



## Articles

# Incorporated limited partnerships: Venture capital's contribution to legal development

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*The Venture Capital Act 2002 (Cth) was enacted to remove tax impediments to venture capital investment in Australia. Those benefits are available only to registered limited partnerships. The passage of that legislation caused members of the venture capital industry to review the state of Australian limited partnership law and to make recommendations for its reform. Their major proposal, creation of the incorporated limited partnership, has been adopted in New South Wales, Queensland and Victoria. This article focuses upon the industry critique of the existing legislation, reform proposals, legislative outcomes and their impact on the broader field of partnership law, while placing limited partnership within a broader historical perspective. The author accepts that major investments deserve a safe delivery vehicle but queries whether the existing legislation was irreparable, why other businesses have been denied access to the unique characteristics of the incorporated limited partnership and why the opportunity has not been taken to engage in more extensive reforms.*

### 1. Introduction

Although, for the last 150 years,<sup>1</sup> the company limited by shares has provided a generally available means of limiting liability for business obligations, there has been a continuing, albeit low key, quest for other forms of limited liability arrangements.<sup>2</sup> In that search the limited partnership, a bridge between the full personal liability of ordinary partnership and corporate limited liability, has often been overlooked. Limited partnership has a long but undistinguished history in the common law world, persisting but rarely establishing a niche for itself as the vehicle for a distinctive commercial activity. Now the requirements of venture capital, one of the newer investment opportunities,

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1 Since passage of the Limited Liability Act 1855 (UK) (18 & 19 Vict, c 133).

2 Traditionally pressure for development has come from the ranks of professionals precluded by law or convention from pursuing their profession in corporate form but, increasingly, it is driven by the urge to create new investment vehicles that appeal to foreign investors who have gained familiarity with their characteristics in their domestic jurisdictions.

spawned by government's desire to encourage the commercialisation within Australia of more of the intellectual capital and business potential generated by Australian designers, inventors and prospectors, provides impetus for its development.

## 2. History of limited partnership

The limited partnership concept developed in Renaissance Italy as a way of releasing feudal capital for commercial trading activities. In many Italian states the nobility were forbidden to engage in trade but they were aware that overseas trade, especially with the East, offered the prospect of better returns than extending or developing their estates. The development of a profit-sharing relationship between a passive investor and an undercapitalised merchant offered both the opportunity to realise their commercial aspirations in a lawful manner.

Limited partnership in the guise of the *commenda* developed concurrently with ordinary partnership in England<sup>3</sup> but did not thrive because of inadequate accounting facilities and a Tudor suspicion that it was a device designed to disguise usurious loans.<sup>4</sup> The concept of a protected loan, with profit participation, was resuscitated by Bovill's Act<sup>5</sup> while the full concept was realised in the Limited Partnership Act 1907 (UK). Tasmania and Western Australia adopted the latter legislation in 1908 and 1909 respectively. By then, most Australian jurisdictions had adopted and repealed equivalent legislation modelled on the Anonymous Partnerships Act 1781 (Ire).<sup>6</sup> Exceptionally, Queensland retained a version of that legislation.<sup>7</sup> However, after the procedural risks implicit in that legislation were demonstrated in *Re Cotton Crops Pty Ltd*,<sup>8</sup> Queensland enacted legislation similar to but less restrictive than the early twentieth century Limited Partnership legislation.<sup>9</sup> Subsequently, New South Wales, Victoria and South Australia enacted similar

3 W Holdsworth, *History of English Law*, 2nd ed, Methuen/Sweet & Maxwell, London, 1937, pp 192–9; M Twomey, *Partnership Law*, Butterworths, Dublin, 2000, at [28.04], cf R Banks (Ed), *Lindley & Banks on Partnership*, 18th ed, Sweet & Maxwell, London, 2002, p 841.

4 K Fletcher (Ed), *Higgins and Fletcher The Law of Partnership in Australia and New Zealand*, 8th ed, LBC Information Services, Sydney, 2001, p 4.

5 Law of Partnership (Amendment) Act 1865 (UK) 28 & 29 Vict, c 86 is retained in the Partnership Acts: 1890 (UK) s 2(3)(d); 1963 (ACT) s 7(4)(d); 1892 (NSW) s 2(3)(d); 1997 (NT) s 6(1)(c)(iv), (2); 1891 (Qld) s 6(c)(iv); 1891 (SA) s 2(III)(d); 1891 (Tas) s 7(c)(iv); 1958 (Vic) s 6(3)(d); 1895 (WA) s 8(3)(d).

6 21 & 22 Geo III, c 46, repealed by the Companies Act 1862 (UK) s 205 and Sch 3, was adopted by NSW 1853, 17 Vict c 9, repealed by the Companies Act 1874; SA 1853, 17 Vict c 20, repealed by the Law of Partnership Act 1866; Vic 1853, 17 Vict c 5, repealed by the Companies Statute 1864.

7 It had retained the NSW law on separation in 1859 and re-enacted it in the Mercantile Act 1867 ss 53–68. These sections were repealed by the Partnership (Limited Liability) Act 1988.

8 [1986] 2 Qd R 328, upheld on appeal [1988] 1 Qd R 34, noted in Fletcher, above n 4, p 271.

9 Partnership (Limited Liability) Act 1988, discussed in K Fletcher, 'Limited Partnership: Getting It Together . . . Eventually' (1989) 19 *Qld LSJ* 285. The older style of limited partnership, known in New Zealand as a special partnership, is retained in Partnership Act 1908 (NZ) Pt II ss 48–67, which substantially re-enacts the provisions of the Special Partnership Act 1858 (NZ).

provisions as amendments to their partnership legislation,<sup>10</sup> in 1991, 1992 and 1997 respectively.

### 3. The structure of limited partnerships

Legislatively, limited partnership differs from a general partnership in two significant ways:

the critical difference between limited partnership and ordinary partnerships is that in a limited partnership there are two classes of partners: general partners, who have the same rights and liabilities as partners in an ordinary partnership, and limited partners, who contribute to the capital of the partnership and share in the profits but have no right to participate in its management nor any responsibility, beyond their capital contributions, for its liabilities.<sup>11</sup>

Secondly, limited partnerships are created by registration.<sup>12</sup> The limited liability of the passive investors is dependent upon the promoter of the venture or the general partner completing and duly lodging a proper application with the registering authority.

As fees are modest and the matters to be disclosed upon application<sup>13</sup> pose little threat to business confidentiality or concerns for personal privacy, it might have been supposed that the device would have been attractive to persons promoting passive investments but its potential has rarely been exploited.

### 4. Commonwealth intervention

Limited partnerships appear to have been little appreciated either before the advent of limited companies<sup>14</sup> or the de facto recognition of proprietary companies in 1897.<sup>15</sup> When, in the late 1980s,<sup>16</sup> promoters of tax effective

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10 Partnership Act: 1892 (NSW) Pt 3 ss 49–81; 1958 (Vic) Pt 3 ss 49–79; 1891 (SA) Pt 3 ss 47–83.

