

Review of the Trustee Ordinance and Related Matters

Frequently Asked Questions

What are the merits of modernising the Trustee Ordinance (“TO”)?

- Reforming Hong Kong’s trust law is a key component in the Government’s strategy to enhance Hong Kong’s position as a major asset management centre in Asia. Our asset management business has huge potential notwithstanding the recent setback under the financial tsunami.
- Modernising our trust law will strengthen the competitiveness and attractiveness of our trust services industry. It will encourage more local and overseas settlors to choose Hong Kong law as the governing law of their trusts and to administer their trusts in Hong Kong.
- A modern and user-friendly TO will benefit the settlors, trustees and beneficiaries by providing more clarity and certainty in law. It will provide trustees all modern powers necessary for the efficient management of trusts.

Why review is needed?

- Some of the provisions in the TO, especially those concerning the powers and duties of trustees, are outdated. They were last enacted in 1934. The rules against perpetuities and excessive accumulations of income in trusts under the Perpetuities and Accumulations Ordinance (“PAO”) are complex and fail to meet market needs.

How is the review conducted?

- We have benefited from the inputs of the Hong Kong Trustees' Association Limited ("HKTA") and the Society of Trust and Estate Practitioners (Hong Kong Branch) ("STEP"). In addition to working closely with the relevant Government departments and financial regulators, we have also engaged some lawyers, academics and practitioners specialised in the trust field.
- Comparable common law jurisdictions like the United Kingdom ("UK") and Singapore have reformed their trust laws in recent years. We can leverage from their reform experience. We have also critically reviewed some of the reform proposals in the light of the experience learned from the financial crisis. (For example, instead of following the UK and Singapore in giving trustees a general power of investment, we are inclined to retain the range of authorised investments in the Second Schedule ("Schedule 2") to the TO as "safe harbour" limits that can be overridden by trust instruments or orders of the court.)
- We will also invite public views on several proposals put forward by the trust services industry to promote the use of Hong Kong trust law. These proposals are mainly based on the experiences of off-shore jurisdictions such as the British Virgin Islands, Cayman Islands and Jersey. We will form a view on these proposals after hearing the views of all stakeholders.
- Charitable trusts may need to be treated differently in several areas, such as trustees' power to employ agents and professional trustees' entitlement to receive remuneration. We will engage them in the consultation process.

What is the consultation and review timeframe?

- The consultation will last 3 months (from 22 June to 21 September). We aim to draw consultation conclusions by the end of 2009, with a view to introducing legislative amendments into the Legislative Council in 2010-11.

What are the key proposals? What are their specific benefits?

- The key proposals and their likely benefits are: -

Proposal	Benefits
Introduce a statutory duty of care for trustees	<ul style="list-style-type: none">♦ Provide a clear and accessible statement of the standard of care to be expected from trustees♦ Provide more certainty for settlors and trustees and give better protection to beneficiaries
Retain the range of authorised investments in Schedule 2 to the TO, subject to review from time to time to keep up with market needs and evolving market circumstances	<ul style="list-style-type: none">♦ Provide reasonable “safe harbour” limits for investments by trustees (in default of express powers in the trust instrument or orders of the court) to maintain the value of capital and returns on capital without taking undue risks
Enhance the safeguard in temporary delegation of trustees’ powers so that the no. of trustees will not be reduced to one which is against the will of the settlor	<ul style="list-style-type: none">♦ Respect the wish of a settlor to have more than one trustee and enhance the protection of beneficiaries
Repeal section 8(3)(a) of the Enduring Powers of Attorney Ordinance so that the power of delegation by an individual trustee is entirely governed by the TO	<ul style="list-style-type: none">♦ Avoid inconsistent and overlapping provisions in different statutes and improve legal certainty

Proposal	Benefits
Provide trustees with a general power to employ nominees and custodians with necessary safeguards	<ul style="list-style-type: none"> ♦ Facilitate trustees to achieve effective trust administration
Empower trustees to insure any trust property against risks of loss or damage by any event and pay premiums out of the trust funds	<ul style="list-style-type: none"> ♦ To ensure that trustees have sufficient power to insure so as to deliver their duty to act in the best interests of the beneficiaries ♦ Provide better protection to trust property and ensure fairer treatment between capital and income beneficiaries
Provide a default charging clause to enable the remuneration of professional trustees of non-charitable trusts	<ul style="list-style-type: none"> ♦ Make settlors aware of the possibility of employing professional trustees and the need to provide for their remuneration ♦ Enable and encourage a trust to appoint professional trustees who have the necessary skills for the effective administration of the trust
Subject trustee exemption clauses seeking to exempt professional trustees who receive remuneration for their services to some statutory control; and to promulgate a code of best practices regarding the use of trustee exemption clauses by relevant professional bodies	<ul style="list-style-type: none"> ♦ Strike a balance between the rights and interests of settlors, trustees and beneficiaries

Proposal	Benefits
Provide some basic rules for beneficiaries' rights to disclosure by trustees of information, accounts and documents relating to the trust	♦ Provide a degree of certainty and assist in the development of a principled approach without codifying all the common law principles in this area prematurely
Provide an alternative court-free route for beneficiaries, who are of full age and capacity and are absolutely entitled to the trust property, to remove a trustee	♦ Provide a simple and time-saving process to remove the trustee and appoint a new one if there is unanimous consent among the beneficiaries
Abolish the rule against perpetuities altogether or introduce a fixed perpetuity period	♦ Reform an outdated and complicated rule that is difficult to apply and creates uncertainty
Abolish the rule against excessive accumulations of income (with possible exception regarding charitable trusts)	♦ Abolish an outdated and complicated rule that creates uncertainty

Why doesn't the Government form a view on other related proposals?

- Some proposals will need more thorough consideration and some concern more unconventional trust concepts which are more commonly practised in off-shore jurisdictions. We would like to hear the views of stakeholders before forming a view on them, which include:
 - (a) whether trustees should be given a wider default power to appoint agents who may exercise asset management functions, e.g. discretionary fund managers, and if so, whether some refinement should be made in respect of charitable trusts;

- (b) regarding charitable trusts, whether professional trustees should be allowed to charge a reasonable amount for their services in the absence of a charging provision in the trust instruments and, if so, what constraints should be imposed;
- (c) whether the role of “protectors” of trusts should be defined in statutes;
- (d) whether the law should provide that a trust will not be invalidated by certain reserved powers of settlors;
- (e) whether the common law principles on the governing law of trusts should be codified;
- (f) whether the law should provide that forced heirship rules will not affect the validity of trusts; and
- (g) whether the creation of non-charitable purpose trusts should be allowed.

**Financial Services Branch
Financial Services and the Treasury Bureau
June 2009**