



New South Wales

Partnership Amendment (Venture Capital Funds) Bill 2004

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

At present, the *Partnership Act 1892* (the *Principal Act*) provides for two forms of partnerships—common law partnerships and limited partnerships. The object of this Bill is to amend the Principal Act to provide for a new form of partnership, an incorporated limited partnership. Unlike common law partnerships and limited partnerships, an incorporated limited partnership is a separate legal entity from its partners. Like a limited partnership, it has general partners who manage the business of the partnership and limited partners who contribute investment capital to, but do not manage, the business. The liability of the limited partners for the debts and obligations and other liabilities of the partnership is accordingly limited. Partnerships with this structure are typically used for international venture capital investment. The Bill will enable individuals, corporations and partnerships who are engaged in certain venture capital projects in Australia to form such an incorporated limited partnership by being registered under the Principal Act.

The Bill also amends the Principal Act to clarify and expand on provisions of the Act relating to limited partnerships and the liabilities of partners in them.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Partnership Act 1892* set out in Schedule 1.

Schedule 1 Amendments

Formation and registration of incorporated limited partnerships

Proposed section 50A (**Schedule 1 [56]**) provides for the formation of an incorporated limited partnership by registration as such in a Register of Limited and Incorporated Limited Partnerships to be kept by the Registrar (currently the Director-General of the Department of Commerce) under Part 3 of the Principal Act. Proposed section 57 (1A) (**Schedule 1 [73]**) provides for the keeping of the Register and for it to have two divisions, a division of limited partnerships and a division of incorporated limited partnerships.

Under proposed section 53D (**Schedule 1 [62]**) an application for registration may be made by an existing partnership (or limited partnership) or by any individuals, corporations or partnerships proposing to be partners in the proposed incorporated limited partnership in specified circumstances. These are essentially that the partnership is registered, or the proposed partnership intends to apply for registration, as a venture capital limited partnership (a *VCLP*) or an Australian venture capital fund of funds (an *AFOF*) under the *Venture Capital Act 2002* of the Commonwealth, or is recognised or intends to meet the requirements for recognition as a venture capital management partnership within the meaning of section 94D (3) of the *Income Tax Assessment Act 1936* of the Commonwealth. (Registration or recognition entitles such partnerships to flow-through taxation treatment and capital gains tax exemption). Proposed section 73E (**Schedule 1 [100]**) requires an incorporated limited partnership to give notice of such eventualities to the Registrar.

Proposed section 54 (**Schedule 1 [63]**) sets out the particulars to be included in an application for registration of an incorporated limited partnership (the details of the particulars required to be included with respect to limited partnerships are also clarified). These are recorded in the Register as the registered particulars with respect to the partnership. Under proposed section 55 (2A) (**Schedule 1**

[66]) the firm-name of the partnership is the name recorded in the Register. **Schedule 1 [76]** amends section 59 of the Principal Act so that the name need not be registered under the *Business Names Act 1962*. Proposed section 55 (2B) (**Schedule 1 [66]**) makes provision for cancellation of the registration of a limited partnership that is registered as an incorporated limited partnership. Consequential amendments are made by **Schedule 1 [64] and [65]**.

Proposed section 55A (**Schedule 1 [68]**) makes it clear that any acts preparatory to the making of an application for registration as an incorporated limited partnership (or limited partnership) do not in themselves create a partnership.

Proposed section 58 (**Schedule 1 [75]**) requires the Registrar to issue certificates as to formation and registered particulars of an incorporated limited partnership (or limited partnership) and describes the evidentiary effect of such certificates.

Proposed section 57 (4) and (5) (**Schedule 1 [74]**) enable the Registrar to correct errors or omissions in the Register.

Proposed section 56 (2) and (2A) (**Schedule 1 [70]**) provide for the signatures required from partners in order to change registered particulars. Proposed section 56 (2A) (b) deals with the situation where the limited partner is a limited partnership. **Schedule 1 [69]** makes a consequential amendment.

