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# **LIMITED PARTNERSHIPS BILL: SAFE HARBOUR AND FEES REGULATIONS**

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**Discussion Document**

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## **INFORMATION FOR SUBMITTERS**

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It would be useful if submissions sent in hard copy or faxed were also provided in electronic form (Adobe Acrobat, Microsoft Word 2000 or compatible format).

Questions in the discussion document are intended to provide a focus for the issues. Broader comment on the issues will also be welcomed.

The closing date for submissions is 29 October 2007.

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## **BACKGROUND: THE LIMITED PARTNERSHIPS BILL**

1. The Limited Partnerships Bill (“the Bill”) has recently been introduced into Parliament. The Bill creates a new form of legal structure in New Zealand called the limited partnership. Limited partnerships are a special form of partnership that are a preferred means internationally for investing in venture capital and can also be used as a flexible legal form by the broader commercial community.
2. By establishing the legal form of limited partnership in New Zealand the Bill aims to encourage the development of the New Zealand venture capital industry, and encourage domestic and international investment in New Zealand. This makes it particularly important that the New Zealand limited partnership contain the key features needed for it to be recognised and accepted internationally.
3. As a result, the limited partnership structure established by the Bill has certain key features that are common to overseas limited partnership regimes. In particular:
  - a. Limited Partnerships having separate legal personality;
  - b. Two classes of partners: 1) general partners who are jointly and severally liable for all of the debts and liabilities of the partnership, and 2) limited partners whose liability is limited to the extent of their contribution to the partnership;
  - c. Limited partners being able to undertake certain activities (commonly referred to as ‘safe harbours’) that allow them to have a say in how the partnership is run, without being deemed to participate in the management of the partnership and potentially losing their limited liability; and
  - d. Flow through tax status, meaning that the partnership itself is not taxed, but that each partner is taxed individually at the partner’s personal tax rate.
4. The Bill also provides for regulations to be enacted dealing with matters including:
  - a. Safe harbours;
  - b. Fees payable to the Registrar of Limited Partnerships; and
  - c. Forms for filing with the Registrar of Limited Partnerships.
5. These regulations need to be enacted before 1 April 2008, which is the date proposed for the Bill to come into force.

6. This discussion document contains proposals for regulations setting out safe harbours and fees payable to the Registrar of Limited Partnerships and Overseas Limited Partnerships, and aims to obtain the views of key stakeholders on these proposals.

## **‘SAFE HARBOURS’ FOR NEW ZEALAND LIMITED PARTNERSHIPS**

### **Issue**

7. Limited partners are passive investors in limited partnerships. In common with overseas limited partnership regimes, the Bill prohibits limited partners from taking part in the management of the limited partnership. In exchange for not taking part in the management of the limited partnership, limited partners have significantly lesser exposure to liability than partners in a normal partnership or general partners in a limited partnership. Specifically, they are liable only to the extent of their investment in the limited partnership.
8. The restricted liability of limited partners under the Bill is a key aspect in the limited partnership structure. The Bill specifically provides that limited partners who do not take part in the management of the limited partnership are not liable for the debts and liabilities of the limited partnership.<sup>1</sup>
9. However, the Bill provides that a limited partner (“A”) who does take part in the management of the business of a limited partnership may be liable to a person (“B”) in the same way as a general partner if, at the time that the debt or liability to that person was incurred:
  - a. A took part in the management of the partnership;
  - b. B knew that A took part in the management of the limited partnership; and
  - c. C believed on reasonable grounds that A was a general partner.
10. As participating in the management of the business of the limited partnership puts a limited partner in breach of the requirements under the Bill, and potentially exposes them to extra liability, it is important to limited partners to know what activities they can be involved in while not participating in the management of the business of the limited partnership.
11. To provide clarity to limited partners, limited partnership Acts in other jurisdictions often include a list of activities that the limited partners can be involved in while not participating in the management of the limited partnership. The Bill contains provision for regulations to be made in New Zealand setting out the safe harbour activities that would not amount to participating in management.

