

2004

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

PARTNERSHIP (VENTURE CAPITAL FUNDS) AMENDMENT BILL 2004

EXPLANATORY STATEMENT

Circulated by authority of the
Attorney General
Mr Jon Stanhope MLA

PARTNERSHIP (VENTURE CAPITAL FUNDS) AMENDMENT BILL 2004

Outline

The Partnership (Venture Capital Funds) Amendment Bill 2004 (the Bill) amends the *Partnership Act 1963* (Partnership Act) and provides for a framework for registration and regulation of incorporated limited partnerships.

The Bill is based on the *Partnership (Venture Capital Funds) Act 2003* (Vic) and incorporates a number of features provided in the *Partnership Amendment (Venture Capital Funds) Act 2004* (NSW). The Bill introduces a new part 6 into the Partnership Act that deals with formation and registration of limited partnerships, powers of incorporated limited partnerships, liability and powers of limited partners, and winding up of incorporated limited partnerships. The Bill also amends a number of provisions in the Partnership Act to clarify their respective applications to a firm other than an incorporated limited partnership and to an incorporated limited partnership. The Bill provides for the commissioner of fair trading under the *Fair Trading (Consumer Affairs) Act 1973* to administer the scheme for incorporated limited partnerships.

Incorporated limited partnerships are vehicles for venture capital investments. Persons or partnerships registered, or proposing to register, under the *Venture Capital Act 2002* (Cwlth) (Venture Capital Act) as a venture capital limited partnership (VCLP) or an Australian Fund of Funds (AFOF) are eligible to register themselves as an incorporated limited partnership. A partnership which is a venture capital management partnership (VCMP) within the meaning of section 94D(3) of the *Income Tax Assessment Act 1936* or a proposed venture capital management partnership may also be registered as an incorporated limited partnership. A VCMP is a general partner in a VCLP or an AFOF. Key features of these entities are flow through taxation benefits to partners and the benefit of limited liability for limited partners in them.

An incorporated limited partnership will have not more than 20 general partners and any number of limited partners. A general partner's liability will be unlimited while the liability of a limited partner is limited to the capital or property that partner contributed or agreed to contribute to the capital of the partnership. Only a general partner could take part in the management of the business of an incorporated limited partnership. A limited partner taking part in the management of the business of the partnership will be liable to the consequences that arise as a direct result of the limited partner's action.

Financial implications

Proposed legislation has no financial impact in this fiscal year. It is not possible to forecast the future financial implications. Administration of the scheme provided in the Bill will require resources, however, in the first year of its operation, this need is expected to be met from existing resources.

General comment about strict liability offences provided in the Bill

The Bill includes a number of offences where strict liability applies to a specific element of the offence or to the offence. Section 23 of the *Criminal Code 2002* (Criminal Code) provides that if a law that creates an offence provides for strict liability, there are no fault elements for the physical elements of the offence. Essentially, this means that conduct alone is sufficient to make the defendant culpable. However, if strict liability applies, the defence of mistake of fact is available where the person considered whether or not facts existed and was under a mistaken but reasonable belief about the facts. Other defences, such as intervening conduct or event (section 39 of the Criminal Code), are also available.

Offences incorporating strict liability elements are carefully considered when developing legislation and generally arise in a regulatory context where for reasons such as public safety or protection of the public revenue, etc, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties

Notes on Clauses

Clause 1 Name of the Act

The Bill, once enacted, will be known as the *Partnership (Venture Capital Funds) Amendment Act 2004*.

Clause 2 Commencement

The Act will commence on a day fixed by the Minister by written notice.

Clause 3 Legislation amended

The Act amends the *Partnership Act 1963* (the Act).

Clause 4 Section 2

New section 2 Dictionary

The dictionary at the end of the Act is part of the Act.

New section 3 Notes

New section 3 explains that a note included in the Act is for explanatory purposes only and does not form part of the Act.

New section 4 Offences against Act – application of Criminal Code etc

This new section provides that other legislation applies in relation to an offence against the Act. Note 1 mentions that the Criminal Code, chapter 2 applies to all offences against the Act.

Clause 5 Section 5

New section 5 Application of certain laws and rules of equity

New section 5 preserves the application of the rules of equity and the common law that apply to partnerships except where they are inconsistent with the Act.

This section precludes the application of law relating to partnership to or in relation to an incorporated limited partnership, the partners in it or the relationship between an incorporated limited partnership and its partners, except as provided (expressly or by necessary implication) under this or another Act.

Clause 6 Section 6

New section 6 Meaning of Partnership

This section explains that **partnership** is the relation between people carrying on a business with a view to profit and includes an incorporated limited partnership. The relationship between members of a corporation is not a partnership.

Clause 7 Rules for determining existence of partnership

This clause provides that section 7 of the Partnership Act does not apply to an incorporated limited partnership. Section 7 specifies circumstances which do not amount to a partnership.

Clause 8 Firms and firm names

This clause omits section 8. The definitions of *firm* and *firm name* are inserted in the dictionary.

Clause 9 Sections 9 to 13

Clause 9 replaces sections 9 to 13 of the Partnership Act with new sections.

