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Incorporated Limited Partnerships: A New Business Structure for Venture Capital Investors under the Partnership and Other Acts Amendment Bill 2004 (Qld)

The Partnership and Other Acts Amendment Bill 2004 (Qld) amends the Partnership Act 1891 *(Qld) by establishing incorporated limited partnerships ('ILPs') as a new business structure in Queensland. Similar legislation already exists in Victoria, New South Wales and the Australian Capital Territory.*

The significance of the introduction of ILPs relates to attracting increased international and domestic venture capital investment in Queensland. An ILP is the preferred business structure internationally for venture capital investment. It is also a structure through which the taxation exemptions and "flow through" taxation treatment for venture capital investors, introduced by the Commonwealth Government in 2002, may be accessed.

The key feature of an ILP is the protection from liability of its limited partner investors.

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CONTENTS

EXECUTIVE SUMMARY

The Partnership and Other Acts Amendment Bill 2004 (Qld) ('Bill') amends the *Partnership Act 1891* (Qld) by establishing incorporated limited partnerships ('ILPs') as a new business structure in Queensland.

The significance of the introduction of ILPs relates to attracting increased international and domestic venture capital investment in Queensland.

Venture capital is the key source of funding for industries with high research and development activities, and for enterprises undergoing an expansion or a restructure (**pages 2-5**).

An ILP is the preferred business structure internationally for venture capital investment. It is also a structure through which the taxation exemptions and "flow through" taxation treatment for venture capital investors, introduced by the Commonwealth Government in 2002, may be accessed (**pages 5-12**).

This Research Brief discusses:

- the key characteristics of ILPs (**page 13**);
- the partners in an ILP (**pages 13-14**), including:
  - the relationship of partners to others and between themselves (**pages 14-15**);
  - the limitation of liability of limited partners of ILPs (**page 15**); and
  - the requirement that limited partners not take part in the management of the business of the ILP (**pages 16-18**);
- the registration of ILPs (**pages 20-23**);
- mutual recognition of the limitation of liability of limited partners of ILPs (**pages 23-24**);
- the powers of ILPs (**pages 24-25**);
- the modified partnership rules in relation to ILPs (**pages 25-34**); and
- the winding up of ILPs (**pages 34-36**).

Currently, Victoria, New South Wales and Tasmania are the only other Australian jurisdictions with legislation which provides for ILPs (**page 36**).

1 INTRODUCTION

On 17 August 2004, the Hon M Keech MP, Minister for Tourism, Fair Trading and Wine Industry Development, introduced the Partnership and Other Acts Amendment Bill 2004 (Qld) ('Bill') into the Queensland Legislative Assembly.

The Bill amends the *Partnership Act 1891* (Qld) by establishing incorporated limited partnerships ('ILPs') as a new business structure in Queensland,[1] similar to the position which already exists in Victoria, New South Wales and the Australian Capital Territory.[2]

The significance of the introduction of ILPs relates to attracting increased international and domestic venture capital investment in Queensland. An ILP is the preferred business structure internationally for venture capital investment.[3] It is also a structure through which the taxation exemptions and "flow through" taxation treatment for venture capital investors, introduced by the Commonwealth Government in 2002, may be accessed.[4]

Under the Bill, ILPs will have the following key characteristics:

- at least one general partner (who is responsible for the management of the business of the ILP);
- at least one limited partner (who commits an agreed amount of capital or property to the ILP, and who is prohibited from taking part in the management of the business of the ILP); and
- a separate legal identity that provides full protection from liability for its limited partner investors.

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1 Note that the Bill also amends the *Partnership (Limited Liability) Act 1988* (Qld), by relocating (and amending) most of the provisions of that Act relevant to limited partnerships in a **new Part 3** of the *Partnership Act 1891*, and makes minor technical amendments to other Acts. These additional matters are not discussed in this Research Brief.

2 Note, however, that the *Partnership (Venture Capital Funds) Amendment Act 2004* (ACT), which was assented to on 2 September 2004, has not yet been proclaimed into force.

3 Queensland partnership law currently only provides for general law partnerships and limited partnerships (see the *Partnership Act 1891* (Qld) and the *Partnership (Limited Liability) Act 1988* (Qld)). Internationally, venture capital investors are not comfortable with utilising limited partnership or company structures.

4 The legislative scheme for taxation exemptions and "flow through" taxation treatment for venture capital investors was introduced by the *Venture Capital Act 2002* (Cth) and the *Taxation Laws Amendment (Venture Capital) Act 2002* (Cth). Part 3 of this Research Brief discusses the scheme.

An ILP will be liable for all of its debts and obligations, with any shortfall to be met by its general partners.

Where a limited partner has taken part in the management of the business of an ILP, the limited partner will be liable only:

- for the loss or injury incurred by a third party as a direct result of any wrongful act or omission of the limited partner; and
- where the third party reasonably believed that the limited partner was in fact a general partner in the ILP.

Despite the restriction on a limited partner being involved in the management of the business of an ILP, a limited partner may still oversee their investment, assist with the growth of the ILP and ensure that the ILP is being managed effectively without compromising their protection from liability.

The protection from liability for limited partners in ILPs acknowledges the "high risk" environment in which venture capital funding is sought. Such protection is also seen as justified in achieving the outcomes associated with an enterprise securing venture capital funding. These outcomes include encouraging local initiatives in new industries, providing local employment and ensuring that the expertise related to an enterprise does not move off-shore.

2 WHAT IS VENTURE CAPITAL?

2.1 NATURE OF VENTURE CAPITAL

Venture capital is a key source of funding for industries with high research and development activities, such as those in the biotechnology, information technology, resources and communications sectors.[5] The research may be in an emerging field, or involve the development of an innovative product. Often, these enterprises are considered "high risk" because they are at crucial stages of their development and require long-term investment. Consequently, greater difficulty may be experienced in attracting the necessary investment, with such investment generally being provided by institutional investors and specialised venture capital investors.

Venture capital investment is also important for businesses undergoing an expansion or a restructure.

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[5] Hon M Keech MP, Minister for Tourism, Fair Trading and Wine Industry Development, Partnership and Other Acts Amendment Bill 2004 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 17 August 2004, pp 1842-1843, p 1842.

The venture capital process involves working with the management of investee businesses through the growth or restructure phase, by injecting the necessary funds and attempting to prevent a failure of the enterprise.[6]

2.2 RECENT FIGURES ON VENTURE CAPITAL INVESTMENT IN AUSTRALIA

A survey published in the *Australian Venture Capital Journal*[7] shows that in the 12 months to 30 June 2004, *by value*:

- most venture capital investment in Australia was for management buy-outs (42.2%, $392.90 million), expansions (19.7%, $183.26 million) and management buy-ins (12.0%, $111.76 million);
- the industries attracting the most venture capital investment in Australia were the health/biosciences (26.1%, $242.69 million), distribution/transport (14.0%, $130.70 million), retailing (12.7%, $118.28 million) and industrial manufacturing (10.5%, $97.61 million) industries; and
- Victoria attracted the most investment (43.9%, $409.08), followed by New South Wales (21.9%, $204.14 million) and Queensland (9.5%, $88.90 million).

Over the same period, in terms of the *number of investments*:

- most investments occurred in the expansion (28.0%, 127), seed (24.0%, 109), start-up (17.2%, 78) and early expansion (16.7%, 76) stages;
- more investments occurred in the health/biosciences (24.7%, 112), information technology/software (13.0%, 59), communications (9.3%, 42), business/financial services (9.3%, 42) and technology (9.0%, 41) industries; and
- most investments occurred in New South Wales (33.5%, 152), followed by Victoria (24.2%, 110) and Queensland (13.0%, 59).

Venture capital investment in Australia for the 12 months to 30 June 2004 was relatively stable at $931.26 million. This was an increase of $52.8 million (or 6%) from the $878.4 million invested in the previous 12 months, and a slight decrease

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[6] For further information on the venture capital industry, see the website of the Australian Venture Capital Association Limited, the peak industry group for the venture capital industry in Australia, http://www.avcal.com.au.

[7] 'Private Equity Media/PricewaterhouseCoopers Australian Venture Capital Survey', *Australian Venture Capital Journal*, September 2004, pp 6-9 and p 13.

of $13.4 million (or 1.4%) on the $944.7 million invested in the 2003 calendar year.[8]

The figures listed above for the 12 months to 30 June 2004 show a continuing trend for management buy-outs to be the preferred stage for venture capital investment, with decreasing investment occurring in the early and expansion stages.[9] In terms of early stage investment in the 12 months to 30 June 2003, *by value*:

- 5.6% (or $52.05 million) of venture capital investment was provided at the seed stage;
- 3.6% (or $33.16 million) was provided at the start-up stage; and
- 5.4% (or $50.60 million) was provided at the early expansion stage.