11 Fletcher, above n 4, pp 269–70.

12 Partnership Act: 1892 (NSW) Pt 3 s 55; 1891 (Qld) s 50; 1891 (SA) Pt 3 s 53; 1958 (Vic) Pt 3 s 54(2); Limited Partnership Act 1908 (Tas) s 4; 1909 (WA) s 4.

13 Registration is achieved by lodging an application, executed by all partners, detailing the firm name, the address of its registered office, the full name of each partner, identification of general and limited partners and a statement of the amount that each limited partner has agreed to contribute to the firm's capital: Partnership Act: 1892 (NSW) Pt 3 s 54(2); 1891 (Qld) s 50(2); 1891 (SA) Pt 3 s 53; 1958 (Vic) Pt 3 s 54(2); Limited Partnership Act: 1908 (Tas) s 8(1); 1909 (WA) s 8.

14 All colonies, except Queensland, repealed their limited partnership legislation when introducing companies legislation, see above n 6.

15 In Queensland, only 12 limited partnerships were registered under the Mercantile Act 1867 between 1867 and 1897 when *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL) was decided. See P Higgins and K Fletcher, *The Law of Partnership in Australia and New Zealand*, 4th ed, Law Book Co, Sydney, 1981, App I, p 339.

16 In Queensland, 174 were registered under the Mercantile Act 1867 before its repeal in 1989. Of these, 114 were registered in its last decade. 145 were registered under the Partnership (Limited Liability) Act 1988 from 1989 to 31 December 1992: see K Fletcher, *Higgins & Fletcher The Law of Partnership in Australia and New Zealand*, 6th ed, 1991, App I, p 361 and 8th ed, 2001, p 272.

investment schemes discovered their potential as a vehicle<sup>17</sup> for their schemes,<sup>18</sup> the Commonwealth removed those advantages.<sup>19</sup> However, concurrently, it has been a consistent supporter of research and innovation through tax concessions under the Pooled Development Funds Act 1992 (Cth). Those concessions are available to limited partnerships, amongst others. More recent legislation has been directed specifically to limited partnerships. The Venture Capital Act 2002 is designed<sup>20</sup> to attract venture capital<sup>21</sup> investment through venture capital limited partnerships (VCLP) or Australian venture capital fund of funds (AFOF), which invest solely in venture capital limited partnerships or related ventures. Limited partnerships, which obtain registration<sup>22</sup> and, thereafter, continue to satisfy the reporting criteria,<sup>23</sup> obtain both capital gains tax exemptions<sup>24</sup> and 'flow-through' treatment of income.<sup>25</sup> The capital gains tax exemption is the primary benefit, as most venture capital funds anticipate making most of their earnings as capital gains on the sale of equity investments. Exempting unconditionally registered limited partnerships from liability to pay tax on capital gains was a practical necessity, if Australia was to be able to compete for capital and expertise with other jurisdictions, which offered similar benefits. The 'flow through' of limited partnership income direct to partners, without intermediate deduction of tax at corporate rates, by reducing the potential for interaction with the Australian Tax Office, benefits all partners.

17 To minimise their liability, the promoters almost invariably became members of a limited company formed to assume the management of the business as its general partner.

18 Their major advantages were that, under an exception to the Companies Code s 5(1) prescribed interest (f) definition, a limited partnership but not a company could undertake a public solicitation for funds without having to register a prospectus and, as partnerships, they were able to distribute profits to partners without deduction of income tax.

19 Corporations Regulations r 1.13A, effective 16 December 1992, required a prospectus where 15 or more partners were sought, while, from 1996, Income Tax Assessment Act 1936 (Cth) Pt III Div 5A, especially ss 94D and 94T, required that the income of most limited partnerships, formed in, carrying on business in or controlled from Australia, be taxed at corporate rates.

20 Venture Capital Act 2002 (Cth) s 3.1.

21 Venture capital is the term applied to funds invested, usually as part of a package that involves managerial input, in the development and/or commercialisation of an invention, process or business. A more comprehensive definition is proffered by the Australian Venture Capital Association Ltd (AVCAL) in their *Revised Submission of Proposed Amendments to State and Territory Partnership Statutes to develop a world best practice venture capital investment structure*, 24 April 2003, at <www.avcal.com.au>, at Public Policy, App A, p 42 (*Revised Submission*).

22 Venture Capital Act 2002 s 9.1, for a VCLP, the limited partnership must be formed under the laws of any part of Australia, one of six named jurisdictions or a foreign country specified by regulation; the general partners have to be residents of those States; the limited partnership has to have a duration of between 5 to 15 years and investment funds of \$20 million or more and s 9.5, for an AFOF, the limited partnership must be set up for between 5 and 20 years and the general partners must be Australian residents.

23 Venture Capital Act 2002 Div 15: ordinarily quarterly and annual returns of investment activity

24 Available under subdiv 118-F of the Income Tax Assessment Act 1997 (and provisions about similar income gains and losses).

25 That is the payment to partners of profit shares without intermediate deduction of tax. This is the normal partnership arrangement, available under the Income Tax Assessment Act 1936 Pt III Div 5, see particularly s 92, that is not generally available to limited partnerships.

## 5. The AVCAL submission

Given Australia's reputation for financial rectitude, these should have been attractive incentives for investors<sup>26</sup> but, when no limited partnerships registered after these concessions became operative,<sup>27</sup> the Australian Venture Capital Association Ltd (AVCAL), the industry lobbyist, was firmly of the opinion that State legislative reform was required to match the Commonwealth effort. In a submission to State and Territory governments, AVCAL argued that amendments to satisfy seven outstanding issues were required to develop a world best practice venture capital investment structure in Australia.<sup>28</sup> While some of the 11 amendments proposed<sup>29</sup> may extend beyond the necessary pre-conditions for the development of a safe environment for limited partnerships, they should not be lightly dismissed. Venture capital investment is a high risk business. The investors are willing to support their assessment that particular 'startup' projects can be successfully commercialised with risk capital and, in many cases, their time and managerial skills. They reasonably argue that, in pursuing an activity which is recognised as being economically beneficial,<sup>30</sup> their funds should not be jeopardised by any inherent inadequacies in the investment vehicle.

AVCAL was concerned about the effectiveness of existing legislative provisions 'to constrain the liability of limited partners to the amount recorded in the relevant register of limited partnerships' and wanted amendments made to remove this uncertainty.<sup>31</sup> This uncertainty exists, at least in part, because most provisions concerning limited partnerships have not been tested in court.<sup>32</sup> It is made manifest in the issues targeted: two restate core principles, four are particular concerns, supported by proposed amendments, and one seeks recognition by non-participant jurisdictions.

### (a) Core principles

AVCAL was concerned about the limited liability of a limited partner and sought assurance that:

1. the limitation of liability in the relevant statute limits all amounts for which the investor [limited partner] may be found liable;

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<sup>26</sup> The Act purports to represent world best practice. See Sen Alston, Minister of Communications, speaking on the Second Reading of the Venture Capital Bill 2002: Australia, *Parliamentary Debates*, Senate, 9 December 2002, p 7464.