New section 9 Power of certain partners to bind firm

New section 9 sets out where a partner may bind the firm. These are as follows:

- A partner in a firm other than an incorporated limited partnership is the agent of the firm, and of the other partners, for the purpose of the firm's business.
- In a firm other than an incorporated limited partnership, a partner's act for carrying on of the firm's business in a usual way binds the firm. However, such act will not bind the firm where the partner has no authority to act in the matter and the person who deals with the partner knows it or does not know or believe the partner to be a partner in the firm.
- A general partner in an incorporated limited partnership is the agent of the partnership, and of the other general partners in it for the purposes of the partnership business.
- A general partner's act for carrying on the business of an incorporated limited partnership in a usual way binds the partnership and its general partners. However, that will not be the case where the general partner who does the act has no authority to act in the particular matter and the person who deals with that general partner knows it or does not know or believe the general partner to be a general partner of the partnership.

New section 10 Partners bound by acts on behalf of firm

New Section 10 provides that a firm other than an incorporated limited partnership and all the partners in that firm are bound by an act or instrument relating to the

business of the firm done or executed in the firm's name or in any other way showing an intention to bind the firm.

This section also provides that an act or instrument relating to the business of an incorporated limited partnership binds the partnership and all the general partners in it where the act was done or instrument was executed in the partnership name or in any other way showing an intention to bind the partnership.

A firm other than an incorporated limited partnership, or an incorporated limited partnership will be bound by an act or instrument only where the act was done or an instrument was executed by a person authorised for that purpose.

This section does not affect a rule of law about the execution of deeds or negotiable instruments.

New section 11 Partner using credit of firm for private purpose

New section 11 specifies the circumstances in which a partner pledging the credit of the firm will bind the firm. It provides that,

- a firm other than an incorporated limited partnership is not bound if a partner pledges the credit of the firm for the purpose apparently not connected with the ordinary course of business of the firm unless the firm has specially authorised the partner to do so, and
- an incorporated limited partnership is not bound if a general partner pledges the credit of the partnership for the purpose apparently not connected with the ordinary course of business of the partnership unless the partnership has specially authorised the partner to do so.

However, a personal liability of an individual partner in a firm other than incorporated limited partnership, or of a general partner in an incorporated limited partnership, is not affected.

New section 12 Effect of notice that firm will not be bound by acts of partner

New section 12 provides that where the partners in a firm other than an incorporated limited partnership agreed to place restrictions on the power of one or more of them to bind the firm, an act in breach of that agreement does not bind the firm in relation to a person who has notice of the agreement.

This section also provides that where the partners in an incorporated limited partnership agreed to place restrictions on the power (if any) of one or more of them to bind the partnership, an act that contravenes the agreement does not bind the partnership in relation to a person who has notice of the agreement.

New Section 13 Liability of partner

New Section 13 provides that each partner in a firm other than an incorporated limited partnership is jointly liable with the other partners of the firm for its debts and obligations incurred while he or she is a partner. Where the partner is an individual,

after his or her death, the dead partner's estate is severally liable for such debts and obligations where they remain unsatisfied, but subject to the earlier payment of the dead partner's separate debts.

In the case of an incorporated limited partnership, this section provides that a general partner in it is liable jointly with the partnership for the debts and obligations of the partnership incurred while that partner is a general partner. Where the general partner is an individual, after his or her death, the dead general partner's estate is severally liable for such debts and obligations where they remain unsatisfied, but subject to the earlier payment of the dead partner's separate debts.

This section also provides that a general partner in an incorporated limited partnership is only liable to the extent the partnership cannot satisfy the debts and obligations or to a greater extent provided by the partnership agreement.

Clauses 10, 11, 12 and 13 Liability of firm not an incorporated limited partnership for wrongs

These clauses amend section 14 of the Partnership Act to make it apply to a partner in a firm other than an incorporated limited partnership. Section 14 deals with the liability of a firm for wrongs..

Clauses 14 Liability of incorporated limited partnerships for wrongs

This clause inserts section 14A into the Partnership Act. New section 14A provides for the liability of an incorporated limited partnership for loss or injury to a person outside the partnership or a penalty incurred, because of a wrongful act or omission of a general partner. The partnership is liable to the same extent as the relevant general partner where the general partner was acting in the ordinary course of the partnership's business or with its authority.

This section also provides that, for the purpose of this provision, a general partner in an incorporated limited partnership is not to be taken to be acting in the ordinary course of the partnership's business where the partner commits a wrongful act or omission as a director of a company or other body (within the meaning of the *Corporations Act 2001* (Cwlth)(Corporations Act)), as a member of a Territory authority, or as a member of the board of a Territory authority, only because of one or more of the following:

- a) the general partner obtained the agreement or authority of the partnership to be appointed or to act as director or member;
- b) the remuneration that the general partner receives as director or member forms part of the income of the partnership;
- c) any other general partner in the partnership is also a director of a company or other body (within the meaning of the Corporations Act), member of a Territory authority, or member of the board of a Territory authority, whether of the same or a different body corporate, Territory authority or board.

Clause 15 Sections 15 to 21

This clause inserts new sections 15 to 21.

New Section 15 Misapplication of money or property received for, or in custody of, firm

New section 15 provides for:

- the liability of a firm other than an incorporated limited partnership where a partner or the firm receives someone else's money or property and the partner or one or more partners misapply it, and
- the liability of an incorporated limited partnership where a general partner or the partnership receives money or property and the general partner or one or more general partners misapply it.