The low level of venture capital support for emerging enterprises, reflected in these figures, has been raised as a concern.[10]

2.3 TRENDS IN AUSTRALIAN VENTURE CAPITAL INVESTMENT

The table below depicts Australian Venture Capital Investment between 1996 and 2004 in terms of:[11]

- the number of investments; and
- the amount invested.

The peak in early 2002 marks the information technology boom.

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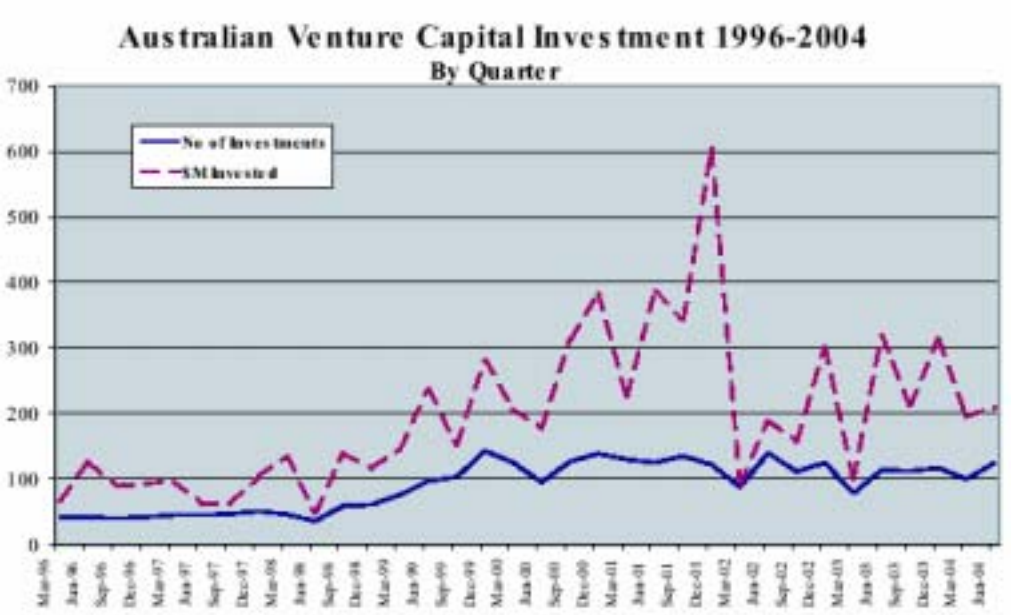
8 'Private Equity Media/PricewaterhouseCoopers Australian Venture Capital Survey', p 6.

9 'Private Equity Media/PricewaterhouseCoopers Australian Venture Capital Survey', p 6.

10 See, for example, Craig Roberts, 'Beyond the far horizon', *Business Review Weekly*, 23 October 2003, p 40.

11 'Private Equity Media/PricewaterhouseCoopers Australian Venture Capital Survey', p 7.



3 COMMONWEALTH'S REGISTRATION AND TAXATION REGIME FOR VENTURE CAPITAL INVESTORS

3.1 BACKGROUND

The *Venture Capital Act 2002* (Cth) and the *Taxation Laws Amendment (Venture Capital) Act 2002* (Cth) commenced operation on 19 December 2002.[12]

The purpose of these Acts was to establish an internationally competitive framework for venture capital investment, and provide an investment vehicle for venture capital that was aligned with 'world's best practice'.[13] The Acts also

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[12] Note, however, that some provisions of the *Taxation Laws Amendment (Venture Capital) Act 2002* (Cth) commenced operation on 31 March 2003. *Venture Capital Act 2002* (Cth), http://scaleplus.law.gov.au/html/pasteact/3/3566/pdf/VentureCapital2002.pdf; *Taxation Laws Amendment (Venture Capital) Act 2002* (Cth), http://scaleplus.law.gov.au/html/comact/11/6594/pdf/1362002.pdf; and Explanatory Memorandum (for both), http://www.scaleplus.law.gov.au/html/ems/0/2002/0/2002111503.htm.

[13] Hon P Slipper MP, Parliamentary Secretary to the Minister for Finance and Administration, Taxation Laws Amendment (Venture Capital) Bill 2002 (Cth) and Venture Capital Bill 2002 (Cth), Second Reading Speeches, House of Representatives, *Debates*, 14 November 2002, pp 9020-9022, at pp 9020 and 9021. For an analysis of the Acts, see Michael Priestley and Bernard Pulle, *Venture Capital Bill 2002, Taxation Laws Amendment (Venture Capital) Bill 2002*, Bills Digest Nos. 77-78 2002-03, Department of the Parliamentary Library, http://www.aph.gov.au/library/pubs/bd/2002-03/03bd077.pdf.

formed a crucial part of the Howard Government's program to encourage new foreign investment into the Australian venture capital market, and to further develop the venture capital industry. During the 2001 election campaign, the Prime Minister, the Hon J Howard MP, stated:[14]

> *One of the more pressing issues facing business leaders is how to operate and expand their companies in an increasingly competitive global environment. My Government remains firmly of the view that Australian companies can successfully compete on the global stage while remaining based in Australia. But to achieve this, we need internationally competitive taxes and taxation systems.*
>
> *If re-elected, the Coalition Government will, as a matter of priority, examine whether features of current taxation arrangements adversely affect the capacity of businesses to remain in Australia. This will be done in consultation with key stakeholders and industry representatives.*
>
> *Particular attention will be paid to whether Australia's international taxation regime acts as an impediment to:*
>
> - *Australian companies attracting domestic and foreign equity;*
> - *Australian companies expanding offshore; and/or*
> - *holding companies and conduit holdings being located in Australia.*
>
> *In an increasingly competitive global environment, reducing taxes on equity flows will significantly enhance the ability of companies to manage their capital base.*
>
> *The Government intends to extend the previously announced exemption for capital gains on venture capital investments by providing venture capital limited partnerships with flow through taxation treatment.*
>
> *These changes … stem from the Government's commitment in Backing Australia's Ability to ensure that venture capital investment is encouraged.*

The tax reforms introduced under these Acts apply to the following types of limited partnership:

- venture capital limited partnerships ('VCLPs') (which invest directly into companies);
- Australian funds of funds ('AFOFs') (which diversify investment risk by investing across a range of VCLPs); and
- venture capital management partnerships ('VCMPs') (which can only be involved in the management of VCLPs and AFOFs).

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[14] Hon J Howard MP, Prime Minister, 'Securing Australia's prosperity', *Media Release*, 15 October 2001, http://www.pm.gov.au/news/media_releases/2001/media_release1338.htm.

3.2 LEGISLATIVE SCHEME

The *Taxation Laws Amendment (Venture Capital) Act 2002* (Cth) amended the *Income Tax Assessment Act 1936* (Cth) and *Income Tax Assessment Act 1997* (Cth) to extend the scope of the existing tax exemption for venture capital investment to registered VCLPs and registered AFOFs which are used to invest in Australian venture capital companies. The *Venture Capital Act 2002* (Cth) provides the administrative measures for the registration of VCLPs and AFOFs.

Essentially, the amendments under the *Taxation Laws Amendment (Venture Capital) Act 2002* (Cth):

- allow VCLPs and AFOFs to be taxed as "flow through" entities in accordance with internationally recognised best practice for venture capital investment;
- provide a tax exemption to eligible non-resident[15] partners of VCLPs and AFOFs on the share of profit or gain made on the sale by the partnership of its interest in an eligible venture capital investment company (the exemption was already available to certain foreign pension funds in similar circumstances); and
- provide for a general partner's share of the gains made on eligible venture capital investments by the VCLPs and AFOFs they manage to be taxed as a capital gain to the individual fund managers.

3.3 REGISTRATION REQUIREMENTS

Part 2 of the *Venture Capital Act 2002* (Cth) sets out the registration and reporting requirements for VCLPs, AFOFs and eligible venture capital investors with the Pooled Development Funds Registration Board ('PDF Board').[16]

Registration of a limited partnership as a VCLP or AFOF with the PDF Board is one of the requirements before investments of venture capital attract the tax

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[15] Eligible non-residents that may qualify for the tax exemption are tax exempt residents of Canada, France, Germany, Japan, the United Kingdom and the United States; venture capital funds of funds established and managed in Canada, France, Germany, Japan, the United Kingdom and the United States; and taxable residents of Canada, Finland, France, Germany, Italy, Japan, the Netherlands (excluding the Netherlands Antilles), New Zealand, Norway, Sweden, Taiwan, the United Kingdom or the United States of America who hold less than 10% of the committed capital in a VCLP or AFOF.