<sup>27</sup> 19 December 2002.

<sup>28</sup> *Revised Submission*, above n 21, p 2.

<sup>29</sup> *Ibid*, pp 8–40. Most of these proposals are discussed below; another that envisions the creation of new forms of limited partnership is discussed later.

<sup>30</sup> 'We need a big boost to our venture capital market if we want to maximise the growth and development of new businesses and industries in Australia. Capital gains tax reform will help ensure that Australian ideas and discoveries stay in Australia and are developed in Australia, rather than going overseas.' Sen Nick Minchin, Federal Minister for Industry, Science and Resources, November 1999, as quoted in *Revised Submission*, *ibid*, p 44.

<sup>31</sup> *Revised Submission*, *ibid*, p1.

<sup>32</sup> Even the language of many provisions of the Limited Partnership Act: 1907 (UK); 1908 (Tas); 1909 (WA) has not been judicially interpreted, let alone the more recent statutory developments. See, for example, *Lindley & Banks on Partnership*, above n 3, Pt 6, Chs 28–33, which has an extensive discussion of the law but refers to few decisions concerning limited partnerships.

2. limited partners are not liable for debts and obligations of the partnership unless they become involved in management (that is, creditors' recourse is limited to the assets of the partnership and of the general partner).<sup>33</sup>

AVCAL did not assert that the current Acts<sup>34</sup> failed to achieve these objectives but argued that 'debts and obligations' may encompass only contractual liabilities.<sup>35</sup> In *Estate Realities Ltd v Wignall*,<sup>36</sup> the case that gave rise to this concern, Tipping J<sup>37</sup> had construed Partnership Act 1908 (NZ) s 12 in this manner but, subsequently, recognised that 'obligations' had a wider scope when discussing 'sections 12, 13 and 16 which deal respectively with contractual obligations, tortious obligations and obligations for breach of trust'.<sup>38</sup> This holding is a matter of legitimate concern in Tasmania, where the liability of a limited partner is limited to the 'debts and obligations of the firm',<sup>39</sup> but not in the other jurisdictions which variously use the broader 'debts or obligations'<sup>40</sup> or 'liabilities'.<sup>41</sup> It is probable, but not certain, that these formulations achieve the primary aim of the legislation by ensuring that the liability of a limited partner, like that of a shareholder in a company limited by shares,<sup>42</sup> will not exceed the amount remaining, if any, of the agreed contribution to capital.

### (b) Involvement in management

A secondary concern, evident in issue 2 and central to issues 3 and 4, is that limited partners should not lose their privileged status by inadvertent involvement in management.<sup>43</sup> AVCAL acknowledges that passive investment is the traditional foundation for limited liability<sup>44</sup> but seeks to ensure, through proposed amendments 5 and 6,<sup>45</sup> that the 'safe harbour' of permitted involvement in the business is well-defined.

Queensland, Tasmania and Western Australia exclude from 'participation in management' the actions of a limited partner, who, either personally or by an agent, inspects the books of the firm, examines the state and prospects of the business or advises or consults with the other partners concerning these matters,<sup>46</sup> whereas the other jurisdictions allow 'safe harbours' of greater extent. New South Wales, South Australia and Victoria permit a limited

33 *Revised Submission*, above n 21, p 2.

34 Partnership Act: 1892 (NSW) ss 60, 61, 65(2); 1891 (Qld) ss 53, 55; 1891 (SA) ss 58, 65; 1958 (Vic) ss 60, 61; Limited Partnership Act: 1908 (Tas) s 4; 1909 (WA) s 4.

35 *Revised Submission*, above n 21, p 16.

36 [1992] 2 NZLR 615

37 *Ibid*, at 633.

38 *Ibid*, at 635. These sections equate with Partnership Act: 1977 (ACT) ss 13, 14 and 17; 1892 (NSW) ss 9, 10 and 13; (NT) ss 13, 14 and 17; 1891 (Qld) ss 12, 13 and 16; 1891 (SA) ss 9, 10 and 13; 1891 (Tas) ss 14, 15 and 18; 1958 (Vic) ss 13, 14 and 17; 1895 (WA) ss 16, 17 and 20.

39 Limited Partnership Act 1908 (Tas) s 4(2)(b).

40 Partnership Act: 1892 (NSW) s 60; 1891 (SA) s 58; Limited Partnership Act 1909 (WA) s 4.

41 Partnership Act: 1891 (Qld) s 53; 1958 (Vic) s 60.

42 Corporations Act 2001 (Cth) s 516.

43 *Revised Submission*, above n 21, p 2.

44 *Ibid*, p 30.

45 *Ibid*, pp 20–32.

46 Partnership (Limited Liability) Act 1988 (Qld) s 16(1A); Limited Partnerships Act: 1908 (Tas) s 6(2); 1909 (WA) s 6(1).

partner to be an employee of or independent contractor to the firm or an officer of a corporate general partner, to give advice to or on behalf of the partnership in a professional capacity or in the course of business dealings, to give a guarantee or indemnity for partnership obligations, to take action to enforce rights as a limited partner or, if authorised, to give advice at partnership meetings.<sup>47</sup> South Australia, also, recognises that participation in a general meeting of partners is not participation in management.<sup>48</sup> It is possible, although untested, that these actions would be found not to constitute participation in management of a limited partnership if raised in proceedings in Queensland, Tasmania or Western Australia.<sup>49</sup>

In the face of such diversity, AVCAL may have been tempted to advocate the position adopted by the National Conference of Commissioners on Uniform State Laws (USA), which in its 2001 revision of the Uniform Limited Partnership Act 'recommended that the rule be abolished altogether, leaving a full status-based liability shield for limited partners'.<sup>50</sup> Instead, it has recommended that the broader existing definition be further expanded to encompass participation in ongoing corporate governance, crisis intervention and co-investing in investee companies.<sup>51</sup> While implementation of the proposal would result in formal recognition that limited partners can be more than just passive investors, the change would not be far reaching in either the existing 'broader definition' jurisdictions or the others. Participation of this sort in corporate governance is a small step, if any, beyond, the current South Australian position. Intervening in management in an attempt to avoid bankruptcy is akin to intervention by creditors to seek a court appointed receiver for a failing company.<sup>52</sup> Investment by a limited partner in a company being assisted by the limited partnership should not, of itself, be construed as participation in management of the limited partnership<sup>53</sup> but AVCAL seeks express acknowledgement that co-investment is permitted to avoid uncertainty.<sup>54</sup>

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47 Partnership Act: 1892 (NSW) s 67; 1891 (SA) s 65; 1958 (Vic) s 67.

48 Partnership Act 1891 (SA) s 65(3).

49 This paragraph paraphrases *Laws of Australia*, vol 4.8, looseleaf, Butterworths, ch 2 'Partnership', para 86.

50 *Revised Submission*, above n 21, p 31, referring to <[http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm)>, s 303.