The reference to "some one else" in relation to an incorporated limited partnership does not include a partner in the partnership.

New section 16 Liability for wrongs joint and several

New section 16 provides that

- each partner in a firm other than an incorporated limited partnership is liable jointly with the other partners, and severally, for the liability of the firm under section 14 (Liability of firm not incorporated limited partnership for wrongs) or 15 while the partner was a partner in the firm, and
- each general partner in an incorporated limited partnership is liable jointly with the other general partners, and severally, for the liability of the partnership under section 14A (Liability of incorporated limited partnership for wrongs) or 15 while the general partner was a general partner. However, the general partner's liability is only to the extent the partnership cannot satisfy the liability or the greater extent provided by the partnership agreement.

New section 17 Improper use of trust property for partnership other than incorporated limited partnership

New section 17 provides that where a partner in a firm other than an incorporated limited partnership who is a trustee improperly uses trust property in the firm's business, or for the firm, another partner in the firm is not liable to the people beneficially interested in the property.

However, that other partner is liable if that partner knew about a breach of trust. Trust money still in the possession of, or under the control, of the firm can be followed and recovered from the firm.

New section 17A Improper use of trust property for incorporated limited partnership

New section 17A is a provision similar to new section 17 but applies in relation to an incorporated limited partnership.

New section 18 People liable by holding out

New section 18 makes a person (apparent partner) liable if he or she represents himself or herself as a partner in a firm other than an incorporated limited partnership or knowingly allowing himself or herself to be represented as such partner, that person is liable as a partner in that firm to a person giving credit to the firm because of that representation. It does not matter whether or not the representation has been made or communicated to the person giving credit or the apparent partner knew that credit was given because of his or her representation.

Where similar circumstances occur in relation to an incorporated limited partnership because of a person representing himself or herself as its general partner (apparent general partner), that person is liable as a general partner of the partnership to the person giving credit to the partnership. It does not matter whether or not the representation has been made or communicated to the person giving credit or the apparent general partner knew that credit was given because of his or her representation.

A continued use by a firm of its old firm name or the name of a dead partner as part of that name does not, of itself, make the partner's legal personal representatives, estate or effects liable for the firm's debts contracted after the partner's death.

New section 19 Admissions and representations of partners

New section 19 provides that an admission or representation made by a partner in a firm other than an incorporated limited partnership or a general partner in an incorporated limited partnership in the course of the firm's or the partnership's business about the firm's or the partnership's affairs, is evidence against the firm or the partnership.

New section 20 Notice to acting partners to be notice in firm

New section 20 provides that notice to a partner who habitually acts in the business of a firm other than an incorporated limited partnership about a matter relating to the firm's affairs operates as notice to the firm. Such notice to a general partner who habitually acts in the business of an incorporated limited partnership operates as notice to the partnership. Notice does not have such effect if the partner of the firm or the general partner of the partnership committed, or consented to the commission of, fraud.

New section 21 Liabilities of incoming and outgoing partners

New section 21 provides for the liabilities of incoming and outgoing partners of incorporated limited partnerships and other partnerships.

Under this section, a partner of a firm other than incorporated limited partnership is not liable, by the partner's admission in the firm alone, for anything done in relation to the firm before the partner's admission, and a partner retiring from the firm does

not cease to be liable for the firm's debts and obligations only because of the partner's retirement.

A partner in an incorporated limited partnership is not liable, by the partner's admission in the partnership alone, for anything done in relation to the partnership before the partner's admission to the partnership. A retiring partner does not, by the partner's retirement alone, cease to be liable for the partnership's liabilities.

This clause also enables a retiring partner in a firm other than an incorporated limited partnership or in an incorporated limited partnership to be discharged from any existing liabilities of the firm or the partnership by an agreement.

Clauses 16 and 17 Revocation of continuing guaranty by change of firm

These clauses amend section 22 of the Partnership Act to clarify that that section does not apply to an incorporated limited partnership.

Clauses 18 and 19 Partnership Property of firms other than incorporated limited partnerships

These clauses amend section 24 of the Partnership Act to clarify that that section does not apply to an incorporated limited partnership.

Clause 20 Partnership property of incorporated limited partnership

This clause inserts new section 24A into the Partnership Act.

New section 24A Partnership property of incorporated limited partnership

New section 24A provides that all property, and rights and interests in property, acquired on account of an incorporated limited partnership, or for or in the course of its business are partnership property. They must be applied exclusively for the partnership. No partner, only because the partner is a partner in the partnership has a legal or beneficial interest in the partnership property.

Clauses 21 to 23 Land bought by co-owners out of profits from land—other than incorporated limited partnerships

These clauses provide for amendments to section 25 of the Partnership Act to clarify that that section does not apply to an incorporated limited partnership.

Clauses 24 and 25 Conversion into personalty of land held by firm

These clauses provide for amendments to clarify that section 27 of the Partnership Act does not apply to an incorporated limited partnership.

Clause 26 Procedure against partnership property for partner's separate judgment debt

Amendments clarify that subsections 28(2) and (3) of the Partnership Act do not apply to an incorporated limited partnership.

Clauses 27 and 28 Rules as to interests and duties of partners other than partners in incorporated limited partnership subject to agreement

These clauses provide for amendments to clarify that section 29 of the Partnership Act does not apply to an incorporated limited partnership.