[16] The Pooled Development Funds Registration Board is established under the *Pooled Development Funds Act 1992* (Cth).

exemptions for venture capital and "flow through" tax treatment of the income of limited partnerships mentioned above.

Once a limited partnership is registered, a general partner of the partnership must lodge quarterly and annual returns with the PDF Board, and provide any further information requested by the PDF Board.[17] The PDF Board has power to deregister VCLPs and AFOFs if they fail to comply with the eligibility requirements, or do not meet the registration or reporting requirements.[18]

VCLPs, AFOFs and tax-exempt non-resident investors may invest in a range of investee companies that constitute "eligible venture capital investment".[19] VCLPs and AFOFs may invest through shares or options. AFOFs can only invest in VCLPs, and in companies in which a VCLP (in which the AFOF is a partner) holds one or more investments.

3.3.1 Venture Capital Limited Partnership

The requirements for a limited partnership to be registered as a VCLP by the PDF Board are that:[20]

- is was established in Australia, Canada, France, Germany, Japan, the United Kingdom, the United States of America or any other country prescribed by regulation;
- all the general partners are residents of a country referred to above;
- the partnership agreement requires the partnership to exist for at least five years but not more than 15 years;
- the partnership's committed capital is at least $20 million;
- the partnership's only investments are "eligible venture capital investments";
- the partnership only carries on activities that are related to making "eligible venture capital investments"; and
- every debt interest that the partnership owns is a "permitted loan".[21]

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17 See Part 2, Division 15 of the *Venture Capital Act 2002* (Cth).

18 See Part 2, Division 17 of the *Venture Capital Act 2002* (Cth).

19 "Eligible venture capital investment" is defined below in Part 3.3.3 of this Research Brief.

20 See section 9-1 of the *Venture Capital Act 2002* (Cth).

21 "Permitted loan" is defined in section 9-10 of the *Venture Capital Act 2002* (Cth).

3.3.2 Australian Venture Capital Fund of Funds

A limited partnership may be registered by the PDF Board as an AFOF if:[22]

- it is established under a State or Territory law in Australia;
- all the general partners are Australian residents;
- its partnership agreement requires the partnership to exist for at least five years and not more than 20 years;
- its only investments are in a VCLP or are an "eligible venture capital investment" in a company in which a VCLP (in which the AFOF is a partner) owns one or more "eligible venture capital investments";
- the partnership only carries on activities that are related to making "eligible venture capital investments"; and
- every debt interest that the partnership owns is a permitted loan.

3.3.3 Eligible Venture Capital Investments

To qualify for the tax emption, the investment must meet a range of requirements.[23] Essentially, these requirements are that the investment be an acquisition of shares in a company, or an acquisition of options issued by a company to acquire shares in the company, that is:

- "at risk": and
- in circumstances where the company:
  - is an unlisted Australian company, or a listed Australian company that will be delisted within 12 months of the date of the investment;
  - has more than 50% of its employees in Australia and 50% of its assets in Australia for 12 months following the investment;[24]
  - does not have as its primary activity property development or land ownership, finance (to the extent that it is banking, providing capital to others, leasing, factoring or securitisation), insurance, construction or the acquisition of infrastructure facilities, or investments that derive income through interest, rents, dividends, royalties or lease payments);
  - has a registered auditor; and

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22 See section 9-5 of the *Venture Capital Act 2002* (Cth).

23 These requirements are set out in sections 118-425 to 118-445 of the *Income Tax Assessment Act 1997* (Qld).

24 This requirement applies if it is the first investment made in the company by the investor.

- is not valued at more than $250 million immediately before the investment is made.

An eligible venture capital investment is "at risk" if the entity that owns the investment has no arrangement as to the maintenance of the value of the shares or any earnings or other return that might be made from owning the shares.

3.4 VENTURE CAPITAL MANAGEMENT PARTNERSHIPS

A VCMP is a limited partnership that:[25]

- is a general partner of either or both of the following:
  - one or more VCLPs;
  - one or more AFOFs; and
- only carries on activities that are related to being such a general partner.

There is no registration process for VCMPs.

3.5 TAXATION TREATMENT

3.5.1 "Flow Through" Tax Treatment

Prior to the amendments under the legislative scheme, limited partnerships were taxed as if they were companies under Division 5A of the *Income Tax Assessment Act 1936* (Cth), and were referred to as corporate limited partnerships.

Under the legislative scheme, VCMPs and registered VCLPs and AFOFs are excluded from being corporate limited partnerships.[26] As a result, they are treated as ordinary partnerships for taxations purposes. This allows partners in these partnerships to be taxed on their share of the income, profits, gains and losses of the partnership according to the partner's tax status.

Loss limitation rules have also been inserted. These rules limit the deduction allowable to limited partners for partnership losses, to the extent of the partner's exposure to the loss. The following amounts are deducted from the capital contribution by the limited partner:

- the amount of contributed capital the partnership has repaid to the partner;

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[25] See section 94D(3) of the *Income Tax Assessment Act 1936* (Cth).

[26] See section 94D(2) of the *Income Tax Assessment Act 1936* (Cth).

- the total of all deductions allowed to the partner for partnership losses incurred in previous income years; and
- the amount of any debt of the partner that is secured by the partner's interest in the VCLP or the AFOF.

3.5.2 Capital Gains and Losses

As is the case for capital gains made on the sale of assets held by an ordinary partnership, capital gains made on assets held by a VCLP, an AFOF or a VCMP are taxable to a partner according to the partner's tax status. Therefore, individuals who are partners in a VCMP qualify for the capital gains tax discount on the carried interest, if they satisfy the other requirements of the discount.

3.5.3 Venture Capital Managers

The legislative scheme addressed the taxation treatment of a venture capital manager's share of the gains made by a VCLP or an AFOF on the sale of eligible venture capital investments.

A venture capital manager is either a general partner of a VCLP or an AFOF, or a limited partner of a VCMP that is a general partner of a VCLP or AFOF.

A venture capital manager's share of these gains, referred to as the "carried interest", is now taxed as a capital gain rather than ordinary income.[27] At the same time, a deduction is not allowable to a VCLP, an AFOF or a VCMP for a carried interest payment.

A carried interest entitlement can be a discount capital gain if the partnership agreement under which it arises was entered into at least 12 months before the payment of carried interest.

In introducing this change, it was explained that:[28]

> *Unlike managers in the passive funds management industry, venture capital managers are actively involved in the management of the companies in which the*

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[27] See section 104-255 of the *Income Tax Assessment Act 1997* (Cth). A "carried interest" is a partner's entitlement to a distribution from a VCLP, an AFOF or a VCMP that is contingent on profits being attained from the limited partners of the VCLP or AFOF (see section 104-255 of the *Income Tax Assessment Act 1997* (Cth)).

[28] Hon P Slipper MP, Parliamentary Secretary to the Minister for Finance and Administration, Venture Capital Bill 2002 (Cth), Second Reading Speech, House of Representatives, *Debates*, 14 November 2002, pp 9020-9021.

funds invest and typically share in capital gains on investments made by the fund after all the investors' committed capital has been returned. This is referred to as the carried interest and is designed to strongly align the interests of the fund manager and investors. To ensure the capital gains treatment of such gains flow through to the individual fund managers, if the general partner is a limited partnership it will also be treated as a flowthrough entity for tax purposes.

These measures recognise that venture capital limited partnerships with flowthrough taxation treatment are the preferred investment vehicles internationally and that countries competing with Australia for capital offer exemption from taxation on gains from the sale of those investments. Taxing the carried interest of venture capital managers as capital is also consistent with the international tax treatment of these gains. An internationally consistent tax treatment is critical in attracting highly skilled international venture capital managers to Australia. Such managers will contribute to the expertise and competitiveness of Australia's venture capital industry which, in turn, will attract venture capital funds by offshore investors.

4 PARTNERSHIP AND OTHER ACTS AMENDMENT BILL 2004 (QLD)

The key amendments to the *Partnership Act 1891* (Qld) are contained in **Part 2** of the Bill which:

- provides for ILPs under a **new Chapter 4** of the *Partnership Act 1891*; and
- relocates (and amends) most of the current provisions of the *Partnership Act 1891* applicable to general law partnerships and limited partnerships into a **new Chapter 2** of the *Partnership Act 1891*. Most of the current rules in relation to such partnerships are revised in terms of their application to ILPs.

Under the amendments, venture capital investors may utilise their preferred business structure, ILPs, to access the Commonwealth's taxation exemptions and "flow through" taxation treatment for venture capital investors discussed above.

4.1 APPLICATION OF PARTNERSHIP LAW TO INCORPORATED LIMITED PARTNERSHIPS

Except as provided otherwise by the *Partnership Act 1891* or any other Act, the law relating to partnerships will not apply to an ILP, the partners in an ILP or the relationship between an ILP and its partners (**new s 5A(2), cl 8**).