51 *Revised Submission*, above n 21, pp 29–32.

52 *As Bond Brewing Holdings Ltd v National Australia Bank Ltd* (1990) 1 ACSR 445; 8 ACLC 330 demonstrates, courts will rarely exercise their inherent powers in this way but there is no reason to expect that a carefully drawn statutory exception to the general rule would not be accorded a construction that permitted stricken investors to intervene in an attempt to rescue their investments.

53 Partnership Act: 1891 (Qld) ss 89(3)(h), 90(1)(c); 1892 (NSW) ss 67A(3)(h), 67B(1)(c); 1958 (Vic) ss 98(3)(h), 99(1)(c) cf Corporations Act 2001 (Cth) Pt 1.2 Div 2 ss 10–17 which, if applicable, would cause a limited partner who invested in concert with the limited partnership to become an associate of the limited partnership.

54 *Revised Submission*, above n 21, p 32.

### (c) General partner is not the agent of the limited partner(s)

Issue 5 'that, unless expressly agreed, investors do not become personally liable, as principals, for the acts of the general partner, as their agent, in relation to the management of the business of the partnership'<sup>55</sup> cuts to the heart of AVCAL's argument.

A limited partnership is essentially a fund managed by the general partner(s) for the benefit of all partners as co-owners. The legislation does not specify the nature of the relationship between the manager and the co-owners. However, whether it is an implied trust, with general partner(s) acting as trustee for limited partner beneficiaries<sup>56</sup> or the more probable principal and agent relationship, arising as an incident of partnership status,<sup>57</sup> the limited partner as co-principal is prima facie bound by acts done in the course of business with his or her express or implied authority. As the limited partnership is not a separate corporate person, in the absence of express statutory exemption from liability, limited partner principals should share liability for the acts of their fellow partners and agents, unless a court finds that the general partners act on behalf of the quasi-corporate fund, which is the limited partnership. The latter is a possibility, as current limited partnership legislation contemplates the continuation of the limited partnership notwithstanding changes in its membership,<sup>58</sup> unlike the situation with general partnerships, where any change in the composition of their membership effects a dissolution of the original partnership and the creation, if the business is continued, of a new partnership.<sup>59</sup> However, while the limited liability of limited partners for contractual obligations is assured, if the narrow view of the limitation of liability for obligations is accepted,<sup>60</sup> limited partners could be held vicariously liable for tortious breaches or breaches of duty committed by the general partner(s) in the management of the business of the limited partnership.

AVCAL has raised a possible ground of liability for limited partners. Although the argument is inconsistent with the tenets of limited partnership and is, therefore, a position that judges should be unwilling to adopt, it is, also, in the absence of a finding that limited partnerships are quasi-corporate, a possibility that can only be excluded by legislation. Adoption of AVCAL's Proposed Amendment 3 that a general partner, acting in the affairs of a limited

<sup>55</sup> Ibid, p 2, supported by Proposed Amendment 7, pp 33–4.

<sup>56</sup> *JW Broomhead (Vic) Pty Ltd (in liq) v JW Broomhead Pty Ltd* [1985] VR 891.

<sup>57</sup> In the absence of an express provision to the contrary, limited partnerships are governed by general partnership provisions, of which the mutual agency of partners is a key characteristic, see Partnership Act: 1892 (NSW) s 50; 1891 (Qld) s 5A(1); 1891 (SA) s 48; 1958 (Vic) s 49(3); Limited Partnership Act: 1908 (Tas) s 7; 1909 (WA) s 7.

<sup>58</sup> Partnership Act: 1892 (NSW) s 56; 1891 (Qld) s 52; 1891 (SA) s 55(1); 1958 (Vic) s 56; Limited Partnership Act: 1908 (Tas) s 9; 1909 (WA) s 9(1).

<sup>59</sup> *SJ Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd* [1989] 2 Qd R 87 at 90 per McPherson J.

<sup>60</sup> See (a) Core Principles above. This situation is of critical importance for Tasmanian limited partners and could be a problem in other Australian jurisdictions.

partnership, does not do so as an agent of its limited partners would cure the perceived problem.<sup>61</sup>

#### (d) Procedure

A limited partner not only wishes to limit liability for the obligations of the limited partnership to the agreed contribution but, as a passive investor, would prefer to be excluded from involvement in any litigation that may arise between the limited partnership and outsiders. This view is expressed obliquely in AVCAL issue 6 'that the general partner and the partnership are the proper parties to an action against the partnership or any partner in relation to the business of the partnership'<sup>62</sup> and more precisely in Proposed Amendment 8,<sup>63</sup> which expressly excludes a limited partner from participation as a party in legal proceedings, other than those brought by a limited partner against the firm or where the limited partner, by participation in the affairs of the firm, shares or may share liability with the firm.

Again AVCAL has identified a weakness in the Australian position. Only Queensland makes express reference to procedure in its legislation. It provides that all actions by or against a limited partnership, except for offences, may be brought against the partnership in its firm name but execution can not be levied against a limited partner to enforce a judgment without the prior leave of the Supreme Court.<sup>64</sup> All other jurisdictions relegate procedure to their Rules of Court, where the special characteristics of limited partnerships are ignored and they are dealt with under the general rubric of partnership. Except in New South Wales, where action can not be commenced in a firm name, unless the business or business name is unregistered,<sup>65</sup> action can be taken in the firm name or by or against all or some named partners.<sup>66</sup> While action in the firm name should be adopted, where possible, as it is simpler and less expensive than serving a larger number of parties, there still remains a possibility that limited partners will be involved in any process and, thereby, incur expense. This situation could be avoided if all proceedings concerning limited partnerships had to be commenced in either the partnership name or the names of the general partner(s) and non-contravening limited partners were excluded from involvement.

#### (e) Recognition of status

As a final issue, AVCAL seeks assurance 'that the limitation of liability provided for under the Act is effective under the laws of each jurisdiction in which the limited partnership invests or acts (whether those are the laws of another State or Territory, of the Commonwealth or of another country)'.<sup>67</sup>

<sup>61</sup> *Revised Submission*, above n 21, pp 15–16. The addition of the words 'or trustee' would extend coverage to the remoter possibility as well but, in both cases, by creation of a statutory fiction.

<sup>62</sup> *Ibid*, p 2.

<sup>63</sup> *Ibid*, pp 35–6.

<sup>64</sup> Partnership Act 1891(Qld) s 65.

<sup>65</sup> Supreme Court Rules (NSW) Pt 64 rr 2, 3, cf Pt 8 r 2 for the usual case.

<sup>66</sup> R 36.01.1 (SA); O 54 r 1 (Tas); O 17.01 (Vic); O 71 r 1 (WA).

<sup>67</sup> *Revised Submission*, above n 21, p 2.