Clauses 29 and 30 Retirement from partnership at will

These clauses provide for amendments to clarify that section 31 of the Partnership Act does not apply to an incorporated limited partnership.

Clause 31 Partnership for term continued over

This clause provides that section 32 of the Partnership Act does not apply to an incorporated limited partnership.

Clause 32 Duty of partner to give accounts

This clause inserts new section 33. This section provides for the obligation of a partner in a firm other than an incorporated limited partnership to give accounts and information about everything affecting the firm and for the obligation of an incorporated limited partnership to give similar accounts and information affecting it to a partner or a partner's legal representatives.

Clauses 33 Accountability of partners for private profits

These clauses provide for amendments to clarify that section 34 of the Partnership Act does not apply to an incorporated limited partnership and provide a new section 34A.

Clauses 34 and 35 Duty of partner not to compete with firm

These clauses clarify that section 35 of the Partnership Act does not apply to an incorporated limited partnership.

Clause 36 Rights of assignee of share in partnership

This clause clarifies that section 36 of the Partnership Act does not apply to an incorporated limited partnership.

Clause 37 New section 36A Application of pt 5

This clause provides that part 5 (Dissolution of partnership and its consequences) of the Partnership Act does not apply to an incorporated limited partnership. Part 6, division 6.6 deals with the winding up of incorporated limited partnerships

Clause 38 New parts 6 and 7

This clause inserts new parts 6 and 7 into the Partnership Act.

Part 6 Incorporated limited partnership

Division 6.1 Preliminary

New section 51 Definitions for part 6

This section defines certain terms applying in part 6.

New section 52 Application of other provisions of this Act

Parts 1 to 4 of the Partnership Act do not apply to incorporated limited partnerships. Appropriate amendments to the provisions in those parts are made to clarify their application or non-application to incorporated limited partnerships.

This section also clarifies that in the case of inconsistency within the Partnership Act, provisions in part 6 prevail in relation to incorporated limited partnerships.

Division 6.2 Nature and formation of incorporated limited partnerships

New section 53 Incorporated limited partnership formed on registration

New section 53 provides for the formation of an incorporated limited partnership on its being registered under part 6.

New section 54 Incorporated limited partnership is separate legal entity

This section provides that an incorporated limited partnership is a corporation with legal personality separate from its partners and with perpetual succession, may have a common seal, and may sue and be sued in its firm name.

The common seal must be kept as the partnership directs and may only be used as authorised by the partnership.

New section 55 Partners in incorporated limited partnership

An incorporated limited partnership is required to have at least one general partner but no more than 20 general partners; and at least one limited partner. A corporation or a partnership (including an external partnership) may be a general partner or a limited partner.

This section provides for counting the number of partners in a partnership or an external partnership when that partnership is a general partner in an incorporated limited partnership. Only the number of partners whose liability is not limited are counted.

An external partnership is a partnership formed under a law of a jurisdiction outside the ACT.

New section 56 Partnership agreement

This section requires the partners of an incorporated limited partnership to have a written partnership agreement between them at all times. Such an agreement has effect as a contract between the incorporated limited partnership and each partner. The interests of the partners of an incorporated limited partnership and their rights and duties in relation to the partnership are, subject to the Partnership Act, determined in accordance with the agreement. An incorporated limited partnership may also sign the agreement.

Division 6.3 Registration of incorporated limited partnerships

New section 57 Who may apply for registration

This section provides that those who may apply to register an incorporated limited partnership are

- a partnership (including an external partnership), or
- any people or partnerships (including external partnerships), or both, proposing to be the partners in the proposed incorporated limited partnership.

The circumstances in which such application for registration may be made are as follows:

- the partnership is registered under the *Venture Capital Act 2002* (Cwlth), part 2 (Registration of venture capital limited partnerships and Australian venture capital funds of funds) as a VCLP or an AFOF under that Act, or
- a general partner in the partnership or a proposed general partner in the proposed incorporated limited partnership intends to apply for registration of the incorporated limited partnership or proposed partnership as a VCLP or an AFOF under the *Venture Capital Act*, part 2, or
- the partnership is a venture capital management partnership under the *Income Tax Assessment Act 1936* (Cwlth), section 94D (3) (Corporate limited partnerships) or
- the partners in the partnership or the proposed partners in the proposed incorporated limited partnership intend that the partnership or proposed incorporated limited partnership will meet the requirements set out in the *Income Tax Assessment Act 1936* (Cwlth), section 94D (3) for recognition as a venture capital management partnership; or
- other circumstances prescribed under the regulations.

New section 58 Application for registration

This section provides for particulars and statements that an application for registration of an incorporated limited partnership must contain and how it should be signed.

New section 59 Registration of incorporated limited partnership

New section 59 provides for registration of an incorporated limited partnership by the commissioner for fair trading. The commissioner does not register an incorporated limited partnership if its firm name would not, in the opinion of the registrar-general, be eligible for registration as a business name under the *Business Names Act 1963*.

New section 60 Register of incorporated limited partnerships

This section deals with a register of incorporated limited partnerships and empowers the commissioner for fair trading to correct any mistake or omission in the register.