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<sup>1</sup> Although the limited partner may be liable for up to three years to repay part of whole of any distribution making the limited partnership insolvent (see clauses 39 and 40 of the Bill).

## **The objective of safe harbours in the Bill**

12. The principal objective of safe harbours is to provide clarity and certainty to limited partners about what activities do not amount to participating in the management of limited partnerships. As the objective of the Bill is also to provide a limited partnership structure that is recognised and accepted by international investors, a further important consideration is that safe harbours for New Zealand limited partnerships are consistent with international best practice and the approaches in other jurisdictions.

## **Options for safe harbours**

13. Safe harbours could take a number of different forms, including
  - a. A list of principles or rules that could be applied by limited partners to determine what activities involve taking part in the management of the limited partnership;
  - b. An exhaustive list of activities that do not amount to taking part in the management of the limited partnership; or
  - c. A non-exhaustive list of activities that do not amount to taking part in the management of the limited partnership.
14. We do not prefer setting out the safe harbours as a list of principles or an exhaustive list of activities. A list of principles would be unlikely to provide sufficient certainty to limited partners about what activities they could be involved in without participating in management, and would be an approach that international investors would be less familiar with. Furthermore, in the most internationally recognised limited partnership regimes (for example, Jersey and Guernsey) safe harbours are a list of specific activities that do not amount to taking part in the management of the limited partnership.
15. We also consider that an exhaustive list of activities would be unnecessarily restrictive. In particular, it would be difficult to establish an exhaustive list that covered all of the circumstances where a limited partner could be involved with the limited partnership while not participating in the management of the limited partnership.

## **The preferred approach to safe harbours**

16. We propose that the safe harbours for New Zealand limited partnerships be a non-exhaustive list of permitted activities set out in regulations made under the Bill. If the activities of a limited partner were not on the list of safe harbours the court would be required to consider whether the activities amount to taking part of the management of the limited partnership or not. This approach provides the necessary flexibility, but also increases the need for the list of safe harbours to be as comprehensive as possible so as to provide certainty to limited partners.

17. In light of this, we consider that this list should be closely based upon that set out in the report *Partnership Law* prepared in 2003 by the English and Welsh, and Scottish Law Commissions. To that end, we propose the following activities be listed as not amounting to participating in the management of the limited partnership:
- a. Taking part in a decision about the variation of the partnership agreement;
  - b. Taking part in a decision about whether to approve, or veto, a class of investment by the limited partnership;
  - c. Taking part in a decision about whether the general nature of the partnership business should change;
  - d. Taking part in a decision about whether to dispose of the partnership business or acquire another business;
  - e. Taking part in a decision about whether a person should become or cease to be a partner;
  - f. Taking part in a decision about whether the partnership should end or be wound up;
  - g. Enforcing rights under the partnership agreement (unless those rights are to carry out management functions);
  - h. Approving the accounts of the limited partnership;
  - i. Being engaged under a contract by the limited partnership or by a general partner of the limited partnership (unless the contract is to carry out management functions);
  - j. Acting in his or her capacity as a director or employee of, or a shareholder in, a corporate general partner;
  - k. Taking part in a decision which involves an actual or potential conflict of interest between a limited partner (or limited partners) and a general partner (or general partners).
  - l. Discussing the prospects of the partnership business; and
  - m. Consulting or advising a general partner, or general partners, about the activities of the limited partnership or about its accounts (including doing so as a member of an advisory committee of the limited partnership).