This, with respect, appears to be an aspiration rather than a realisable goal. Participating jurisdictions have an interest in realising their legislative objectives but it is difficult to envisage public policy reasons, other than judicial comity, that would cause jurisdictions without limited partnership legislation to place the interests of limited partners in foreign registered bodies over the claims of their own citizens. This is implicitly acknowledged in Proposed Amendment 2<sup>68</sup> which merely advocates mutual recognition of State laws by participating States.

Under the current law, every jurisdiction, except Western Australia, has a provision enabling the executive to recognise other jurisdictions possessing corresponding laws and to extend to partnerships registered under those laws the same privileges as are possessed by limited partners in partnerships registered by the State.<sup>69</sup> This development, which follows US practice in part,<sup>70</sup> implies that the determination of status is a matter for executive, not judicial, determination. It has resulted in the peculiar situation that New South Wales has formally recognised the laws of most US jurisdictions and that of Quebec in Canada<sup>71</sup> but none of the corresponding Australian laws, while other States have exercised their executive power more sparingly.<sup>72</sup> Furthermore, unless these provisions can be regarded as supplementary to any judicial discretion and not exclusive of its operation, their presence in the legislation, even where the power has not been exercised by the executive, would preclude a judge recognising and implementing a limitation of liability provision found in the law of the State of registration of a foreign limited partnership operating within the State.<sup>73</sup> Unless corrected, certainty for limited partnerships registered in some States will be won at the expense of non-recognition of limited liability status for firms from other jurisdictions.

Mutual recognition of corresponding Australian laws can do no harm but does not resolve the problem for limited partnerships formed in other jurisdictions eligible to take advantage of the taxation concessions offered by the Commonwealth.<sup>74</sup> While investors may legitimately hope for the certainty that comes from executive recognition, it is arguable that Western Australia, by not legislating, has created a more favourable environment for judicial recognition of a foreign limited partner's status. While the position with

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68 Ibid, pp 13–14.

69 Partnership Act: 1892 (NSW) s 64; 1891 (Qld) s 54; 1891 (SA) s 62; 1958 (Vic) s 64; Limited Partnership Act 1908 (Tas) s 12A.

70 The Revised Uniform Limited Partnership Act 1976 (USA) Art 9, which has been adopted by most States, requires foreign limited partnerships to register before carrying on business in the jurisdiction but, at s 907(c), expressly declares that a foreign limited partner is not liable as an ordinary partner if the foreign limited partnership fails to register.

71 NSW has exercised this power to recognise 46 states of the USA, the District of Columbia and Quebec: Partnership Regulation 2002 (NSW) s 5 Sch 1.

72 Tasmania has recognised Victoria and Victoria has recognised South Australia, see *Revised Submission*, above n 21, p 14, but the other States have not exercised this power.

73 Variation on a sentence from K Fletcher (Ed), *Higgins & Fletcher The Law of Partnership in Australia and New Zealand*, 8th ed, LBC Information Services, Sydney, 2001, p 275, noted in *Revised Submission*, above n 21, p 14.

74 Under the Venture Capital Act 2002 (Cth) s 9.1 a VCLP may be formed under the laws of any part of Australia, any of six named foreign jurisdictions: Canada, France, Germany, Japan, United Kingdom and United States or a foreign country specified by regulation.

partnerships is less certain than with corporations limited by shares,<sup>75</sup> given the quasi-corporate nature of limited partnerships, it is arguable that, in exercise of judicial comity, courts should recognise that the limited liability status accorded limited partners under the law of their State of registration is a rule of substance that should be recognised outside that limited partnership's State of registration.<sup>76</sup> Judicial recognition in one jurisdiction would be likely to be replicated in others. If accorded, it would offer more complete protection for the interests of limited partners than legislative solutions dependent upon executive direction.

## 6. Meeting the needs of limited partners

A passive investor wants assurance that the investment vehicle is capable of effecting its investment purpose without exposing the investor to a liability beyond that represented by the investment. To achieve that goal, the vehicle must ensure that the liability of the limited partner is strictly limited to the amount invested, the limited partner is not a proper party to litigation concerning the limited partnership and that a general partner is not the agent of the limited partner. Furthermore, legislation creating the vehicle must ensure that limited partners who comply with their obligations under the law are not penalised by any act or failure to act on the part of the general partner(s) or other limited partner(s).<sup>77</sup>

The then existing limited partnership provisions met most of these objectives.<sup>78</sup> The Acts declare that the liability of a limited partner is limited to the amount shown in the Register of Limited Partnerships<sup>79</sup> and, in the case of the modern enactments that this limitation extends expressly to any liability incurred outside the State of registration.<sup>80</sup> Nothing in the legislation explicitly excludes the possibility of an agency relationship existing between the general and limited partners but, except for Tasmania,<sup>81</sup> limited partners are shielded from possible vicarious liability for torts or conjoint liability for breach of fiduciary duty by the terms of the limitation provisions. However, except in

<sup>75</sup> *Bateman v Service* (1881) 6 App Cas 386, recognition of limited liability under Victorian companies legislation by a Western Australian court.

<sup>76</sup> In K Fletcher, 'Interstate Trade: The Last Hurdle for Limited Partnerships' (1993) 11 *C&SLJ* 433 at 436–7, such an argument was made, in reliance upon *Chaff and Hay Acquisition Committee v JA Hemphill & Sons Pty Ltd* (1947) 74 CLR 375 at 397 per Williams J; *General Steam Navigation Co v Guillou* (1843) 11 M&W 877; 152 ER 1061 and *Bateman v Service* (1881) 6 App Cas 386 and the views of M Wolff, *Private International Law*, 2nd ed, Clarendon Press, Oxford, 1950, pp 239–40 and P M North and J J Fawcett (Eds), *Cheshire and North's Private International Law*, 12th ed, Butterworths, London, 1992, pp 87–8 but R C Banks (Ed), *Lindley & Banks on Partnership*, 18th ed, Sweet & Maxwell, London, 2002, p 845 cautions that such recognition should not be assumed.

<sup>77</sup> This is the primary message of *Re Cotton Crops Pty Ltd* [1986] 2 Qd R 328, upheld on appeal [1988] 1 Qd R 34, noted in Fletcher, above n 4, p 271, where the attainment of limited liability for the limited partners was dependent upon the promoter publishing adequate notices in appropriate newspapers.

<sup>78</sup> Partnership Act: 1892 (NSW) Pt 3; 1891 (SA) Pt 3; 1958 (Vic) Pt 3; Limited Partnership Act: 1908 (Tas); 1909 (WA); Partnership (Limited Liability) Act 1988 (Qld).

<sup>79</sup> Partnership Act: 1892 (NSW) s 60; 1958 (Vic) s 60; 1891 (SA) s 58; Limited Partnership Act: 1908 (Tas) s 4; 1909 (WA) s 4; Partnership (Limited Liability) Act 1988 (Qld) s 10(1).

<sup>80</sup> Partnership Act: 1892 (NSW) s 66C; 1891 (SA) s 61; 1958 (Vic) s 63.

<sup>81</sup> See discussion at '5(a) Core principles' above.