Schedule 1 [57]–[59] amend sections 51 and 52 to provide for incorporated limited partnerships to have at least one but no more than 20 general partners and one limited partner. Proposed section 52 (4) (**Schedule 1 [59]**) removes any uncertainty that may arise with respect to calculating the size of a limited partnership or incorporated limited partnership where a general partner is itself a partnership.

Proposed section 51 (2) and (3) (**Schedule 1 [57]**) make it clear that a corporation or partnership may be a general partner or limited partner in a limited partnership or an incorporated limited partnership and that a partnership that is such a partner may be a partnership formed under a law of a place other than New South Wales (an *external partnership*.) A definition of *external partnership* is inserted by **Schedule 1 [52]**.

Nature and powers of an incorporated limited partnership

Proposed sections 53 and 53A (**Schedule 1 [60]**) describe the nature and powers of an incorporated limited partnership. It is a body corporate with legal personality separate from the partners in it and with perpetual succession and may sue and be sued in its firm-name. It has (subject to any limitation imposed by the partnership agreement) all the legal power and capacity of an individual and also of a body corporate to carry on the business of the partnership, whether within or outside New South Wales or outside Australia.

Proposed sections 1B (2) and 1C (**Schedule 1 [2] and [3]**) emphasize the different nature of this new form of partnership by making it clear that references in the Principal Act to a partnership or firm that is an incorporated limited partnership are references to the separate legal entity that is distinct from the persons or partnerships that constitute it. As such it has rights and liabilities that are distinct from those of the partners in it, whether limited or general. Accordingly, much of the existing law of partnership has no application to incorporated limited partnerships, the partners in an incorporated limited partnership or to the relationship between an incorporated limited partnership and its partners.

Schedule 1 [4] amends section 1 (1) to include this new form of partnership in the definition of “partnership” contained in the Principal Act. **Schedule 1 [5]** amends section 2 to make it clear that existing rules for determining the existence of a partnership do not apply in determining whether an incorporated limited partnership exists. Similar amendments are made to sections 20 and 22–31 and to insert proposed sections 20A and 31A (**Schedule 1 [37]–[49]**).

Relationship of partners of incorporated limited partnership to each other and to the partnership

Proposed section 53B (**Schedule 1 [60]**) provides that there must be a written partnership agreement for an incorporated limited partnership and that such an agreement operates also as a contract between the incorporated limited partnership and each partner. The interests of the partners in the incorporated limited partnership and their rights and duties in relation to the partnership are, subject to the Principal Act, to be determined in accordance with the agreement.

Division 2 of Part 2 of the Principal Act (Relationship of partners to persons dealing with them) applies to incorporated limited partnerships by the operation of proposed section 50 (**Schedule 1 [54]**). However, its application is modified by proposed section 53C (**Schedule 1 [60]**) and by amendments made to sections 5–18 of the Principal Act by **Schedule 1 [8]–[36]**.

Proposed section 53C describes the relationship of the partners in an incorporated limited partnership to each other and to the partnership. Except as provided by the partnership agreement or as otherwise agreed by the partners (and subject to proposed section 67A), in general neither a general partner, the incorporated limited partnership, nor an officer, employee, agent or representative of the partnership, can bind a limited partner and a limited partner is not an agent of a general partner, another limited partner or the partnership. A limited partner is not (subject to proposed section 67A) a proper party to a suit by or against the partnership.

The amendments to sections 5–18 of the Principal Act made by **Schedule 1 [8]–[36]** describe the liability of the general partners in an incorporated limited partnership. They include amendments to ensure that the persons authorised to do an act or execute an instrument for an incorporated limited partnership do not generally include a limited partner and that the general partners are jointly liable with the incorporated limited partnership for its liabilities but that such liability is limited to that which the incorporated limited partnership cannot satisfy or as otherwise provided by the partnership agreement.

Schedule 1 [91] amends section 68 of the Principal Act to provide for the resolution of differences between the partners in an incorporated limited partnership.