## **Costs and benefits of the proposed approach to safe harbours**

18. The safe harbours in paragraph 17 will provide certainty to limited partners about activities that they can be involved in without participating in the management of the limited partnership. The safe harbours are also similar to those found in internationally accepted limited partnership models, such as those from Jersey and Guernsey.
19. In particular, the safe harbours deal with subject areas that are typically covered in overseas limited partnership Acts, such as involvement in strategic decision making, contract work, and providing consultation or advice to the limited partnership. This means that the proposed safe harbours should be recognised and accepted by international investors.
20. The safe harbours are also similar to, and broadly consistent with, the safe harbours found in many of the limited partnership models from Australian states, for example, New South Wales and Victoria. This is a particularly important consideration in ensuring the recognition of New Zealand limited partnerships by Australian investors. By facilitating trans-Tasman investment, the limited partnerships regime will be an important contribution to the New Zealand and Australian government's goal of a single economic market between the two countries.
21. The fact that these safe harbours that are proposed are not a comprehensive list means that there remains adequate flexibility in interpreting the meaning of "participating in the management of the limited partnership". As the safe harbours are set out in regulations, there is also the ability to more easily amend the list if changed circumstances make it appropriate.

## **FEES PAYABLE TO THE REGISTRAR OF LIMITED PARTNERSHIPS**

### **Issue**

22. Under the Bill, the Companies Office is required to maintain registers of limited partnerships and of overseas limited partnerships carrying on business in New Zealand. New Zealand limited partnerships are formed on registration with the Companies Office and overseas limited partnerships are also required to be registered with the Companies Office if they carry on business in New Zealand. The Bill requires registered limited partnerships to file an annual return with the Companies Office.<sup>2</sup>

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<sup>2</sup> It is intended that registration application forms will be available on-line, and allow intending limited partnerships to download application forms electronically; and either complete and submit them electronically, or complete the forms on-line, print them out and file them by post. It is also proposed to provide a separate website address for the register of limited partnerships, and searches of the register will be able to be carried out via this dedicated website.

23. The Companies Office operates its registers according to the principle of cost recovery and it is intended that the costs of maintaining the registers be recovered through fees. In order to recoup the cost of maintaining the registers of limited partnerships and overseas limited partnerships, fees need to potentially be charged for:
- a. Applications by potential limited partnerships to be registered (or by overseas limited partnerships to be registered);
  - b. The filing of annual returns; and
  - c. The provision of certified copies of documents held on the Register.

**The proposed fees**

24. Consistent with the principle of cost recovery, it is proposed to charge the fees set out in the following table in relation to the registers of limited partnerships and overseas limited partnerships:

Type of Transaction	Registers of Limited partnerships and overseas limited partnerships
Application to be registered	\$270.00 (incl. GST)
Filing of annual return	No fee
Request for certified copy of document held on the register	\$25.00 (incl. GST)

**Comment on the proposed fees**

25. The fees have been set at a rate designed to do no more than recover the costs of maintaining the register, and at rates that are comparable with those charged for equivalent transactions involving other registers maintained by the Companies Office.
26. In calculating the fee for an application to register limited partnership, the cost of undertaking the registration process (on a time/cost basis), as well as the ongoing maintenance of a limited partnership’s registration, have both been taken into account.
27. It is proposed that there will no fee for filing the annual returns required under the Bill. Rather, the application fee would represent a one-off fee for the life of the limited partnership. We believe that this will result in a reduction in compliance costs for the limited partnership, as well as efficiencies derived from avoiding the need to administer and collect annual fees.

28. The fee for provision of a certified copy of a document held on the Register is consistent with that charged for the provision of certified copies of documents from several other registers maintained by the Companies Office (including the registers of companies, motor vehicle dealers and personal property securities).

## **QUESTIONS FOR SUBMITTERS**

### *Safe Harbours for New Zealand Limited Partnerships*

- I. Do you agree that the safe harbours should be a non-exhaustive list of activities that do not involve participating in the management of the limited partnership? If not, what form do you think that the safe harbours should take, and why?
- II. Do you agree with the list of safe harbours in paragraph 17? Are there any activities that you think should be added to, or removed from, the list?

### *Fees payable to the Registrar of limited partnerships and overseas limited partnerships*

- III. Do you have any comments on the proposed fees payable to the Registrar of limited partnerships and overseas limited partnerships?