Queensland,<sup>82</sup> nothing excludes a limited partner from the possibility of involvement in any partnership action.

The agency problem can be cured by legislative action but is conceptually difficult to overcome as the general partner(s) manage the assets of the limited partnership as agents for all the partners as principals. However, its potentially adverse effects for limited partners can be circumvented by ensuring that the liability provision limits the liability of limited partners for the obligations of the firm to the amount, if any, of the agreed capital contribution that remains unpaid<sup>83</sup> and by ensuring that limited partners are not involved in litigation between the limited partnership and outsiders. An amendment to the court rules or, for more certainty, inclusion in the Act of a provision requiring commencement of any action against the firm by a proceeding in the firm name and service on a general partner would, if coupled with recognition that limited partners are not proper parties to proceedings and provision that execution must be levied first against partnership property and, if not fully satisfied, then against the property of general partners but not limited partners, confirm the exempt status of limited partners. As all limited partnerships are registered, there should be less difficulty determining the name of the firm or the identity of its general partners than is the case with general partnerships, where an entry in the business names register may be the only formal record of the name and composition of the firm.

## 7. Incorporated limited partnerships

When the venture capital limited partnership concept did not generate a significant response, probably because venture capitalists, potential passive investors and their legal advisers had doubts about the security of the available investment vehicles, legislation was introduced to encourage investment. It did not attempt to correct perceived problems with limited partnerships but introduced a new concept. Victoria, closely followed by New South Wales and, subsequently, Queensland,<sup>84</sup> adopted AVCAL's primary recommendation by legislating for incorporated limited partnerships.<sup>85</sup>

An incorporated limited partnership is a limited partnership possessed of corporate status<sup>86</sup> but not limited liability for all its members. It may have

82 Former Partnership (Limited Liability) Act 1988 (Qld) s 21, now Partnership Act 1891 (Qld) s 65 requires that action be brought in the firm name and does not permit execution to be levied against the property of a limited partner except with the leave of the Supreme Court.

83 See '5(a) Core principles' above.

84 Both the Partnership (Venture Capital Funds) Act 2003 (Vic) and the Partnership Amendment (Venture Capital Funds) Act 2004 (NSW) are consolidated with their respective Partnership Acts, while by the Partnership and Other Acts Amendment Act 2004 (Qld), Queensland both relocates the substance of its Partnership (Limited Liability) Act 1988 and introduces incorporated limited partnerships to the Partnership Act 1891.

85 This development explains the incongruity between some of AVCAL's issues and proposed amendments, see *Revised Submission*, above n 21, pp 2 and 8–39. The issues were directed at perceived problems in the current law but the primary proposed amendment was the creation of incorporated limited partnership, see *Revised Submission*, above n 21, pp 8–11.

86 Partnership Act: 1891 (Qld) s 72; 1892 (NSW) s 53; 1958 (Vic) s 84. The Acts recognise that the incorporated limited partnership has the capacity and powers of an individual as well as the powers of a body corporate: 1891 (Qld) s 83; 1892 (NSW) ss 53, 53A; 1958 (Vic) s 95.

between one and 20 general partners, who are not accorded limited liability by this legislation, and one and an unlimited number of limited partners.<sup>87</sup>

The special feature of an incorporated limited partnership is that there is no relation of agency between the general and limited partners.<sup>88</sup> Limited partners have no responsibility for the liabilities of the incorporated limited partnership or the general partner,<sup>89</sup> beyond risking their agreed capital contribution. Provided limited partners have not taken part in the management of the incorporated limited partnership,<sup>90</sup> they are not proper parties to any proceeding concerning the incorporated limited partnership,<sup>91</sup> except litigation between the limited partner and the incorporated limited partnership.

## 8. The achievement

The importance of the advent of incorporated limited partnership legislation can be assessed in both economic and legal terms. The Federal Government believed that the Australian economy would be enhanced if more discoveries and developments by Australian prospectors, inventors and designers proceeded to commercialisation within Australia. It removed tax impediments to limited partnerships<sup>92</sup> but attracted no registrants. AVCAL commissioned research suggested that the Commonwealth incentive, if combined with reform of State limited partnership legislation, could achieve the objective of securing:

international foreign capital for the growth and development of innovative Australian companies [and] lead to investment of more than \$1 billion in Australian growth companies, add \$350 million to Australian GDP and add \$120 million to net exports each year.<sup>93</sup>

Whether or not that level of investment is achieved, Registers of Limited Partnerships are gaining entries and the Pooled Development Fund Board (PDF Board)<sup>94</sup> has received applications from limited partnerships since the incorporated limited partnership legislation was enacted in the eastern seaboard States. This indicates that incorporated limited partnerships are

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87 Partnership Act: 1891 (Qld) s 73; 1892 (NSW) s 52; 1958 (Vic) s 85. These sections appear to accord ordinary partnerships recognition as quasi-corporations for the purpose of registration but, when calculating the number of general partners in a limited partnership, each general partner in the ordinary partnership counts as one person.

88 Partnership Act: 1891 (Qld) s 84; 1892 (NSW) s 53C; 1958 (Vic) s 96.

89 Partnership Act: 1891 (Qld) s 86; 1892 (NSW) s 66A; 1958 (Vic) s 96. This position is restated for acts occurring outside the State: Partnership Act: 1891 (Qld) s 92; 1892 (NSW) s 63; 1958 (Vic) s 103.

90 Partnership Act: 1891 (Qld) s 87; 1892 (NSW) s 67A; 1958 (Vic) s 98(2).

91 Partnership Act: 1891 (Qld) s 84(7); 1892 (NSW) s 53C(6); 1958 (Vic) s 96(7).

92 Capital gains tax exemptions and the untaxed direct 'flow through' of incorporated limited partnership income to investors, see '4. Commonwealth intervention', above, especially nn 24 and 25.

93 *Revised Submission*, above n 21, p 1.

94 Which registers VCLP and AFOF applications under the Venture Capital Act 2002 (Cth). Within a year of enactment of the Victorian legislation, 13 incorporated limited partnerships had been incorporated and four of the seven funds had undertaken the fundraising to qualify for full registration with the PDF Board.

perceived as safe investment vehicles, providing both assurance of limited liability for passive investors and eligibility for the taxation benefits available to registered limited partnerships.<sup>95</sup>

Legally, the primary justification for creating the incorporated limited partnership is that the introduction of a corporate shell around a limited partnership structure overcomes potential problems associated with the limited partnership as an investment vehicle. Limited partners have a contractual relationship with the corporation that has received their investment capital.<sup>96</sup> The general partners manage the fund owned by the corporation. In managing the corporate business they are agents of the corporation, not the limited partners.<sup>97</sup> If external disputes have to be litigated, the corporation is the party involved. If the incorporated limited partnership loses, judgment will be entered against it and, probably, the general partners who manage it but not the limited partners. Where the corporation operates outside its State of incorporation, limited partners should have no apprehension that their limited liability will not be recognised and respected.<sup>98</sup> The Part meets all the concerns of limited partners while providing a low cost incorporation facility<sup>99</sup> with few reporting requirements.<sup>100</sup>

The incorporated limited partnership was tailor-made for this particular role. Incorporated entities can be formed under these laws<sup>101</sup> only for the purposes of being a venture capital fund, investing in a variety of venture capital funds or managing such operations.<sup>102</sup> It provides promoters, investors and their legal advisers with all the desired characteristics that should ensure its utilisation to garner taxation benefits for investors and the macroeconomic stimulus sought by government.