Schedule 1 [93] and [94] amend section 69 of the Principal Act to provide for transfer of the interests of partners in an incorporated limited partnership.

Limitation of liability of partners in incorporated limited partnerships for the liabilities of the partnership

Schedule 1 [53] inserts a new definition of *liability* into section 49 of the Principal Act. *Liability* includes any debt, obligation or other liability of any kind, wherever and however incurred. Proposed section 66A (**Schedule 1 [86]**) provides that a limited partner has no liability for the liabilities of the incorporated limited partnership or of a general partner but not so as to prevent the satisfaction of such liabilities by the contributions of capital or property by limited partners, or by the enforcement of the obligation to so contribute. The limitation on liability is qualified by proposed section 67A (**Schedule 1 [90]**) which provides that a limited partner must not take part in the management of the incorporated limited partnership. A limited partner who does take part in the management may be liable for acts taken by the partner that cause loss or injury to a third party if the third party reasonably believed the limited partner was a general partner. However, the limited partner's liability is limited to that incurred as a direct result of such acts and to liability that would be incurred if the partner were in fact a general partner.

Proposed section 67A (4) provides that a limited partner is not to be regarded as taking part in the management of the business of the incorporated limited partnership merely because the partner engages in specified acts (the *safe harbour provisions*). The acts specified include those that a limited partner in a limited partnership may currently do under section 67 of the Principal Act without being considered to be taking part in the management of the business of the limited partnership. However these are expanded and enhanced to recognise the active role that limited partners in incorporated limited partnerships may play in overseeing the investments of the partnership and in advising and assisting the investees (for example, proposed section 67A (3) (g) will enable a

limited partner to give advice to, consult or act as an officer or director of an associate (as defined in proposed section 67B (**Schedule 1 [90]**) of the incorporated limited partnership with whom the incorporated limited partnership invests and to participate in committees dealing with requests from general partners for consent to do various things). Proposed section 67 (6) (**Schedule 1 [89]**) emphasises that section 67A (3) is not an exhaustive list of actions that may be taken that do not amount to taking part in the management of a business.

Liability for partnerships formed under corresponding laws and for acts or omissions outside the State

Proposed section 66C (**Schedule 1 [86]**) makes it clear that it is intended that the limitation on the liability of a limited partner in an incorporated limited partnership conferred by or under the Principal Act extends to liability incurred outside the State. Proposed section 66D (**Schedule 1 [86]**) provides for the recognition of the limitation of liability of partners in incorporated limited partnerships formed under the law of another jurisdiction for liabilities incurred in the State, provided that the law substantially corresponds to the provisions of the Principal Act relating to incorporated limited partnerships or is declared to be a corresponding law by the Governor.

Proposed section 66E (**Schedule 1 [86]**) provides that sections 66C and 66D cannot be taken to imply that a limited partner in an incorporated limited partnership can have liability for conduct or acts or omissions outside the State that would not attract liability if done within the State.

Schedule 1 [82]–[84] amend section 64 of the Principal Act to enable a jurisdiction other than another State, Territory or country to be declared to be a corresponding law for the purposes of that section (which is a provision relating to recognition of laws concerning limitation of liability of limited partners in limited partnerships similar to proposed section 66D). Proposed section 64A (**Schedule 1 [85]**) is an equivalent provision for limited partnerships to proposed section 66E.

Clarification of provisions relating to limited partnerships

Schedule 1 [53] inserts a definition of *liability* into section 49 of the Principal Act. References elsewhere in the Principal Act referring to debts or obligations are replaced with references to the more widely defined liabilities (see for example, **Schedule 1 [79], [81], [88] and [97]**).

Winding up of incorporated limited partnerships

Proposed Schedule 2 (**Schedule 1 [99] and [110]**) provides for incorporated limited partnerships to be wound up voluntarily or if required to be wound up by the Registrar. The Registrar may require an incorporated limited partnership to be wound up on various grounds. For example, under proposed clause 3 of Schedule 2 to the Principal Act (**Schedule 1 [110]**), the Registrar may require an incorporated limited partnership to be wound up if the Commonwealth revokes its registration as a VCLP or an AFOF or if it fails to be registered or within two years after registration as an incorporated limited partnership under the Principal Act.

