Association's members.

  Under the Model Deed the Trustee cannot amend the deed to make any part of the Trust Fund subject to any trust other than as set out in clause 4 – see clause 13 (a). Accordingly the Trustee will never be able to alter the definition of who the beneficiaries are.

- "The Association's Rules must be modified to restrict the powers of the Management Committee to day-to-day operations and have all other powers rest with the members"

  The Management Committee would strongly oppose any such restriction.

  Presently it is the Association (through its members) who have the power to vary or vest the Trust. There is no reference to the Trust in the current rules of the Association.

- “The Model Deed is not relevant to the existing trust deed objects”

  This is simply incorrect. The existing trust is a private charitable trust. The arrangements under the existing trust deed will be maintained under the Model Deed. The Objectives set out in clause 4.2 of the Model Deed capture all the Objects set out in clause 3.4 of the existing deed.

- “Under the Guidelines the Trustee of the Model Deed must be a corporation and the Association is not a Corporation”.

  This is incorrect. An incorporated association can be a trustee under the Model Deed, as it falls within the definition of a ‘corporation’ set out in clauses 6.1 and 6.2.

- “The ACNC and the ATO require a ‘Responsible Person’ on the Board and this is not in the existing trust objectives”.

  The Management Committee fails to see why there could be any objection to having a Responsible Person on the board of the trustee.

  The existing trust deed presently only has tax exempt status because it complied with Taxation Ruing TR95/27. That tax ruling required the existing trust to have Responsible Persons on its board, and in the ruling it defined ‘Responsible Person’ in terms very similar to the same definition as set out in the Model Deed.

- “The ACNC and the ATO requires a formal investment strategy which does not fit in well with the existing religious services”

  This is also simply incorrect. The existing deed has investment strategy clauses which are standard to almost all private trust deeds. Those clauses in the existing deed are found at clauses 2.2, 3.4(d), 7.1(h), 7.1(i), &.1(k), and 7.1(r).

  The Model Deed simply requires this investment strategy to be formalised.

- “The ACNC and the ATO requires 5% of the net assets to be donated to third party eligible recipients and this is not in the existing trust deed objectives”

  It is correct that the Model Deed, in compliance with the Guidelines, requires at least 5% of the net assets of the trust to be distributed each year to ‘eligible entities’ and that this is not a requirement in the existing trust deed.

  However the Saivite Building Fund is an ‘eligible entity’ so the Management Committee sees no difficulty in making the 5% distribution to that body each year.

Conclusion

It is hoped that the above outline sets out clearly for members the reasons why it is recommended that the existing trust deed be varied by replacing it with the Model Deed (as amended).

It is also hoped that the above outline has addressed all the principal queries raised by certain members who have expressed concern about amending or vesting the existing trust. The proposal to replace the existing trust deed with the Model Deed is recommended as the most cost efficient means of modernising the trust deed and ensure compliance with the ACNC and ATO requirements for tax exempt charitable status.

Should any members have additional queries, they are asked in the first instance to refer them to the Management Committee to ensure the costs of responding to them are kept to an absolute minimum.

Yours Sincerely
CHRIS STOKES & ASSOCIATES

C.P. Stokes
Principal