New section 61 Changes in registered information

This section requires a statement to be lodged with the commissioner for fair trading if the registered information relating to an incorporated limited partnership changes, and signed by all the general partners in the incorporated limited partnership or by a general partner authorised by all the general partners. Non-compliance is a strict liability offence. A general partner has a defence if the partner did not know about the failure to comply with the requirement and has taken reasonable precautions and exercised appropriate diligence to avoid the failure. The statement is required to contain the information required by the regulations.

New section 62 Certificates of registration etc

New section 62 provides for the issuing of a certificate of registration of an incorporated limited partnership, and a certificate relating to a change in the registered information or the correction of a mistake or omission in the register. The commissioner for fair trading is required to issue a certificate to the general partners of the relevant incorporated limited partnership. The commissioner may also give an applicant a certificate for an incorporated limited partnership about its formation and registered information as at the time of the application.

A certificate under this provision is to be conclusive evidence, as appropriate, about the formation of an incorporated limited partnership, or the registered information for an incorporated limited partnership at a stated time, the general partners and limited partners of an incorporated limited partnership at a stated time, or any other information in the register about an incorporated limited partnership at a stated time.

New section 63 Business Names Act not to apply

This New section provides that an incorporated limited partnership need not register a business name under the *Business Names Act 1963* if the name is the firm name of the partnership registered under this part.

New section 64 Acts preparatory to registration do not create partnership

This section clarifies that a preparatory act for the registration of an incorporated limited partnership does not itself create a partnership.

Division 6.4 Powers of incorporated limited partnerships

New section 65 Powers of partnership

New section 65 provides that an incorporated limited partnership has the legal capacity and powers of an individual and also all the powers of a corporation and gives examples of such powers.

This section also provides that the powers of an incorporated limited partnership may be limited by the partnership agreement.

New section 66 Relationship of partners to others and between themselves

This section clarifies that

- a general partner, an incorporated limited partnership or any one acting for them is not an agent of a limited partner and acts of these persons do not bind a limited partner; and
- a limited partner is not an agent of, or fiduciary for, a general partner, another limited partner, or the incorporated limited partnership, and the acts of a limited partner do not bind these persons.

This rule may be changed by the partnership agreement for an incorporated limited partnership or as agreed by its partners.

This rule also does not prevent an agreement whereby a partner acts as an agent of another partner or the incorporated limited partnership, or the partnership acts as an agent of a partner. In both cases, acts of an agent binds the principal.

A partner or two or more partners or all partners may give consent or authority for an incorporated limited partnership under an agreement either in relation to all cases, or in relation to all cases subject to stated exceptions, or in relation to any stated case or class of case. Such consent or authority may be given under the partnership agreement. A general partner or two or more general partners acting in accordance with the partnership agreement may give any consent or authority required or permitted to be given by an incorporated limited partnership.

This section also provides that a limited partner, as limited partner, is not a proper party to a court or tribunal proceeding begun by or against the incorporated limited partnership. However, a limited partner is a proper party in a proceeding begun by the incorporated limited partnership against the limited partner or in a proceeding begun by the limited partner against the incorporated limited partnership.

New section 66 is subject to section 68 (Limited partner not to take part in incorporated limited partnership's management).

Division 6.5 Liability and powers of limited partners

New section 67 Limitation of liability of limited partners

This section clarifies that a limited partner is not liable for the liabilities of the incorporated limited partnership or of a general partner.

However, a limited partner's contribution of capital or property to the incorporated limited partnership may be used in satisfaction of a liability of the incorporated limited partnership or of a general partner. A limited partner's obligation to contribute capital or property to the incorporated limited partnership may also be enforced in satisfaction of a liability of the incorporated limited partnership or of a general partner.

New section 67 is subject to section 68 (Limited partner not to take part in incorporated limited partnership's management).

New section 68 Limited partner not to take part in management of incorporated limited partnership

This section prohibits a limited partner in an incorporated limited partnership from taking part in the management of the partnership's business. Where a limited partner takes part in the management of the partnership and the person to whom the liability was incurred believed that the limited partner was a general partner, the partnership is bound by the acts of the limited partner. In that case, the limited partner is liable, as if a general partner, for the liability the partnership incurred to a person as a direct result of the acts of the limited partner if the partnership is unable to satisfy the liability.

There are a number of circumstances and acts in relation to which a limited partner is not to be taken as taking part in the management of the partnership's business, such as being an employee of the incorporated limited partnership, giving advice to or for the incorporated limited partnership in a professional capacity, giving a guarantee in respect of any liability of the incorporated limited partnership or of a general partner, acting as a lender to an associate of the partnership, and certain acts permitted by the partnership agreement. Subsection 68(4) lists these circumstances and acts.

This section also provides for the right of a limited partner, to the extent authorised by the partnership agreement, to access and inspect the books or records of the incorporated limited partnership or copy them, and to examine the state or prospects of the partnership's business and advise, or consult with other partners in relation to them. Except for this right, the operation of this section cannot be varied by the partnership agreement or with the consent of the partners.

A limited partner does anything in connection with the conduct of the business of an incorporated limited partnership is not to be regarded as that partner taking part in the management of the partnership's business.

A limited partner in an incorporated limited partnership that is a venture capital management partnership under the *Income Tax Assessment Act 1936* (Cwlth), section

94D93 is not to be taking part in the management of the partnership's business only because of any act that partner takes in respect of an incorporated limited partnership in the capacity of a partner or an associate of a partner in the venture capital management partnership.