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95 The Commonwealth Assistant Treasurer, Hon Helen Coonan, in a press release, dated 2 December 2003, gave an assurance that incorporated limited partnerships were eligible for the taxation concessions provided under the Venture Capital Act 2002 (Cth).

96 Partnership Act: 1891 (Qld) s 74; 1892 (NSW) s 53B; 1958 (Vic) s 86.

97 Partnership Act: 1891 (Qld) s 84(1); 1892 (NSW) s 53C(1); 1958 (Vic) s 96(1).

98 The applicability of the principle in *Bateman v Service* (1881) 6 App Cas 386 (PC), which endorsed recognition of the limited liability of shareholders in companies limited by shares operating outside their colony of incorporation, should be accepted for partners with limited liability in an incorporated limited partnership that chooses to operate outside its jurisdiction of registration.

99 Partnership Act: 1891 (Qld) s 76 — no fee yet prescribed by regulation; 1892 (NSW) s 81 and Partnership Regulation 2002 Sch 2: \$800; 1958 (Vic) s 88(3): \$500 until another fee is set.

100 Partnership Act: 1891 (Qld) s 79; 1892 (NSW) s 56; 1958 (Vic) s 91 require notification of changes in registered particulars: firm name, registered office, name, address and status of partners and details of VCLP or AFOF registration — but no financial or annual returns. However, the incorporated limited partnership will be required to meet disclosure requirements under Venture Capital Act 2002 (Cth) Div 15.

101 Partnership Act: 1891 (Qld) s 75; 1892 (NSW) s 53D(3); 1958 (Vic) s 87.

102 A venture capital limited partnership (VCLP) or Australian Fund of Funds (AFOF) must register under the Venture Capital Act 2002 (Cth) Pt 2 whereas a venture capital management partnership (VCMP) qualifies for registration under State law if it satisfies the requirements of Income Tax Assessment Act 1936 (Cth) s 94D(3). Both Partnership Act: 1892 (NSW) s 53D(3)(c) and 1958 (Vic) s 87(2)(c) allow for application to be made in other, as yet unprescribed, circumstances.

## 9. The concept's potential

Incorporated limited partnerships were created by the States, at the request of the venture capital industry, to support a Commonwealth initiative that offered benefits to investors, inventors, designers and developers of Australian resources and the Australian economy. Only incorporated limited partnerships registered with the PDF Board under the Venture Capital Act 2002 (Cth) can offer passive investors the full advantage of the package of tax benefits and limited liability, with no risk of collateral damage or expense.

In the absence of the tax benefits, the device is less appealing. The incorporated limited partnership is a specialised form of corporation, whose members' functions are defined by the general partner/limited partner distinction of all limited partnerships. Those features are likely to have limited appeal to most business promoters and either potential general or limited partners. Business promoters, because of the legal obligation to register the incorporated limited partnership<sup>103</sup> and the practical need to incorporate a general partner, will only consider this form of corporate vehicle where a company limited by shares is not permitted or it offers benefits unobtainable by such a company. The general partners have the fiduciary obligations and assume the management role of company directors but notionally face unlimited liability for the obligations of their corporation.<sup>104</sup> The limited partners obtain the limited liability accorded to members of most corporations but, notwithstanding the statutory exceptions to the prohibition on participation in management,<sup>105</sup> may, subject to the terms of their partnership agreement,<sup>106</sup> have fewer opportunities to be involved in the governance of their firm than shareholders in a public limited liability company.<sup>107</sup>

While it is possible that venture capital related businesses are the only ones that could benefit from adoption of this structure, this is unlikely. A linkage between entrepreneurial spirits and passive investors underlies modern capitalist society. It seems more likely that the incorporated limited partnership, which offers a corporate structure, limited liability for investors, the obligation to develop an agreement to meet the particular needs of an enterprise and extensive opportunities for investors to have involvement in governance of the enterprise without losing their protected status would, if freed from its current limitations, warrant consideration as the vehicle for other commercial or investment operations. The incorporated limited

103 Partnership Act: 1891 (Qld) Ch 4 Pt 3 ss 75–82; 1892 (NSW) Pt 3 Div 3 ss 53D–59; 1958 (Vic) Pt 5 Div 3 ss 87–94.

104 In practice, general partners will almost inevitably be limited liability companies formed under the Corporations Act 2001 (Cth), although the Acts proceed upon the premise that individual human beings or unincorporated associations, even limited or general partnerships: Partnership Act: 1891 (Qld) s 73(3),(4); 1892 (NSW) s 51(3); 1958 (Vic) s 85(3) — may be partners in an incorporated limited partnership.

105 Partnership Act: 1891(Qld) s 87(3); 1892 (NSW) s 67A(3); 1958 (Vic) s 98(3). See discussion at '5(b) Involvement in management' above.

106 Partnership Act: 1891 (Qld) s 74; 1892 (NSW) s 53B; 1958 (Vic) s 86.

107 Investors should ensure that their partnership agreement makes adequate provision for auditing of accounts, reporting of results, payment of profit shares and appropriate arrangements for calculating the amounts to be paid to general partners for management services, as well as requiring their majority consent to any significant changes to the business or its management.

partnership appears to have potential to serve as an alternative to a unit trust or other trust structure, as the wrap vehicle for a managed investment scheme<sup>108</sup> or to provide more assurance for limited partners than an ordinary limited partnership provides.<sup>109</sup> While the incorporated limited partnership was conceived as a solution to a particular and immediate problem, State parliaments should allow other business promoters and operators the opportunity to avail themselves of its unique characteristics.

## 10. Ripples of concern

The AVCAL submission<sup>110</sup> was written to promote development of the venture capital industry in Australia but its detailed investigation of limited partnership law has implications that extend beyond its objective of obtaining a secure tax advantaged investment vehicle for passive investors. With the primary objective achieved in three States, the secondary issues warrant consideration in so far as they affect the concept and a broader range of partnership matters.

### (a) Opening the register

While the incorporated limited partnership concept was developed to implement a particular Commonwealth Government initiative, there appears to be no reason why States should restrict its use to enterprises associated with the venture capital industry. Without the associated federal tax benefits<sup>111</sup> the device is unlikely to be used extensively but, with legislation and regulatory facilities in place, there is little cost involved in encouraging further economic development by opening access to these safe investment vehicles to a more extended range of commercial and investment activities.