4.2 KEY CHARACTERISTICS OF AN INCORPORATED LIMITED PARTNERSHIP

An ILP is formed on registration under the **new Chapter 4** (**new s 71**).

As with general law partnerships and limited partnerships, an ILP is, at its most basic level, a relationship which subsists between persons who are carrying on a business in common with a view of profit (s 5(1)).

The persons who have entered into partnership with one another are, for the purposes of the *Partnership Act 1891*, called collectively a "firm" and the name under which their business is conducted is the "firm-name" (**current s 3(2) renumbered as new s 4(1), cl 6(2)**).[29] However in the case of an ILP, a reference to the ILP or the firm is a reference to the ILP as a separate legal entity and not to its partners (**new s 4(3), cl 7**).

An ILP:

- is a body corporate with legal personality separate from that of its partners;
- has perpetual succession;
- may have a common seal;
- may sue and be sued in its firm-name (**new s 72**); and
- must have at least one 'general partner' (but no more than 20 general partners) and at least one 'limited partner' (**new ss 72 and 73**).

There is no limit on the number of limited partners in an ILP.

4.3 PARTNERS IN AN INCORPORATED LIMITED PARTNERSHIP

4.3.1 General Partners and Limited Partners

Similar to limited partnerships, ILPs will have:

- general partners (who manage the business of the partnership); and
- limited partners (who contribute investment capital to, but do not take part in the management of, the ILP).

An individual, a partnership or a body corporate may be a general partner or a limited partner in an ILP (**new s 73(2)**).

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[29] Note that under a **new s 4(2)**, the firm-name of the ILP will be the name of the ILP recorded in the register (**cl 7**).

In determining the number of general partners in an ILP, where a general partner is a partnership and:

- no partner in the partnership has limited liability, all the partners in the partnership are to be counted; and
- one or more partners in the partnership has limited liability, only those partners without limited liability are to be counted (**new ss 73(3) and (4), cl 73**).

Any partner in an ILP who is not a limited partner, will be a general partner. A 'limited partner' is defined as a partner in an ILP whose liability to contribute is limited under the **new Chapter 4** (**dictionary, cl 46**).

4.3.2 Partnership Agreement

A written partnership agreement between the partners in an ILP must be in force at all times. The partnership agreement has effect as a contract between the ILP and each partner under which the ILP and each partner agree to observe and perform the agreement so far as it applies to them.

The interests of the partners in an ILP and their rights and duties in relation to the partnership are, subject to the *Partnership Act 1891*, to be decided in accordance with the agreement (**new s 74**).

4.3.3 Relationship of Partners to Others and Between Themselves

Unless the partnership agreement provides otherwise, or the partners agree otherwise:

- a general partner, the ILP or an officer, employee or agent of a general partner or of the ILP is not an agent of a limited partner;
- the acts of a general partner or of the ILP or of an officer, employee or agent of a general partner or of the ILP do not bind a limited partner;
- a limited partner is not an agent of, or a fiduciary for, a general partner, another limited partner or the ILP; and
- the acts of a limited partner do not bind a general partner or another limited partner or the ILP (**new s 84(1)**).[30]

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[30] Note that in any of the circumstances mentioned in the **new section 84(1)**, a reference to a general partner includes, if the general partner is a partnership, a partner in that partnership (**new s 84(2)**).

None of the above restrictions, however, prevent making, or limit or restrict, an agreement between two partners, or between a partner and the ILP, under which:

- one partner acts as an agent of another partner or of the ILP and, by so acting, binds the other partner or the ILP; or
- the ILP acts as an agent of a partner and, by so acting, binds the partner (**new s 84(3)**).

Where the *Partnership Act 1891* requires or permits any consent or authority to be given by a partner, two or more partners or all the partners then, in the case of an ILP, it may be given by that partner or those partners provided for in the partnership agreement. The consent or authority may be given either in relation to all cases, or in relation to cases subject to stated exceptions, or in relation to any stated case or class of case (**new s 84(4)**).

Any consent or authority under the *Partnership Act 1891* that is required or permitted to be given by an ILP may, without limiting any other way in which it might be given, be given by a general partner or two or more general partners acting under the partnership agreement (**new s 84(5)**).

A limited partner, as limited partner, is not a proper party to any proceeding commenced in a court or tribunal by or against the ILP, other than a proceeding commenced by the ILP against the limited partner or by the limited partner against the ILP (**new s 84(7)**).

4.3.4 Limitation of Liability of Limited Partners of ILPs

The liability of partners in a general law partnership for the debts and obligations of the partnership is unlimited.

A limited partner in an ILP has no liability for the liabilities of:

- the ILP; or
- a general partner in the ILP (**new s 86(1)**).

However, this limitation on a limited partner's liability does not prevent:

- a contribution of capital or property made by a limited partner to the ILP being used; or
- an obligation of a limited partner to contribute capital or property to the ILP being enforced by any person to whom the obligation is owed,

in satisfaction of a liability of the ILP or of a general partner (**new s 86(2)**).

Further, the limitation of liability of limited partners in an ILP is subject to a requirement in the **new section 87** discussed below that limited partners in an ILP not take part in the management of the business of the ILP (**new s 86(3)**).

4.3.5 Limited Partner not to take part in the Management of the ILP

As a general rule, a limited partner in an ILP must not take part in the management of the business of the ILP (**new s 87(1)**). This restriction balances the limitation on liability that applies to limited partners.

If:

- as a direct result of any wrongful act or omission of a limited partner in taking part in the management of the business of an ILP, the limited partner causes any loss or injury to any person other than a partner in the ILP ('third party'); and
- at the time of the act or omission the third party had reasonable grounds to believe that the limited partner was a general partner in the ILP,

the limited partner will be liable for the loss or injury to the same extent that they would have been if they were in fact a general partner in the ILP (**new s 87(2)**).

The **new section 87(3)** provides an extensive but non-exhaustive list of when a limited partner will not be regarded as taking part in the management of the business of an ILP. Essentially, a limited partner may oversee their investment, assist with the growth of the ILP and ensure that the ILP is being managed effectively. This carve out has been referred to as the "safe harbour" for limited partners.[31]

Specifically, the **new section 87(3)** provides that a limited partner will not be regarded as taking part in the management of the business of an ILP only because they, or a person acting for them:

- is an employee or an independent contractor of the ILP or of a general partner or an associate of the general partner,[32] or is an officer of a general partner that is a body corporate;
- gives advice to, or for, the ILP or a general partner or an associate of the general partner in the proper performance of functions arising from:
  - the engagement of the limited partner in a professional capacity or a person acting on behalf of the limited partner in a professional capacity; or

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[31] Hon N Newell MP, Partnership Amendment (Venture Capital Funds) Bill 2004 (NSW), Second Reading Speech, Legislative Assembly, *New South Wales Parliamentary Debates*, 27 February 2004.

[32] Note that the **new section 88(1)(a)** defines what an 'associate of a general partner' includes. The **new section 88(1)(b)** defines what an 'associate of a limited partner' includes, and the **new section 88(1)(c)** defines what an 'associate of an ILP' includes.

- business dealings between the limited partner, or a person acting on behalf of the limited partner, and the ILP or between the limited partner and a general partner or an associate of the general partner;

- gives a guarantee or indemnity in relation to any liability of the ILP or of a general partner or an associate of the general partner;
- takes any action, or participates in any action taken by any other limited partner, for the purpose of enforcing the rights, or safeguarding the interests, of the limited partner as a limited partner;
- if permitted by the partnership agreement:
  - calls, requisitions, convenes, chairs, participates in, postpones, adjourns or makes a record of a meeting of the partners or of the limited partners or of any of them; or
  - requisitions, formulates, signs, approves, disapproves, proposes, moves, supports, opposes, speaks to or votes on any resolution of the partners or of the limited partners or of any of them;
- exercises a power conferred on the limited partner under the *Partnership Act 1891*, partnership agreement or otherwise to access and inspect the books or records of the ILP, or examine the state or prospects of the business of the ILP or advise, or consult with, other partners in relation to the state or prospects of the business of the ILP;
- is or acts as an officer, director, security holder, partner, agent, employee or independent contractor of an associate of the ILP;
- gives advice to, or consults with, an associate of the ILP;
- is or acts as a lender to, or fiduciary for, an associate of the ILP;
- to the extent authorised by the partnership agreement, participates on, or has or exercises any right to appoint one or more persons to, or remove one or more persons from, or to nominate one or more persons for appointment to or removal from, a committee that considers, approves of, consents to or disapproves of any one or more of the following proposals from a general partner:
  - a proposal involving a material change in the nature of the business of the ILP, including a change in, or departure from, any investment guidelines, policies or conditions relating to the business of the ILP;
  - a proposal for the adoption of a method for valuing some or all of the assets of the ILP, including a change to, replacement of or variation from a method for valuing some or all of the assets of the ILP;
  - a proposal for an extension or reduction in the period in which, under the partnership agreement, investments (or particular types of investments) can be made by the ILP, or for any approval or disapproval of investments that the ILP does not otherwise have a right to make;

