Hong Kong Institute of
Certified Public Accountants
香港會計師公會

By fax (2869 4195) and by email (to_review@fstb.gov.hk)

5 October 2009

Our Ref.: C/EPLM, M65859

Division 6
Financial Services and the Treasury Bureau
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Dear Sirs,

Re: Consultation Paper on Review of the Trustee Ordinance and Related Matters

--- Please find appended to this letter, the views of the Hong Kong Institute of Certified Public Accountants on the above-referenced consultation paper.

If you have any questions on our submission, please feel free to contact me on 2287 7084.

Yours faithfully,

Peter Tisman
Director, Specialist Practices

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<u>Appendix</u>

Response of Hong Kong Institute of CPAs to Consultation Paper on the Review of the Trustee Ordinance and Related Matters

Chapter 2 – Trustees' duty of care, powers and remuneration

A. Trustees' duty and standard of care

Re. Question 1:

(a) In principle the Institute supports the introduction of a statutory duty of care for trustees.

(b) (i) The standard should be along the lines of the standard in the UK Trustee Act 2000 ("TA") referred to in paragraph 2.8 of the consultation paper.

(ii) We agree

(iii) We would agree that the statutory duty should replace the common law duty of care, which might otherwise have applied. It should be made clear that, in circumstances where the statutory duty does not apply, e.g., because it is excluded by, or inconsistent with, the trust instrument, and the common law duty would currently apply, the common law duty will continue to apply in future.

(c) No further comment.

B. Trustees' general power of investment in default of express provisions in the trust instrument

Re. Question 2:

(a) In principle we would favour retaining the Schedule 2 range of authorised investments.

(b) In the light of the impact of the financial crisis on, for example, short-term corporate profitability and dividends, we would suggest that some revision to the dividend record may need to be considered, such as that the five-year dividend

record need not apply to each of the five years immediately preceding the investment but might instead apply to, say, five of the six or seven years immediately preceding the investment.

(c) The qualification criteria apply only on entering into an investment, although it may be that after certain time, even a short period, following an investment decision, a particular security or other investment would no longer be able to meet the entry criteria. Consideration should be given, therefore, to clarifying that trustees are expected to monitor the performance of investments periodically and, if a particular security or other investment falls significantly short of the entry criteria for an extended period, trustees who rely on Schedule 2 should consider the need to disinvest where this is practical.

C. <u>Trustees' power of delegation</u>

Re. Question 3:

(a) We agree that the power of delegation under section 27 of the Trustee Ordinance ("TO") should be retained subject to the proposed amendment.

(b) While, in principle, it would be sensible to review overlapping provisions of the TO and Enduring Powers of Attorney Ordinance (EPAO) and resolve any inconsistencies, it should also be recognised that the respective provisions do not necessarily serve the same purposes in all circumstances. For example, while under the TO, the grant of power of attorney does not survive the subsequent mental incapacity of the donor, under the EPAO, one of the reasons for granting an enduring power of attorney may be precisely because of the anticipated mental incapacity of the donor.

Power to employ agents

Re. Question 4:

(a) We are not convinced of the need or appropriateness of giving trustees a general power to of appointing agents. However, consideration could be given to specifying particular functions or responsibilities in relation to which trustees may appoint agents, which could include most functions or responsibilities other than fiduciary responsibilities.

(b) – (d) See our response to (a) above.

(c) We would agree with the introduction of provisions like those in the TA 2000 for the appointment of agents by trustees of charitable trusts, subject to safeguards similar to those in the TA 2009, as referred to in paragraph 2.41 of the consultation paper.

D. <u>Trustees' power to employ nominees and custodians</u>

Re. Question 5:

(a) We agree that the TO should be amended to give trustees a general power to appoint nominees and custodians for specific purposes.

(b) The safeguards referred to in paragraph 2.48 should stipulated in the TO.

(c) Other safeguards referred to in paragraph 2.41, in relation to the appointment of agents by a trustee under the TA 2009, should also be considered where relevant in relation to the appointment of nominees and custodians.

E. <u>Trustees' power to insure</u>

Re. Question 6:

We agree that the TO should amended to provide trustees with a wider power to insure along the lines of the TA 2009.

F. <u>Professional trustees entitlement to receive remuneration</u>

Re. Question 7:

(a) We would agree, if, in the absence of a statutory charging provision in the TO, or an express provision in the trust instrument, a professional trustee is prohibited from being remunerated, that the TO should be amended to allow professional trustees to be remunerated where no contrary intention is expressed in the trust instruments.

(b) If a trust instrument contains provisions entitling trustees to receive remuneration, it is not clear why a professional trustee would not be able to

charge for any services provided on a professional basis. If, however, there is any doubt about the matter, then it should be put legally beyond doubt.

(c) The consultation paper does not explain why the UK and Singapore reforms have distinguished non-charitable and charitable trusts is this regard. Further clarification is needed therefore. However, subject to this point, in principle, it would seem reasonable that, where professional trustees are appointed to charitable trusts they should also be able to receive reasonable remuneration for their services, provided they are not the sole trustee in relation to any given charitable trust and the majority of other unconnected trustees agree that the professional trustee(s) may charge.

(d) See the response to item (b) above.

G. <u>Others</u>

Re. Question 8:
We have no further comments

Chapter 3 – Trustees' exemption clauses

Re. Question 9:

(a) There may be a case for reviewing the reasonableness of trustee exemption clauses and making them subject to control, primarily in relation to professional trustees who receive remuneration for their service. However, trustees that act dishonestly should not be able to benefit from exemption clauses.

