

Limited Partnerships Bill introduced

Introduction

The much heralded Limited Partnerships Bill was introduced into the House on 7 August 2007. As the explanatory note to the Bill sets out, limited partnerships are a form of partnership involving:

- general partners, who are liable for all of the debts and liabilities of the partnership; and
- limited partners, who are only liable to the extent of their contribution to the partnership (unless they become involved in management).

Limited partnerships are a standard international vehicle for venture capital investment funds, and often used for private equity funds and other pooled investments.

The explanatory note continues that in the highly competitive international venture capital market, New Zealand is “disadvantaged by size and distance”. This makes it particularly important that New Zealand adopt a limited partnership structure that is “consistent with international norms” and which provides a form of legal and tax structure that is recognised and accepted by international investors. This is what the Bill sets out to achieve.

Special partnerships

Under the Bill, the special partnership provisions of the Partnership Act 1908 are to be repealed although transitional provisions permit a special partnership existing on the commencement of the New Act to continue but **not** to be renewed at the end of its current seven year term.

Key features of a New Zealand limited partnership

Under the Bill, the new regulatory regime for limited partnerships will have the following key features:

- a limited partnership can be formed for any business purpose (except for insurance and banking) by registration with the Companies Office
- a limited partnership will have separate legal personality (unlike a general partnership or a special partnership)
- any legal person may be a general or limited partner
- a limited partnership must have at least one general and one limited partner – the function of the general partner is to manage the business of the limited partnership and the function of the limited partners is to provide money or assets to fund that business
- the general partner will be liable for the debts and liabilities of the limited partnership
- the limited partners are not responsible for the liabilities of the partnership except to the extent of their contribution to the partnership (so long as the limited partners do not engage in the management of the limited partnership)
- safe harbours or activities will be prescribed in regulations so that limited partners are able to participate in “strategic activities” without this affecting their limited liability status
- a limited partnership may be dissolved in a variety of circumstances
- a limited partnership must have a written partnership agreement. On registration of the limited partnership, the partnership agreement has effect as a contract between the limited partnership and each partner, and between the partners themselves. The partnership agreement cannot, however, be a means to contract out of the provisions of the legislation
- a limited partnership must not be a party to a listing agreement for the listing of securities on a securities market
- under the Bill, the register of limited partnerships maintained by the Registrar of Companies must include details of the name and address of each limited partner – but that information “*must not be available to a member of the public and must not be able to be searched...except by the Registrar*”

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- distributions by a limited partnership are subject to a similar regime to that which applies to companies under the Companies Act 1993 (including the statutory solvency test)
- the new Act will prevail over the Partnership Act 1908 in any matter for which the new Act provides, and
- the Bill also contains provisions requiring overseas limited partnerships which carry on business in New Zealand to register (much in the way that overseas companies are required to register).

Taxation

The Bill proposes changes to the taxation treatment of all partnerships – both limited partnerships and general partnerships. The tax rules will also apply to New Zealand resident partners of foreign general partnerships and foreign limited partnerships (where those limited partnerships do not have separate legal personality). In addition, joint ventures and co-owners can choose to have the partnership tax rules apply to them.

It is proposed that the rules be effective from income years commencing 1 April 2008.

The key tax proposals include:

- all partnerships will be subject to flow-through treatment for tax purposes with partners deriving income, expenses, tax credits, rebates and losses (subject to some loss limitation rules applicable to limited partners in limited partnerships) in proportion to their share in partnership income
- each partner's share of partnership income will be as determined in the partnership agreement, or in the absence of such an agreement, by operation of the Partnership Act
- a new anti-avoidance provision will provide that transactions between partners of a partnership as members of that partnership will be treated as being for a market value amount of consideration (except salary and wages)
- subject to specific carve outs, partners will be required to account for tax on their exit from a partnership in some circumstances, if the amount of disposal proceeds from the partnership interest exceeds the total net tax book value of the partner's share of partnership property by more than \$50,000
- when exiting partners account for tax in respect of their share of partnership assets and liabilities, the partnership and the incoming partner must take on a cost base in the partnership's assets and liabilities. The cost base must be equal to the amount the exiting partner was deemed to have disposed of them for under the disposal provisions
- a 50% or more change in partnership ownership within 12 months will be a deemed dissolution of a partnership and a deemed disposal of partnership property
- the entry and exit rules will be elective for partnerships of five or fewer partners, provided no partner has limited liability for the partnership's debts, and

- for limited partnerships:
 - tax losses will only be able to be claimed by limited partners in limited partnerships to the extent of the tax book value of the limited partners' investment. A "basis" concept will calculate the extent of a limited partners' investment and the extent to which tax losses can be accessed by limited partners in a particular income year
 - there are proposed anti-avoidance provisions preventing artificial increases in "basis"
 - excess tax losses will be able to be carried forward by limited partners to future income years
 - general partners in limited partnerships will have no restriction on access to tax losses
 - a simple transition from a special partnership to a limited partnership will not generally trigger income tax implications for the partners, and a transitioning special partnership can determine the "basis" of special partners' interests either by the market value of the special partnership interests, or by calculating "basis" as if the special partnership had always been a limited partnership from inception, and
 - only the general partner (and not all other partners) will be treated as agent of absentee (ie foreign resident) limited partners in a limited partnership for income derived from a partnership business carried on in New Zealand.

Minter Ellison Rudd Watts

At Minter Ellison Rudd Watts we have experience with structuring investment vehicles (including venture capital funds) under the existing special partnership legislation and our lawyers have also been involved with the creation of private equity and venture capital funds overseas under limited partnership legislation similar to the Bill (and upon which many aspects of the Bill have been based). Through our Australian colleagues at Minter Ellison, we also have access to experience in forming and advising investment vehicles under the Australian venture capital limited partnership legislation.

We would be happy to discuss aspects of the Bill with interested parties and, where appropriate, assist in the public consultation process leading to the final legislation.

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