  - a proposal relating to any actual or potential transaction or other matter involving any actual or potential conflict of interest;
  - a proposal relating to any actual or potential transaction, contract, arrangement or understanding between one or more of the partners, or their associates, and the general partner, the ILP or any associate of the general partner or of the ILP;
  - a proposal for the delegation, waiver, release or variation of an authority, right, duty or obligation of the general partner;
  - a proposal for the appointment or approval under the partnership agreement of any person as a senior executive of the general partner or of an associate of the general partner;
- nominates, selects, investigates, evaluates or negotiates with any person in connection with the removal or replacement of a general partner, or participates on a committee that proposes, considers, approves of, consents to or disapproves of any nomination, selection, appointment, change in control or ownership, suspension, replacement or removal of a general partner or an associate of a general partner; or
- takes any action, or participates in any action taken by any other limited partner, for the purpose of registering or maintaining the registration of the ILP or a general partner in the partnership under the *Venture Capital Act 2002* (Cth) as a VCLP or an AFOF (**new s 87(3)**).

Subject to the partnership agreement, a limited partner or a person authorised by a limited partner may at any time:

- have access to and inspect the books or records of the ILP or copy any of them; and
- examine the state or prospects of the business of the ILP and advise, or consult with, other partners in relation to the state or prospects of the business of the ILP (**new s 87(4)**).

Further, a limited partner in an ILP that is a VCMP is not to be regarded as taking part in the management of the business of the ILP only because of any act the limited partner takes in relation to the ILP in the capacity of a partner or associate of a partner in the VCMP (**new s 87(7)**).

The provisions of the **new section 87** may not be varied by the partnership agreement or with the consent of the partners, whether given by or under the partnership agreement or otherwise (**new s 87(5)**).

Note also that in the **new section 87**, a reference to a general partner in an ILP includes, if the general partner is a partnership, a partner in that partnership (**new s 87(8)**).

4.3.6 Differences between Partners

A majority of the general partners in an ILP may decide a difference arising as to ordinary matters connected with the business of the ILP.

This general rule may, however, be varied by the partnership agreement or with the consent of the partners (**new s 89**).

4.3.7 Change in Partners

The following general rules in relation to an ILP may be varied by the partnership agreement or with the consent of the partners (**new s 90(5)**).

A limited partner may, with the consent of the general partners and the agreement of the transferee, transfer the whole or a part of the limited partner's interest in the ILP.

If the whole of such an interest is transferred to the one transferee, the transferee becomes a limited partner in substitution for the transferor, with all the rights and obligations of the transferor. However, if only a part of the interest is transferred, the transferee becomes a limited partner in substitution for the transferor with all the rights and obligations of the transferor in relation to that part (**new ss 90(1)-(3)**).

It is not necessary to obtain the consent of any limited partner for a person to be admitted as a partner in an ILP (**new s 90(4)**).

4.3.8 Change in Status of Partners

A general partner who becomes a limited partner remains liable for any liability of the ILP that arose before that change to the extent that the ILP is unable to satisfy the liability, or to the greater extent provided by the partnership agreement (**new s 91(1)**).

If a limited partner becomes a general partner, the partner remains not liable (subject to the **new s 87(2)** discussed in Part 4.3.5 of this Research Brief) for any liability of the ILP that arose before the partner became a general partner (**new s 91(2)**).

4.4 REGISTRATION OF INCORPORATED LIMITED PARTNERSHIPS

4.4.1 Application for Registration as an ILP

An application for registration as an ILP may be made by a partnership or by persons proposing to be the partners in the ILP (**new s 75(1)**). In effect, this means that an application can be made by natural persons, persons in a general law partnership, persons in a limited partnership, an ILP itself or other body corporate proposing to be partners in the proposed ILP.[33]

The ILP must register as, or satisfy the requirements applicable to, one of the three authorised venture capital bodies – a VCLP, an AFOF or a VCMP. That is, the circumstances in which an application for registration may be made are:

- that:
  - the partnership is a VCLP or an AFOF under the *Venture Capital Act 2002* (Cth); or
  - a general partner in the limited partnership or ILP, or a proposed general partner in the proposed ILP, intends to apply for registration of the limited partnership, ILP or proposed ILP as a VCLP or an AFOF under the *Venture Capital Act 2002* (Cth); or
- that:
  - the partnership is a VCMP under s 94D(3) of the *Income Tax Assessment Act 1936* (Cth); or
  - the partners in the limited partnership or ILP, or the proposed partners in the ILP, intend that the partnership or proposed ILP will meet the requirements set out in s 94D of the *Income Tax Assessment Act 1936* (Cth) for recognition as a VCMP (**new s 75(2)**).[34]

An application for registration as an ILP must be made to the chief executive in the approved form. The information that must accompany the application includes:

- a statement in relation to each partner or proposed partner as to whether the partner or proposed partner is, or proposes to be, a general partner or a limited partner;

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[33] Partnership and Other Acts Amendment Bill 2004 (Qld), *Explanatory Notes*, p 12.

[34] VCLPs and AFOFs under the *Venture Capital Act 2002* (Cth), and VCMPs under the *Income Tax Assessment Act 1936* (Cth), are discussed in Parts 3.3.1, 3.3.2 and 3.4 of this Research Brief.

- a statement in relation to each partner or proposed partner that is a partnership to the effect that the partner or proposed partner is a partnership;
- for an application by a partnership that is a VCLP or an AFOF, evidence of its registration under the *Venture Capital Act 2002* (Cth);
- for an application by persons proposing to be the partners in a VCLP or an AFOF, a statement that the persons propose to be the partners in a VCLP or an AFOF;
- for an application by a partnership that is a VCMP, a statement that the partnership is a VCMP; and
- for an application by persons proposing to be the partners in a VCMP, a statement that the persons propose to be the partners in a VCMP (**new s 76**).

If the chief executive registers an ILP, the firm-name of the partnership is its name as recorded in the register (**new s 77(2)(a)**). An ILP must have as part of its firm-name the words 'an incorporated limited partnership', 'L.P.' or 'LP' at the end of its firm-name (**new s 77(3)**).[35] The certificate of registration of an ILP (**new s 80**) must be displayed at all times in a conspicuous position at its registered office (**new s 107(3)**). An ILP must keep a registered office in Queensland to which all communications with the ILP may be addressed (**new s 108**).

A certificate of registration issued to an ILP stating any of the following matters is evidence of the matters stated:

- an ILP was formed on the date of registration shown in the certificate;
- an ILP existed at a time shown in the certificate;
- named persons were the general partners and limited partners in an ILP at a time shown in the certificate; and
- any other particular of an ILP mentioned in the certificate was recorded in the register at a stated time (**new s 80**).

The chief executive must keep a register of ILPs registered under the *Partnership Act 1891*, and the information recorded in the register must be available for public inspection (**new s 78**).

On registration of an ILP, its name as recorded in the register is taken to also be its business name for the purposes of the *Business Names Act 1962* (Qld) (**new s 81**).

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[35] Note also that any document issued for an ILP in connection with the conduct of its business must contain the words 'an incorporated limited partnership', 'L.P.' or 'LP' at the end as part of the firm-name of the partnership (**new s 107(1)**).

4.4.2 Requirements following Registration as an ILP

An ILP that was registered on the basis of an intention to:

- become a VCLP or an AFOF must, within one month after becoming a VCLP or an AFOF, give the chief executive with a copy of a document evidencing its status as such;
- meet the requirements for recognition as a VCMP must, within one month after becoming a VCMP, give the chief executive a statement that it is a VCMP (**new ss 109(1)-(2)**).

If the registration of an ILP as a VCLP or an AFOF is revoked, or an ILP ceases to be a VCMP, the ILP must, within seven days, notify the chief executive (**new s 109(3)**).

4.4.3 Assumptions that may be made in Relation to an ILP

A person may make the following assumptions:

- that the partnership agreement of an ILP has been complied with;
- that anyone who appears, from information provided by an ILP that is available to the public from the register, to be a general partner in the ILP is a general partner in the ILP and has authority to exercise the powers and perform the duties customarily exercised or performed by a general partner in an ILP;
- that anyone who is held out by an ILP to be a general partner in, or an agent of, the ILP is a general partner in the ILP, or has been properly appointed as an agent of the ILP, and has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of partner in, or agent of, an ILP;
- that the general partners in, and agents of, an ILP properly perform their duties to the ILP;
- that a document has been properly signed by an ILP if it appears to have been signed under the **new section 104(2)**;[36]
- that a document has been properly signed by an ILP if the ILP's common seal appears to have been affixed to the document; and

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[36] The **new section 104(2)** provides that the ways an ILP may sign a document, including a deed, are without using a common seal (whether or not the ILP has a common seal) if the document is signed by a general partner, or as a deed if the document is expressed to be signed as a deed and is signed with the use of a common seal or by a general partner.