New section 69 Interpretation for s 68

This section defines the references to an associate of a general partner, of a limited partner or of an incorporated limited partnership for the purpose of section 68 (Limited partner not to take part in incorporated limited partnership's management.)

New section 70 Differences between partners

This section provides that in an incorporated limited partnership, a difference arising as to ordinary matters connected with its business may be decided by a majority of the general partners. The partners may vary the operation of this provision.

New section 71 Change in partners

This section enables a limited partner to transfer all or part of the partner's interests to a transferee with the general partners' consent and the transferee's agreement. Where all of the limited partner's interests are transferred, the transferee becomes a limited partner in substitution for the transferor. If only a part of the limited partner's interests were transferred, and that part is a part of the transferor's legal interest in the partnership, the transferee becomes a limited partner in place of the transferor in respect of that part.

This section also enables a person to be admitted as a partner in an incorporated limited partnership without the consent of any limited partner.

The partners may vary the operation of this provision.

New section 72 Change in status of partners

A general partner may become a limited partner and a limited partner may become a general partner. This section provides that a limited partner, who was a general partner before, remains liable for any liability of the incorporated limited partnership that arose at the time the partner was a general partner. The liability is to the extent that the partnership is unable to satisfy or to the greater extent provided in the partnership agreement.

This section also provides that a general partner is not liable for any liability of an incorporated limited partnership that arose while the partner was a limited partner.

New section 73 Liability in respect of conduct or acts or omissions outside the ACT

New section 73 provides that the limitation on liability of a limited partner in an incorporated limited partnership extends in respect of conduct or acts or omissions outside the ACT.

New section 74 Incorporated limited partnerships formed under corresponding laws

This section sets out the liability of a partner for a liability incurred by a recognised incorporated limited partnership that was formed under a corresponding law of a State, Territory, foreign country or another jurisdiction. The Minister may declare a law to be a corresponding law.

The Minister may declare a law of a foreign country to be a corresponding law only if that law provides for the limitation of certain partners in certain partnerships.

This section does not affect any rule of law under which recognition is or may be given to a limitation of a liability of a partner in a partnership.

New section 75 Effect of s 73 and s 74

This section clarifies that there is no implication from section 73 or 74 that a limited partner is liable (or but for that section would be liable) in connection with the conduct of a partnership's business or acts or omissions outside the ACT in circumstances where that partner would not be liable for them within the ACT.

Division 6.6 Winding up of incorporated limited partnership

New section 76 Meaning of *assets* for div 6.6

For the purpose of the winding up of an incorporated limited partnership, this section defines the meaning of “assets”.

Assets of an incorporated limited partnership means the assets remaining after satisfaction of the partnership's liabilities and the costs, charges and expenses of the winding up.

New section 77 Voluntary winding up

This section enables an incorporated limited partnership to be wound up voluntarily in two ways, that is

- (a) in accordance with the partnership agreement, if it sets out the terms on which the partnership may be voluntarily wound up; or
- (b) subject to the partnership agreement, if the limited partners resolve to wind up the partnership by special resolution.

Assets must be dealt with in accordance with the partnership agreement. Where the partnership agreement does not provide for it, they must be distributed among the partners in shares that are proportionate to their respective contributions of capital or property to the partnership.

A person aggrieved by the operation of this provision may apply to the Supreme Court and the Court may make any order relating to the disposal of the assets that it considers appropriate.

New section 78 Winding up on commissioner's certificate

This section enables the commissioner for fair trading, by written notice, to require an incorporated limited partnership to show good cause why it should not be wound up if the commissioner considers that any of the following has occurred:

- (a) the partnership has stopped carrying on business, or
- (b) where the partnership has been incorporated on the basis that the partnership is or is intended to be:
 - (i) registered as a VCLP or an AFOF under the *Venture Capital Act 2002* (Cwlth), part 2 (Registration of venture capital limited partnerships and Australian venture capital funds of funds), or
 - (ii) a venture capital management partnership under the *Income Tax Assessment Act 1936* (Cwlth), section 94D (3) (Corporate limited partnerships), and
 the partnership has stopped being, or has not within the period of two years after its incorporation become, respectively a VCLP, an AFOF or a venture capital management partnership, or
- (c) none of the partners is a limited partner, or
- (d) incorporation of the partnership has been obtained by mistake or fraud, or
- (e) the partnership exists for an illegal purpose.

The commissioner for fair trading may, if he or she is satisfied that the incorporated limited partnership should be required to be wound up, issue a certificate that the incorporated limited partnership be wound up. The commissioner issues the certificate only if he or she is satisfied that good cause has not been shown why the partnership should not be wound up. The certificate is a notifiable instrument. A written notice must be given to the incorporated limited partnership about the issue of the certificate. The commissioner records this fact in the register.

A notice under this section must be served on the incorporated limited partnership at its registered office. If service cannot reasonably be made, the notice must be published in a newspaper circulating generally in the ACT.

New section 79 Review of certificate

This section enables an application to the Supreme Court to be made for a review of a decision of the commissioner for fair trading to issue a certificate under section 78. The Supreme Court may affirm the decision under review, or set aside the decision under review and cancel the certificate.