(b) Prima facie, option (i), that is, the approach adopted under section 26 of the Mandatory Provident Schemes Ordinance (Cap. 485) would seem to be the most appropriate option. Professional trustees acting in good faith, who may make an "honest mistake", on the other hand, should not be denied the opportunity to limit their potential liability. Settlors should be made aware of any exemption or limitation clauses.

Chapter 4 – Beneficiaries' right to information and right to remove trustees

A. <u>Beneficiaries' right to information</u>

Re. Question 10:

(a) We agree on the need to balance the various interests, as discussed in paragraph 4.8 of the consultation paper. While it seems that there is an increasingly common view that beneficiaries should be entitled to more information from trustees than the common law currently requires, there is as yet no consensus on the scope of that information and on whether or not to codify the requirement for disclosure of such information. The consultation paper does not quote an example of any jurisdiction that has codified the requirement at this stage. Under the circumstances, it may be better to wait and see whether and how recommendations for statutory amendments that have been made in other jurisdictions are implemented.

(b) If, however, it is decided that codification of some basic rules is desirable, a cautious approach should be adopted initially in relation to both the categories of beneficiaries that are entitled to trust information and the scope of information to which they are entitled to be provided.

As regards the option in paragraph 4.9 of the consultation paper, even providing the information referred to in the draft bill produced by the Law Institute of British Columbia of Canada, as outlined in the consultation paper, could be quite onerous for trusts with a range of assets, as it appears that, amongst other things, it would be necessary to obtain a valuation of each of the assets. It is also questionable whether any beneficiary should be able to receive this information upon request, including beneficiaries with only a right to be considered as discretionary objects. The second option, indicated in paragraph 4.10, may be preferable, but the statutory requirement to provide information could be limited to beneficiaries with a real expectation of benefit. However, further clarification is needed of precisely what information would be provided under this option, as disclosing to beneficiaries their interest in a trust without disclosing the trust property (e.g., assets and liabilities) would be of limited use to them.

B. Beneficiaries’ right to remove trustees

Re. Question 11:
We agree that beneficiaries of full age and capacity, who are absolutely entitled to the trust property, should be empowered to remove a trustee, in similar manner and circumstances to such beneficiaries under the UK Trusts of Land and Appointment of Trustees Act 1996.

Chapter 5 – Perpetuities and accumulations of income

Re. Question 12:
As, under the Perpetuities and Accumulations Ordinance, settlers may already choose a fixed perpetuity period of no more than 80 years (paragraph 5.3 of the consultation paper refers) and no argument is advanced against this provision, it would appear to be reasonable to make 80 years, or possibly 100 years, a fixed perpetuity period.

Re. Question 13:
We have no strong view regarding abolition of the rule against excessive accumulations of income (“REA”), generally, but consider that REA should be retained for charitable trusts, to ensure that the income from charitable trusts is applied for its intended purposes well within fixed perpetuity period (should one be adopted; see the response to question 12 above). The UK Law Commission proposal of 21 years is reasonable, but a slightly longer period might also be acceptable. It would be helpful to know what time periods have been adopted in similar circumstances in other jurisdictions.

Chapter 6 - Further proposals on promoting the use of Hong Kong trust law

A. Protectors of trusts

Re. Question 14:
The concerns raised in paragraphs 6.9 and 6.10 of the consultation paper have some validity and need to be answered. In any case, the concept of “protector” has not been widely adopted in trust laws elsewhere and, where it has been adopted, there appears to be no standard definition of the term or agreement on a protector’s legal role and standing. If settlors’ reserved powers are set out in law, as discussed in item B of chapter 6, then some of the rationale for having a protector could fall away. Under the

circumstances, we are doubtful whether it would be helpful to give "protector" a statutory definition in the TO at this time.

B. Reserved powers of settlors and validity of trusts

Re. Question 15:

(a) Introducing a statutory provisions that a trust will not be invalidated by reason only of certain reserved powers of settlors should help to strengthen certainty in relation to this area of the law. As indicated above, it could also reduce the need to provide specifically for protectors of trusts in the legislation, which, given the doubts over the role and status of protectors, would not help to increase the level of certainty.

(b) For the reasons stated in paragraph 6.15 of the consultation paper, we would advocate a cautious approach when specifying the extent of reserved powers settlers may retain. It would not be beneficial to business here were other jurisdictions to question the validity of trusts set up under Hong Kong law due to the statutory right of settlers to retain very extensive powers over trusts that they have established. We would agree with including reserved powers of investment or asset management and, possibly, the power to add or remove trustees for good reason.

C. Governing law of trusts

Re. Question 16:

On the basis of the explanation given in the consultation paper, we do see any need to codify the common law principles in relation to the governing law of trusts.

C. Forced heirship

Re. Question 17:

(a) Introducing a statutory provision to the effect that forced heirship rules will not affect the validity of trusts or the transfers of property into trusts that are governed by Hong Kong law would on the face of it help increase certainty.

(b) On the basis of the information provided it not easy to distinguish the relative merits of the legal provisions introduced in different jurisdictions. In addition, it is possible to envisage circumstances in which trusts would be set up merely to circumvent forced heirship rules. Given that the incidence of cases where conflicts arise are likely to be limited, another option that may be worth considering would be to clarify in the law that the courts in Hong Kong are not obliged to give effect to forced heirship rules under foreign law (the Hague Convention notwithstanding), and either that there should be a presumption in favour of trusts validly set up under Hong Kong law, or that the courts may weigh up the respective merits in individual cases.

E. Non-charitable purpose trusts and enforcers

Re. Question 18:

Given the concerns raised about possible abuse of non-charitable purpose trusts, which, in our view, are legitimate concerns, we consider that these issues will have to be addressed first, and a more convincing case made as to the need for and/or benefits of providing for the creation of an unlimited, or broader, scope of non-charitable purpose trusts, if this proposal is to be further pursued in future.