Proposed clause 7 of Schedule 2 (**Schedule 1 [110]**) provides for the winding up of an incorporated limited partnership in certain circumstances to be declared to be an applied Corporations legislation matter for the purposes of Part 3 of the *Corporations (Ancillary Provisions) Act 2001* in relation to Part 5.7 of the *Corporations Act 2001* of the Commonwealth.

Miscellaneous

Schedule 1 [6] and [7] amend section 4 of the Principal Act to make it clear that an incorporated limited partnership may be referred to as a firm.

Schedule 1 [100] inserts proposed sections 73B–73E into the Principal Act. Proposed section 73B provides for the execution of documents by an incorporated limited partnership, with or without using a common seal.

Proposed section 73C entitles a person who deals with an incorporated limited partnership or with a person who has acquired property from the partnership to make the assumptions set out in proposed section 73D, unless the person knew or suspected that the relevant assumption was incorrect, and for the inability of the partnership to assert that any of the assumptions are incorrect.

Proposed section 73D sets out various assumptions that may be made, including providing that a person may assume compliance with the partnership agreement of an incorporated limited partnership and that a person who appears to be a general partner or agent of the partnership is such, has customary powers and duties and properly performs those duties.

Proposed section 73E requires an incorporated limited partnership to lodge certain documents with the Registrar.

Schedule 1 [101]–[105] amend sections 75, 76, 77 and 78, respectively, of the Principal Act to provide for the identification of incorporated limited partnerships by inclusion of the words “An Incorporated Limited Partnership” (or “L.P.” or “LP” as an abbreviation) after the firm-name, to enable limited partnerships to use such abbreviations, to require an incorporated limited

partnership to keep a registered office in New South Wales, to describe methods of serving documents on limited partnerships and incorporated limited partnerships and to provide that an entry in the Register in relation to an incorporated limited partnership constitutes notice of certain matters.

Schedule 1 [106] amends section 80 so that proceedings for offences against any Part of the Act or the regulations are dealt with summarily before a Local Court.

Schedule 1 [107] inserts proposed sections 80A and 80B into the Principal Act. Proposed section 80A provides that if an offence is committed under the Principal Act by a general partner in a limited partnership or incorporated limited partnership that is itself a partnership or limited partnership, the offence is taken to be committed by each partner. It makes it a defence for any such partner in a prosecution to prove that the partner took all reasonable precautions and exercised all due diligence to avoid the commission of the relevant offence. Proposed section 80B enables the Registrar to issue a notice requiring an incorporated limited partnership to furnish information within a specified period and makes it an offence for the general partners to fail to comply with the notice or to supply false or misleading information.

Schedule 1 [108] amends section 81 of the Principal Act to expand the power to make regulations relating to matters such as the keeping of records by limited partnerships and incorporated limited partnerships, to enable the regulations to exempt persons or classes of persons or other matters or things from provisions of the Act and to enable the regulations to create offences.

Proposed section 81A (**Schedule 1 [109]**) enables the regulations to declare that a matter dealt with by the Principal Act or the regulations is an excluded matter for the purposes of section 5F of the *Corporations Act 2001* of the Commonwealth.

Schedule 1 [110] inserts proposed section 83 and Schedule 1 into the Principal Act. Schedule 1 contains provisions of a savings or transitional nature, including a provision to enable the regulations to make provision for matters of a savings or transitional nature consequent on the amendment of the Act.

Schedule 1 [2] inserts proposed section 1B (3) to make it clear that notes included in the Principal Act do not form part of the Act. Notes are inserted in the Principal Act by **Schedule 1 [7], [67], [72], [77] and [92]**.

The remaining amendments are consequential amendments such as those inserting definitions (**Schedule 1 [52] and [53]**) and amending headings (**Schedule 1 [50], [55], [61], [78], [87] and [96]**).