The commissioner may also cancel the certificate under section 78(2) at any time after a review application is made to the Supreme Court.

New section 80 Procedure for winding up on certificate

New section 80 provides that a winding up of an incorporated limited partnership on which a certificate under section 78 is issued must begin within 28 days of the notification of the certificate or of the decision of the Supreme Court under section 79 to affirm the commissioner's decision to issue the certificate.

The commissioner may appoint a liquidator. A general partner in the incorporated limited partnership may be a liquidator. The liquidator must publish a notice of his or her appointment in a newspaper, and must give the security prescribed in the regulations (if any). The commissioner may appoint a person to fill the position of liquidator if it becomes vacant.

This section also provides that the reasonable costs of a winding up are payable out of the property of the incorporated limited partnership.

New section 81 Distribution of assets on winding up required on commissioner's certificate

In relation to the winding up of an incorporated limited partnership on the commissioner's certificate, this section provides the following matters:

- The assets must be dealt with in accordance with the partnership agreement, if the agreement provides for it.
- In any other case, the assets are distributed among the partners in shares proportionate to their respective contributions of capital or property to the partnership.
- A person aggrieved by the operation of this section may apply to the Supreme Court and the Court may make any order that it considers appropriate for the disposal of the assets.

New section 82 Displacement and application of Corporations legislation etc

This section declares the winding up of an incorporated limited partnership to be an excluded matter for the purposes of the Corporations Act, section 5F in relation to the Corporations Act, part 5.7 (Winding up of bodies other than companies) and applies that part with specified modifications to an incorporated limited partnership as if it were a Part 5.7 body.

This section also enables the Australian Securities and Investments Commission to exercise a function under part 5.7 pursuant to an agreement under the *Australian Securities and Investments Commission Act 2001* (Cwlth). Where a function is not given to that commission, the commissioner of fair trading may exercise that function.

New section 83 Commissioner to be told about winding up

This section requires an incorporated limited partnership to lodge with the commissioner for fair trading a notice of the beginning of the winding up of the partnership and a notice of the finish of the winding up. Non-compliance is a strict liability offence. The commissioner records the receipt of a notice in the register.

A general partner has defence for a failure to comply with the requirement under this provision if the partner did not know of the failure and has taken reasonable precautions and exercised due diligence to avoid the failure.

New section 84 Cancellation of incorporation

New section 84 requires the commissioner for fair trading to, by written notice, cancel the incorporation of an incorporated limited partnership once it is wound up. The notice is a notifiable instrument. The commissioner is also required to record the cancellation of incorporation in the register. An incorporated limited partnership ceases to exist with the cancellation of its incorporation.

Division 6.7 Miscellaneous

New section 85 Execution of documents

This section enables an incorporated limited partnership to execute a document

- without using a common seal if the document is signed by a general partner; or
- as a deed if the document is expressed to be executed as a deed and is executed with the use of a common seal or without using a common seal if the document is signed by a general partner.

This section does not limit the ways that an incorporated limited partnership may execute a document (including a deed).

Note: The *Evidence Act 1995* (Cwlth), section 150 (1) (Seals and signatures) provides for certain presumptions to be made about seals and duly sealed documents. See also this Act, s 54 (2) on seals of incorporated limited partnerships.

New section 86 Entitlement to make assumptions

This section refers to assumptions provided in section 87 and provides that

- a person is entitled to make those assumptions in relation to dealings with an incorporated limited partnership,
- the partnership is not entitled to assert in a proceeding that those assumptions are incorrect,
- a person is entitled make the above assumptions in relation to dealings with someone else who has, or purports to have, acquired title to property from an incorporated limited partnership,
- that other person and the incorporated limited partnership are not entitled to assert in a proceeding that those assumptions are incorrect,
- the assumptions may be made even if a partner or agent of an incorporated limited partnership acts fraudulently, or forges a document, and
- a person is not entitled to make an assumption under section 87 if the person knew or suspected that the assumption was incorrect.

New section 87 Assumptions that may be made under s 86

This section provides for assumptions a person may make. Examples of such assumptions are that the partnership agreement of the incorporated limited partnership has been complied with, that the general partners in, and agents of, the incorporated

limited partnership properly exercise their functions, that a document has been properly executed by the incorporated limited partnership if the document appears to have been signed in accordance with section 85 (Execution of documents), and that a document has been properly executed by an incorporated limited partnership if its common seal appears to have been properly affixed to the document.

New section 88 Identification of incorporated limited partnerships

New section 88 requires any document issued on behalf of an incorporated limited partnership in connection with the conduct of the partnership's business to contain in legible letters the term "An Incorporated Limited Partnership" (or 'L.P.' or 'LP' as an abbreviation) at the end of the partnership's firm name. Non-compliance is a strict liability offence.

New Section 89 Display of certificate of registration

This section requires that the certificate of registration of an incorporated limited partnership is to be displayed at all times in a conspicuous position at the registered office of the partnership. Non-compliance is a strict liability offence.

The reference to *document* in this section includes any letter, notice, publication, written offer, contract, order for goods or services, invoice, bill of exchange, promissory note, cheque, negotiable instrument, endorsement, letter of credit, receipt and statement of account.