- that a general partner in, or agent of, an ILP who has authority to issue a document or certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy (**new s 106**).

These assumptions are relevant as follows:

- in relation to dealings with an ILP, a person is entitled to make the assumptions and the ILP is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect;
- in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from an ILP, a person is entitled to make the assumptions and an ILP and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect;
- the assumptions may be made even if a partner or agent of the ILP acts fraudulently, or forges a document, in connection with the dealings; and
- a person is not entitled to make an assumption if at the time of the dealing the person knew or suspected that the assumption was incorrect (**new s 105**).

Provisions containing similar assumptions exist in the *Corporations Act 2001* (Cth).

4.5 MUTUAL RECOGNITION OF LIMITATION OF LIABILITY OF LIMITED PARTNERS OF INCORPORATED LIMITED PARTNERSHIPS

The Bill provides mutual recognition of the limitation of liability of limited partners in ILPs under the laws of other Australian jurisdictions, and some overseas jurisdictions.

4.5.1 Liability for Conduct or Acts outside Queensland

A limited partner in an ILP may only be liable for a liability incurred by the ILP as a result of:

- the conduct of the ILP's business outside Queensland; or
- acts outside Queensland of a general partner, a limited partner or the ILP or of any officer, employee or agent of a general partner or of the ILP,

if the limited partner would be so liable if the conduct or acts occurred within Queensland (**new s 92**).

4.5.2 Recognised ILPs under Corresponding Laws

A partner in a 'recognised ILP' (being a partnership formed under the law of another State or of another country or jurisdiction that substantially corresponds to the **new Chapter 4**, or that is declared by regulation by the Governor in Council under the **new s 93(2)** to be a corresponding law for **Chapter 4**) may only be liable for a liability incurred by the ILP as a result of:

- the conduct of the recognised ILP's business in Queensland; or
- the acts in Queensland of a partner in the recognised ILP or of the ILP itself or of any officer, employee or agent of a partner in the ILP or of the ILP,

if the partner would be so liable under the corresponding law if the conduct or acts happened in the place where the recognised ILP was formed (**new s 93(1)**).

The law of another State may be declared to be a corresponding law only in the Minister is satisfied that under that law a limited partner in an ILP formed under the **new Chapter 4** and registered or otherwise recognised under that law may only be liable for a liability incurred by the partnership as a result of:

- the conduct in that State of the business of the ILP; or
- the acts in that State of a partner in the ILP or of the ILP itself or of any officer, employee or agent of a general partner in the partnership or of the partnership,

if the partner would be so liable under the **new Chapter 4** if the conduct or acts happened in Queensland (**new s 93(3)**).

An overseas law may not be declared a corresponding law unless the Minister is satisfied that the law provides for the limitation of liability of particular partners in particular partnerships **(new s 93(4)**).

These rules are in addition to, and do not limit, any rule of law under which recognition is or may be given to a limitation of liability of a partner in a partnership (**new s 93(5)**).

No implication is to be taken to arise from the **new sections 92 or 93** that a limited partner has any liability, or apart from that section would have any liability, in connection with conduct of an ILP's business or acts outside of Queensland that the limited partner would not have in connection with conduct or acts within Queensland (**new s 94**).

4.6 POWERS OF INCORPORATED LIMITED PARTNERSHIPS

An ILP has the legal capacity and powers of an individual, and also all the powers of a body corporate including, for example, the power to do the following, whether within or outside Queensland or Australia:

- carry on the business of the partnership;
- do all things necessary or convenient to be done in connection with the carrying on of the business of the ILP including, for example:
  - enter into contracts or otherwise acquire rights or liabilities;
  - create, confer, vary or cancel interests in the ILP;
  - acquire, hold and dispose of real or personal property or of an interest, whether beneficial or legal, in real or personal property;
  - appoint agents and attorneys, and act as agent for other persons;
  - form, and participate in the formation of, companies or ILPs;
  - participate in partnerships, trusts, unincorporated joint ventures and other arrangements for the sharing of profits; or
  - do any other thing it is authorised to do by or under this chapter or the partnership agreement (**new s 83(1)**).

Note, however, that the powers of an ILP may be limited by the partnership agreement (**new s 83(2)**).

If a statement is made in an application for registration as an ILP that the applicants propose to be the partners in a VCLP or an AFOF, then the ILP's powers are limited to carrying on activities related to becoming registered as a VCLP or AFOF until the ILP becomes a VCLP or AFOF (**new s 83(3)**). Similarly, if a statement is made in an application for registration as an ILP that the applicants propose to be the partners in a VCMP, the ILP's powers are limited to carrying on activities related to becoming a VCMP until the ILP becomes a VCMP (**new s 83(4)**).

4.7 MODIFIED PARTNERSHIP RULES IN RELATION TO INCORPORATED LIMITED PARTNERSHIPS

Most of the partnership rules in the *Partnership Act 1891* that current apply to general law partnerships and limited partnerships under the *Partnership (Limited Liability) Act 1988* are revised to apply to ILPs.

4.7.1 Power of a General Partner of an ILP to Bind the ILP

The current rule in section 8 of the *Partnership Act 1891* in relation to the power of a partner to bind a firm is revised in terms of ILPs to apply to its general partners only.

Every general partner in an ILP will be an agent of the ILP and of the other general partners for the purpose of the business of the ILP. The acts of every general partner who does any act for carrying on in the usual way business of the kind carried on by the ILP will bind the ILP and the other general partners. These rules will not apply, however, if:

- the general partner had no authority to act for the ILP in the particular matter;[37] and
- the person with whom the general partner was dealing either knew that the general partner had no authority, or did not know or believe the general partner to be a general partner (**new s 8(2), cl 11(3)**).

4.7.2 General Partners of an ILP Bound by Acts on Behalf of ILP

The current rule in section 9 of the *Partnership Act 1891* in relation to partners being bound by acts on behalf of a firm is revised in terms of ILPs to bind only the ILP and its general partners.

An act or instrument relating to the business of an ILP, and done or executed in the firm-name, or in any other manner, showing an intention to bind the ILP by any person authorised to bind the ILP (whether a general partner or not) will be binding on the ILP and all the general partners (**new s 9(2), cl 12(3)**).

4.7.3 General Partners of an ILP using Credit of Firm for Private Purposes

The current rule in section 10 of the *Partnership Act 1891* in relation to a partner using credit of the firm for private purposes is revised in terms of ILPs to apply to its general partners only.

If a general partner pledges the credit of an ILP for a purpose apparently not connected with the ILP's ordinary course of business, the ILP will not be bound unless the general partner is in fact specially authorised by the ILP. This rule will not, however, affect any personal liability incurred by an individual general partner (**new ss 10(2) and (3), cl 13(3)**).

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[37] The Explanatory Notes state that this will be determined at common law by reference to the partnership agreement and relevant statutory powers (page 5).

4.7.4 Effect of Notice that ILP will not be Bound by Acts of General Partner

The current rule in section 11 of the *Partnership Act 1891* is restated to apply to ILPs.

If it has been agreed by the partners in an ILP that any restrictions are to be placed on the power (if any) of any one or more of them to bind the firm, no act done in contravention of the agreement will be binding on the ILP in relation to persons having notice of the agreement (**new s 11(2), cl 14(4)**).

4.7.5 Liability of General Partners of ILP

The current rule in section 12 of the *Partnership Act 1891* in relation to the liability of partners of a firm is revised in terms of ILPs to address the liability of its general partners.

Every general partner in an ILP will be liable jointly with the ILP for all the debts and obligations of the ILP incurred while the general partner is a general partner. If a general partner is an individual then, after the general partner's death, their estate will also be severally liable for those debts or obligations so far as they remain unsatisfied but subject to the prior payment of the general partner's separate debts.

However, despite this rule, a general partner in an ILP will only be liable to:

- the extent the ILP is unable to satisfy the debts and obligations; or
- a greater extent provided by the partnership agreement (**new ss 12(2) and (3), cl 15(4)**).

4.7.6 Liability of the ILP for Wrongs

The current rule in section 13 of the *Partnership Act 1891* in relation to the liability of a firm for any wrongful act or omission of a partner is revised in terms of the liability of an ILP for wrongful acts and omissions of its general partners.