### (b) The condition of limited partnerships

The AVCAL Submission was a carefully considered argument prepared jointly by two leading commercial law firms.<sup>112</sup> It advocated development of the incorporated limited partnership<sup>113</sup> because the existing 'State limited partnership statutes . . . do not provide investors with certainty as to the limitation of their liability'.<sup>114</sup> While it is possible that the potential economic impact of the foreign investment was sufficient to cause three States to create an investment vehicle that met the specifications of investors and their legal advisers, without too much regard being paid to the suitability of existing limited partnership arrangements,<sup>115</sup> it is unlikely that they would have accepted the need to create a new legal entity unless persuaded that there were

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108 Under Corporations Act 2001 (Cth) Ch 5C.

109 See '5. The AVCAL submission' above.

110 See *Revised Submission*, above n 21, and the discussion of its major arguments at '5. The AVCAL submission' above.

111 See '4. Commonwealth intervention', especially at nn 24 and 25 above.

112 Gilbert & Tobin and Freehills.

113 *Revised Submission*, above n 21, Proposed Amendment 1, p 8.

114 *Ibid*, p 5.

115 This possibility should not be discounted entirely. In the course of introducing the incorporated limited partnership, no substantive amendments were made to the existing

real problems with the existing limited partnership laws.<sup>116</sup> If that is the case, it is unfortunate that appropriate amendments to correct the problems were not introduced. Businesses, other than those associated with the venture capital industry, are denied the possibility of registration as incorporated limited partnerships but, if they choose to function as limited partnerships, they may, in the light of the AVCAL submission, have a legitimate fear that their chosen vehicle is unsafe.

### (c) Amendments to partnership law

Partnership law is not static<sup>117</sup> but it has rarely been subjected to legislative amendment. The position has changed in the three jurisdictions that have adopted the incorporated limited partnership proposal and included those legislative provisions in an enlarged Partnership Act. To enable this to occur, each has made numerous amendments to their general partnership law. The amendments are extensive and essentially negative, excluding incorporated limited partnerships from the operation of many general partnership principles. They are, however, necessary if the grafting of an incompatible corporate structure on to a basic partnership rootstock is to have any chance of success.<sup>118</sup>

It is unfortunate that this disruption to a venerable but not well drafted legislation<sup>119</sup> was not accompanied by positive amendments. With the recent publication of the joint report of the Scottish and English Law Commissions on Partnership Law<sup>120</sup> making nine recommendations for reform of general partnership law and five for the reform of limited partnership law,<sup>121</sup> the

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limited partnership provisions, whereas governments alerted to a patent structural defect in existing laws could be expected to take steps to correct the situation when amending the legislation.

116 *Revised Submission*, above n 21, especially Proposed Amendments 3–8, pp 15–36, discussed at ‘5. The AVCAL submission’ above.

117 Notwithstanding the statutory provisions for ordinary partnerships remaining substantially unchanged for over a century: Partnership Act: 1892 (NSW); 1891 (Qld); 1891 (SA); 1891 (Tas); 1895 (WA), with the apparently more modern Acts of (ACT) 1963; (NT) 1997 and (Vic) 1958 being expressed in similar terms, they have been subjected to regular re-interpretation by the courts, see recent examples, in *Hanlon v Brookes* (1997) 15 ACLC 1626; *Popat v Shonchhatra* [1997] 3 All ER 800; *Fry v Oddy* [1999] 1 VR 557; *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64; *Khan v Miah* [2001] 1 All ER 20; [2000] 1 WLR 2123 (HL); *Anderson Group v Davies* (2001) 53 NSWLR 401 and *Dubai Aluminium Ltd v Salaam* [2003] 2 AC 366; [2002] 3 WLR 1913 (HL).

118 Contrast the United Kingdom, where the near equivalent Limited Liability Partnership Act 2000 is regarded as a body corporate to which no part of the law of partnership is applicable, either expressly or by implication, see ss 1(2) and 5 and R Banks (Ed), *Lindley & Banks on Partnership*, 18th ed, Sweet & Maxwell, London, 2002, pp 3–4.

119 Lord Lindley, quoted in Banks, *ibid*, p 4, described the English Act as ‘not a perfect measure, nor even so good as Parliament may have made it’. See, also, K Fletcher (Ed), *Higgins & Fletcher The Law of Partnership in Australia and New Zealand*, 8th ed, LBC Information Services, Sydney, 2001, pp 6–7.

120 Law Commission Report No 283 and Scottish Law Commission Report No 192, published as Command Paper 6015 (2003). Consultation papers, raising issues of concern about partnership and limited partnership had been published in 2000 and 2001 respectively.

121 Cmnd Paper 6015 summarised in Pt XX, 303, with a draft Bill appended.

States, with laws drawn from the same stock,<sup>122</sup> could have sponsored a second wave of migration with equally beneficial results to those achieved when the Partnership Act 1890 (UK) was adopted by those jurisdictions.<sup>123</sup>

## 11. Conclusion

AVCAL have been successful advocates for the fledgling Australian venture capital industry. They first persuaded the Commonwealth Government to remove tax impediments to qualified venture capital limited partnerships, then persuaded the three eastern seaboard States to enact incorporated limited partnership legislation to provide safer investment vehicles for their passive investors. The new entities are tailor made for their role of promoting economic growth by encouraging more foreign investment in the commercialisation of Australian discoveries and developments. The direct benefit is patent. Removal of barriers in State laws that unnecessarily replicate those detailing the conditions for the grant of tax benefits in the Venture Capital Act 2002 (Cth) would unleash the potential of incorporated limited partnerships to be formed for a range of investment and commercial purposes.

Furthermore, the *Revised Submission* contained an implicit warning about other aspects of partnership law. The incorporated limited partnership concept apparently found acceptance because the *Revised Submission* satisfied State governments that the current limited partnership regime was suspected of carrying an implicit threat to the security of limited partners. The States, by limiting access to incorporated limited partnerships and failing to address the problems of their limited partnerships, have ensured that the present amendments to the partnership legislation, extensive as they are, merely mark the beginning of a review period for that legislation.

While the connection between the *Revised Submission* and general partnership is gossamer thin (the necessary amendment of the law to prevent general partnership principles being applied to the incompatible corporate bodies introduced by the legislation) it is possible that recent legislative activity will cause more attention to be paid to the quality of that century old legislation. The Partnership Act 1890 (UK), which is the model for all the Australian Acts,<sup>124</sup> was criticised when first enacted. Notwithstanding a further century of case law accretions to those statutory statements, all Acts would benefit from further amendments to correct their remaining problems and uncertainties.

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122 Partnership Act: 1891 (Qld); 1892 (NSW) and 1958 (Vic) are essentially transcripts of the Partnership Act 1890 (UK).

123 Differences in legal environment and case law development over the last century may have rendered some of the Commissions' proposed reforms otiose in these jurisdictions but, it is submitted that, most could have been adopted readily with benefit to Australian law.

124 Only the Partnership Act 1895 (WA) contains evidence of local consideration being given to partnership principles before adopting the UK model. See further Fletcher, above n 120, p 7, especially nn 25–6.