New section 90 Registered office

New section 89 provides that an incorporated limited partnership must keep its registered office in the ACT. Non-compliance is a strict liability offence committed by each general partner. The regulations may prescribe the hours when the registered office is to be open to the public.

New section 91 Certain documents to be given to commissioner

This section requires an incorporated limited partnership that was incorporated on the basis that it intended to apply for registration of the partnership as a VCLP or AFOF under the *Venture Capital Act 2002* (Cwlth), part 2 (Registration of venture capital limited partnerships and Australian venture capital funds of funds) to lodge with the commissioner for fair trading a copy of a document proving its status as a VCLP or AFOF. The document must be lodged within one month after the registration.

This section also requires an incorporated limited partnership that was incorporated on the basis that it intended to meet the requirements for recognition as a venture capital management partnership under the *Income Tax Assessment Act 1936* (Cwlth), section 94D (3) (Corporate limited partnerships) to lodge with the commissioner for fair trading a statement that it is such a venture capital management partnership. This statement must be lodged within one month after becoming the venture capital management partnership.

Where the registration of an incorporated limited partnership as a VCLP or AFOF is revoked, or an incorporated limited partnership ceases to be a venture capital management partnership, the incorporated limited partnership must, within seven days after the day the revocation took effect or it ceased to be that venture capital management partnership, lodge with the commissioner for fair trading a notice of the revocation or cessation, stating the date it took effect.

If an incorporated limited partnership ceases to carry on business, the incorporated limited partnership must, as soon as practicable, lodge with the commissioner for fair trading a notice of the cessation, stating the date it took effect.

A notice under this section must contain the information required by the regulations.

Each general partner in the incorporated limited partnership commits a strict liability offence if in breach for noncompliance with a requirement under this section.

New section 92 Service on incorporated limited partnership

This section provides for serving documents on an incorporated limited partnership.

New section 93 Entry in register constitutes notice

This section provides that an entry in the register of information about an incorporated limited partnership, including an entry stating the effect of any notice received by the commissioner for fair trading, is sufficient notice of the information or of the effect of the notice to all people who deal with the partnership.

New section 94 Duty to give information

This section enables the commissioner for fair trading to require an incorporated limited partnership to provide information. The information must be given to the commissioner within 28 days of the notice or any additional time allowed by the commissioner. Non-compliance is a strict liability offence committed by each general partner. A general partner has a defence if the partner did not know of the non-compliance and took reasonable precautions and exercised due diligence to avoid it.

A defendant in a prosecution for the offence under this section has a defence if the defendant proves that it was not within the power of the incorporated limited partnership to give the commissioner the information.

New section 95 Secrecy

New section 95 applies to the commissioner for fair trading or anyone employed or engaged to administer part 6. A person to whom this section applies must not, otherwise than in relation to the exercise of a function under law, record, divulge or communicate protected information.

This restriction does not apply to divulging or communicating protected information with the consent of the person from whom it is obtained or to a law enforcement authority. Protected information need not be divulged or communicated to a court or

a document containing such information does need to be produced to a court, unless it is necessary to do so for this Act or any other Act.

In this section ***protected information*** means information obtained under part 6 by a person to whom this section applies because of the exercise of a function under this part.

New section 96 Offences by partnerships

This section applies where a general partner in an incorporated limited partnership commits an offence under part 6, and the general partner is a partnership (whether or not an external partnership).

The reference to the general partner is a reference to each partner in the partnership (or external partnership), or if the partnership (or external partnership) is one in which any partner has under the law of the place where it is formed limited liability for the liabilities of the partnership, each partner in the partnership whose liability is not limited.

New section 97 Delegation by commissioner

This section enables the commissioner for fair trading to delegate his or her functions under this part to a public servant.

New section 98 Relationship with Corporations legislation

This section provides for the regulations to declare a matter under this Act to be an excluded matter for the Corporations Act, section 5F (Corporations legislation does not apply to matters declared by State or Territory law to be an excluded matter).

The declaration may be in relation to

- (a) the whole of the Corporations legislation to which the Corporations Act, part 1.1A (Interaction between Corporations Legislation and State and Territory laws) applies; or
- (b) a stated provision of that legislation; or
- (c) that legislation other than a stated provision; or
- (d) that legislation otherwise than to a stated extent.

Note Section 5F of the Corporations Act provides that if a State or Territory law declares a matter to be an excluded matter for the purposes of that section in relation to all or part of the Corporations legislation of the Commonwealth, then the provisions that are the subject of the declaration will not apply in relation to that matter in the State or Territory concerned.

Section 99 enables the Minister to determine fees for the Act. A determination is a disallowable instrument.

This section enables the commissioner for fair trading to approve forms for this Act. An approved form is a notifiable instrument.

Section 101 enables the Executive to make regulations for this Act.

The regulations may deal with the keeping of records by an incorporated limited partnership and information or copies of records or documents required to be given to the commissioner for fair trading by an incorporated limited partnership.

The regulations may also

- exempt, or provide for the exemption, of any person, matter or thing from any stated provision of this Act,
- make provision about a matter by applying, adopting or incorporating (with or without change) a standard, or a provision of a standard, as in force at a particular time or from time to time, or
- may create offences for contraventions of the regulations with the maximum penalties of not more than 10 penalty units for each offence.

The dictionary provides for the definitions of words used in the Act.