If by any wrongful act or omission of a general partner in an ILP acting in the ordinary course of business of the ILP, or with its authority, loss or injury is caused to any person who is not a partner in the ILP, or any penalty is incurred, the ILP will be liable for the loss, injury or penalty to the same extent as the general partner so acting or omitting to act.

However, a general partner in an ILP who commits a wrongful act or omission as a director of a body corporate under the *Corporations Act 2001* (Cth) will not to be taken to be acting in the ordinary course of business of the ILP or with its authority only because of any one or more of the following:

- the general partner obtained the agreement or authority of the ILP to be appointed or to act as a director of the body corporate;
- remuneration that the general partner receives for acting as a director of the body corporate forms part of the income of the ILP; or
- any other general partner in the ILP is also a director of that or any other body corporate (**new ss 13(3) and (4), cl 16(4)**).

4.7.7 Misapplication of Money or Property Received for or in Custody of an ILP

The current rule in section 14 of the *Partnership Act 1891* in relation to a firm making goods a loss in circumstances where money or property of a third person is misapplied by a partner is revised in terms of ILPs to apply where the misapplication is by one or more of its general partners.

In each of the following cases involving general partners in an ILP, the ILP will be liable to make good the loss mentioned in the case:

- one general partner acting within the scope of their apparent authority receives the money or property of a third person and misapplies it;
- an ILP in the course of its business receives money or property of a third person, which is misapplied by one or more of the general partners of the ILP while it is in the custody of the ILP (**new s 14(2), cl 17**).

4.7.8 Liability of General Partners in ILP for Wrongs Joint and Several

The current rule in section 15 of the *Partnership Act 1891* concerning the joint and several liability of every partner for everything the firm becomes liable for under sections 13 or 14 is revised for ILPs to apply only to its general partners.

Every general partner in an ILP will be liable jointly with the other general partners in the ILP and also severally for everything for which the ILP, while the general partner is a general partner in the ILP, becomes liable under sections 13(3) or 14(2) discussed above.

However, the general partner will only be liable to:

- the extent the ILP is unable to satisfy the liability; or
- a greater extent provided by the partnership agreement (**new ss 15(2) and (3), cl 18(3)**).

4.7.9 Improper Employment of Trust Property for ILP Purposes

The current rule in section 16 of the *Partnership Act 1891* regarding partners not being liable for another partner's improper employment of trust property for partnership purposes is revised in terms of ILPs so that it applies to the improper employment of trust property by general partners.

If a general partner in an ILP, being a trustee, improperly employs trust property in the business or on the account of the ILP, neither the ILP nor any other partner will be liable for the trust property to the persons beneficially interested in it.

However, this does not affect any liability incurred by any partner in the ILP by reason of the partner's having notice of the breach of trust, and nothing in the provision above prevents trust money from being followed and recovered from the ILP if it is still in its possession or under its control (**new ss 16(3) and (4), cl 19(4)**).

4.7.10 Persons Liable by 'Holding Out' as a General Partner in an ILP

The current rule in section 17 of the *Partnership Act 1891* attaching liability to persons who hold themselves out as partners is revised in terms of ILPs to attach liability to persons who hold themselves out as general partners.

Everyone who by words or conduct represents himself or herself, or who knowingly suffers himself or herself to be represented, as a general partner in a particular firm that is an ILP will be liable as a general partner to anyone who has on the faith of the representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent general partner making the representation or suffering it to be made (**new s 17(2), cl 20 (7)**).

If, after a partner's death, the ILP business is continued in the old-firm name, the continued use of that name or of the deceased partner's name as part of that name does not of itself make the deceased partner's executors or administrators estate or effects liable for any partnership debts contracted after the partner's death (**existing s 17(2) renumbered as s 17(3), cl 20(4)-(6)**).

4.7.11 Admissions and Representations of General Partners in an ILP

A version of the existing rule in section 18 of the *Partnership Act* will apply to ILPs.

An admission or representation made by any general partner in an ILP concerning the partnership affairs, and in the ordinary course of its business, will be evidence against the ILP (**new s 18(2), cl 21(2)**).

4.7.12 Notice to Acting Partner to be Notice to the ILP

The existing rule in section 19 of the *Partnership Act* is modified to apply to ILPs.

Notice to any general partner in an ILP who habitually acts in the ILP's business of any matter relating to the ILP's affairs will operate as notice to the ILP, except in the case of a fraud on the ILP committed by or with the consent of that partner (**new s 19(2), cl 22(2)**).

4.7.13 Liabilities of Incoming and Outgoing General Partners in an ILP

The existing rule in section 20 of the *Partnership Act* is modified to apply to ILPs.

A person who is admitted as a general partner into an existing ILP will not, by that admission alone, become liable for anything done before the person became a general partner. Further, a partner who retires from an ILP will not, by that retirement alone, cease to be liable for liabilities of the ILP incurred before the partner's retirement for which the partner was liable. A retiring partner in an ILP may be discharged from any existing liabilities by an agreement to that effect between the partner and the ILP and the creditors, and this agreement may be either expressed or inferred as a fact from the course of dealing between the creditors and the firm (**new ss 20(2), (4) and (6), cl 23**).

4.7.14 Partnership Property of an ILP

The existing rule in section 23 of the *Partnership Act* will not apply to ILPs (**new s 23(4), cl 26(7)**). Instead, a **new section 23A** is inserted to deal with the partnership property of an ILP.

The **new section 23A** states that all property, and rights and interests in property, acquired, whether by purchase or otherwise, on account of an ILP, or for the purposes and in the course of the business of the ILP, are called 'partnership property' in the *Partnership Act 1891* and must be applied by the ILP exclusively for the purposes of the ILP. No partner in an ILP, only because of being a partner in the ILP, will have any legal or beneficial interest in its partnership property (**cl 27**).

4.7.15 Duty of ILP to Render Accounts etc

A revised section 31 of the *Partnership Act 1891* will apply to ILPs.

An ILP will be, subject to the partnership agreement, bound to render true accounts and full information of all things affecting the ILP to any partner or the partner's legal representative (**new s 31(2), cl 33(2)**).

4.8 PARTNERSHIP RULES WHICH WILL NOT APPLY TO INCORPORATED LIMITED PARTNERSHIPS

4.8.1 Revocation of Continuing Guaranty by Change in ILP

The existing rule in section 21 of the *Partnership Act* will not apply to ILPs (**new s 21(2), cl 24(2)**).

Section 21 provides that a continuing guaranty given either to a firm or to a third person in relation to the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or the firm in relation to the transaction of which, the guaranty was given.

4.8.2 Conversion into Personal Estate of Land Held as Partnership Property

The existing rule in section 25 of the *Partnership Act 1891* will not apply to ILPs (**cl 28**).

Section 25 states that if land has become partnership property then, unless the contrary intention appears, it is to be treated as between the partners (including the representatives of a deceased partner), and also as between the representatives of a deceased partner, as personal and not real estate.

4.8.3 Procedure against Partnership Property for a Partner's Separate Judgment Debt

An enforcement warrant can not issue against any property of an ILP except on a judgment against the ILP (**new s 26(1), cl 29**).

The existing rules in sections 26(2) and (3) will not apply to ILPs.

Section 26(2) provides that the court may, on the application of any judgment creditor of a partner, make an order charging that partner's interest in the

partnership property and profits with payment of the amount of the judgment debt and interest on the judgment debt, and may by the same or subsequent order appoint a receiver of that partner's share of profits, and of any other money which may be coming to the partner in relation the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

Section 26(3) provides that the other partner or partners are at liberty at any time to redeem the interest charged, or in the case of a sale being directed, to purchase the same.

4.8.4 Rules as to Interests and Duties of Partners subject to Special Agreement

The existing rule in section 27 of the *Partnership Act 1891* will not apply to ILPs (**cl 30**).

Section 27 provides that the interests of partners in the partnership property and their rights and duties in relation to the partnership must be decided, subject to any agreement between the partners, by the following rules:

- all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm;
- the firm must indemnify every partner in relation to payments made and personal liabilities incurred by the partner in the ordinary and proper conduct of the business of the firm, or in or about anything necessarily done for the preservation of the business or property of the firm;
- a partner making for the purpose of the partnership any actual payment or advance beyond the amount of capital which the partner has agreed to subscribe, is entitled to interest at the rate of 6% per annum from the date of the payment or advance;
- a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by the partner;
- every partner may take part in the management of the partnership business;
- no partner is entitled to remuneration for acting in the partnership business;
- no person may be introduced as a partner without the consent of all existing partners;
- any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners; and

- the partnership books are to be kept at the place of business of the partnership and every partner may have access to and inspect and copy any of them.

4.8.5 Retirement from Partnership at Will

The existing rule in section 29 of the *Partnership Act 1891* will not apply to ILPs (**cl 31**).

Section 29 provides that if no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of the partner's intention to do so to all the other partners.

4.8.6 If Partnership for Term is Continued over, Continuance on Old Terms Presumed

The existing rule in section 30 of the *Partnership Act 1891* will not apply to ILPs (**cl 32**).

Section 30 provides that if a partnership for a fixed term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were upon expiration.

4.8.7 Accountability of Partners for Partnership Profits

The existing rule in section 32 of the *Partnership Act 1891* will not apply to ILPs (**cl 34**).

Section 32 states that every partner must account to the firm for any benefit derived by the partner without the consent of the other partners from any transaction concerning the partnership, or from any use by the partner of the partnership property name or business connection.

4.8.8 Duty of Partner not to Compete with Firm

The existing rule in section 33 of the *Partnership Act 1891* will not apply to ILPs (**cl 35**).

Section 33 states that if a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, the partner must account for and pay over to the firm all profits made by him or her in that business.

4.8.9 Rights of Assignee of Share in Partnership

The existing rule in section 34 of the *Partnership Act 1891* will not apply to ILPs (**cl 36**).

Section 34 states that an assignment by any partner of his or her share in the partnership does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must, except in case of fraud, accept the account of profits agreed to by the partners. In case of a dissolution of the partnership, whether as respects all the partners or the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between the assigning partner and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

4.8.10 Dissolution of Partnership and its Consequences

The existing sections 35 to 47 of the *Partnership Act 1891* which relate to dissolution of a partnership and its consequences are grouped under a **new Chapter 2, Part 4** of the *Partnership Act 1891* and do not apply to ILPs. Instead, new provisions dealing exclusively with the dissolution of ILPs will be inserted. These provisions are discussed below (**new s 34A, cl 37**).

4.9 WINDING UP OF INCORPORATED LIMITED PARTNERSHIPS

A new **Chapter 2, Part 6** of the *Partnership Act 1891* will provide for the winding up of ILPs.

Essentially, the winding up of an ILP may occur:

- voluntarily, in accordance with any terms in the partnership agreement for a voluntary winding up, or if so resolved by a special resolution of the limited partners (**new s 96**);
- by a certificate from the chief executive published in the gazette, after notice has been given to the ILP to show good cause why it should not be wound up (**new s 97**); or
- under the provisions of Part 5.7 of the *Corporations Act 2001* (Cth) (with some modification) (**new s 101**).

The chief executive must cancel the registration of an ILP as soon as practicable after it is wound up, and record the cancellation in the register. An ILP ceases to exist on the cancellation of its registration (**new s 103**).

4.9.1 Voluntary Winding Up

On a voluntary winding up of an ILP, its assets[38] must be dealt with in accordance with the terms (if any) of the partnership agreement. If there are no such terms, then the assets must be distributed among the partners in shares that are proportionate to their respective contributions of capital or property to the ILP (**new s 96(2)**).

4.9.2 Winding Up on Chief Executive's Certificate

The chief executive may give notice to an ILP to show why good cause why it should not be required to be wound up. Such notice may be given if the chief executive considers that:

- the ILP has ceased to carry on business;
- having been registered under Chapter 4 on the basis that the ILP is, or is intended to be, a VCLP or an AFOF, the ILP's registration under the *Venture Capital Act 2002* (Cth) has been revoked, or the ILP has not within two years after its incorporation become a VCLP or an AFOF;
- having been registered under Chapter 4 on the basis that the ILP is, or is intended to be, a VCMP, it has ceased to meet, or has not in the period of two years after its incorporation met, the requirements in s 94D(3) of the *Income Tax Assessment Act* 1936 (Cth) for recognition as a VCMP;
- none of the partners is a limited partner;
- incorporation of the ILP has been obtained by mistake or fraud; or
- the ILP exists for an illegal purpose (**new s 97(1)**).

If after 28 days the chief executive is satisfied that the ILP should be wound up, the chief executive may publish in the gazette a certificate as to the requirement that the ILP be wound up (**new s 97(2)**).

Notice of such publication must then be given to the ILP, and the giving of the notice be recorded in the register (**new ss 97(3) and (4)**).

A person whose interests are affected by the decision of the chief executive to publish such a certificate may apply to the Supreme Court for a review of the decision (**new s 98**).

The procedure for a winding up of an ILP required on a certificate of the chief executive is set out in the **new section 99**. The chief executive may appoint a person to be the liquidator of the ILP. The liquidator may, upon the chief

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[38] The assets of an ILP are the assets remaining after satisfaction of the liabilities of the ILP and the costs, charges and expenses of the winding up (**new s 95**).

executive's approval, be a general partner in the ILP and need not be a registered liquidator under the *Corporations Act 2001* (Cth) or give security as required under that Act. The liquidator has all the powers and duties of a liquidator appointed to wind up a company under the *Corporations Act 2001* (Cth).

On a winding up of an ILP required on a certificate of the chief executive, the assets of the partnership must be dealt with in accordance with the terms (if any) set out in the partnership agreement. If there are no such terms, then the assets must be distributed among the partners in shares that are proportionate to their respective contributions of capital or property to the ILP (**new s 100(1)**).

5 INCORPORATED LIMITED PARTNERSHIPS IN OTHER AUSTRALIAN JURISDICTIONS

Victoria, New South Wales and the Australian Capital Territory are the only other jurisdictions in Australia with legislation which provides for ILPs. The provisions of the Bill reflect this legislation.

The relevant legislation is as follows:

- the *Partnership (Venture Capital Funds) Act 2003* (Vic), which came into operation on 3 December 2003 and amended the *Partnership Act 1958* (Vic);
- the *Partnership Amendment (Venture Capital Funds) Act 2004* (NSW), which came into operation on 5 April 2004 and amended the *Partnership Act 1892* (NSW); and
- the *Partnership (Venture Capital Funds) Amendment Act 2004* (ACT), which was assented to on 2 September 2004 but which has not yet been proclaimed into force, and amends the *Partnership Act 1963* (ACT).

In introducing the Partnership Amendment (Venture Capital Funds) Bill 2004 (NSW), the Hon N Newell MP stated:[39]

> *Introducing this structure to complement the Commonwealth's recent venture capital tax reforms, it is anticipated that more than $1 billion will be invested in Australian growth companies, $350 million will be added to Australian gross domestic product and $120 million will be added to net exports each year.*

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[39] Hon N Newell, Partnership Amendment (Venture Capital Funds) Bill 2004 (NSW), Second Reading Speech, Legislative Assembly, *New South Wales Parliamentary Debates*, 27 February 2004, p 6,748.

APPENDIX A – MINISTERIAL MEDIA STATEMENT

Hon. Margaret Keech MP, Minister for Tourism, Fair Trading and Wine Industry Development

18 August 2004

Queensland serious about venture capital

Fair Trading Minister Margaret Keech has introduced to Parliament a Bill aimed at making Queensland more attractive for new international venture capital investment.

Mrs Keech said the Partnership and Other Acts Amendment Bill would be a great incentive to further investment, particularly in the areas of biotechnology and information technology.

"The Bill establishes a new incorporated limited partnership (ILP) as the legal structure most suitable to access the Australian Government's venture capital investment taxation exemptions and 'flow through' taxation treatment," she told Parliament last night.

"This Bill is designed to attract investors to Queensland to inject money into new fields or innovative products into new fields or products like biotechnology or IT by removing some of the heavy financial and management risks.

"Currently, there are no limits to the liability of partners for debts and obligations of the partnership, which means if something goes wrong with the investment, the personal assets of the partners are at risk.

"This Bill will create incorporated limited partnerships and an attractive environment for venture capitalists in Queensland by permitting a business structure that will protect limited partner investors' personal assets."

Mrs Keech said ILPs would fund growth companies undertaking research and development activities in Queensland.

"Queensland has the venture capital opportunities to bring in the big investors. By allowing for registration of ILPs, we're creating the incentive needed to draw overseas and Australian financial backers," she said.

"This is great news for those small to medium enterprises attempting to raise venture capital in what are normally considered high-risk investments such as emerging technologies or new products requiring funding for research and development."

Under the new Bill:

- Both general and limited partners are allowed, with the relationship between both types governed by written agreements and legislation.
- Limited partner investors are offered the protection of no liability for the debts and obligations of the incorporated limited partnership.

- Limited partner investors are only required to contribute the capital or property to the incorporated limited partnership to which they have agreed.
- Limited partner investors must not take part in the management of the business of an incorporated limited partnership unlike the general partner.
- General partners must satisfy debts to the extent the incorporated limited partnership is unable.
- Incorporated limited partnerships in Queensland will be recognised outside of the State.

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