A BILL TO ESTABILISH LIMITED LIABILITY PARTNERSHIPS

Working Paper 27

Queensland Law Reform Commission
July 1984

Q U E E N S L A N D

A WORKING PAPER OF THE LAW REFORM COMMISSION

ON A BILL TO ESTABLISH
LIMITED PARTNERSHIPS

Q.L.R.C.W.P. 27

PREFACE

The Law Reform Commission has been functioning since the 1st March, 1969 and is constituted by the Law Reform Commission Act 1968 - 1984.

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The office of the Commission is at the Central Courts Building, 179 North Quay, Brisbane.

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LAW REFORM COMMISSION

WORKING PAPER ON A BILL TO ESTABLISH LIMITED PARTNERSHIPS

The Third Programme of the Law Reform Commission as approved by the Governor-in-Council on 8th September, 1983 includes an examination of the law in relation to Limited Liability Partnerships.

The Statute Law of Queensland has, since this State separated from New South Wales, included provisions enabling the establishment of Limited Partnerships. Those legislative provisions are contained in Sections 53 to 69 of "The Mercantile Acts, 1867 to 1896."

The Attached paper contains a discussion of the existing law applicable and a draft Bill which have been prepared for the Commission by Mr. J.G. Mann of Messrs. Chambers McNab Tully and Wilson. The Bill has been drawn on the basis that since the general body of Partnership Law in the main is applicable to Limited Partnerships the special legislation has only to outline the procedure for securing Limitation of Liability for those who wish to form a partnership on that basis.

The Working Paper is being circulated to persons and bodies known to be interested in these matters from whom comment and criticism are invited. In particular, comment is invited in relation to the following matters:

1. Whether incorporated bodies with limited liability should be permitted to be general or special partners.

2. If further contributions are to be allowed, whether the Act should provide that these are to be treated as contributions to capital.

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Recipients of this Working Paper are reminded that these recommendations for the reform of the law must have the approval of the Governor-in-Council before being laid before Parliament and no inferences should be drawn therefrom as to any Government Policy.

It is requested that any observations you may desire to make be forwarded to the Secretary, Law Reform Commission, P.O. Box 312, North Quay, Qld. 4000 so as to be received no later than 30th November, 1984.

(Sgd.) B.H. McPherson

The Hon. Mr. Justice B.H. McPherson,
Chairman.

Brisbane,
31st July, 1984.

INTRODUCTION

Ever since separation, the statute law of Queensland has included provisions enabling the establishment of limited partnerships.

In Inspector of Awards v. Langham ([1943] G.L.R. 271 at 273) Tyndall J. summarised what His Honour perceived as the essential character of a limited partnership:-

"The characteristics of a limited partnership are (1) one or more partners whose liability for the debts and obligations is unlimited and (2) one or more partners whose liability for such debts and obligations is limited in amount, the right to take part in the management of the affairs of the firm being confined to the partner or partners with unlimited liability. It is obvious that the rights of limited partners are purposely made inferior to those usually enjoyed by ordinary partners in consideration of the special statutory dispensation of limited liability".

From the fact that, for a long time, few limited partnerships were registered, one might deduce that such a structure in itself was not attractive to participants in a business venture or had some sort of commercially unacceptable consequence. The real reason however that partnerships were not formed with the unique character of placing a limitation on the liability of some of its members may be either because the existence of the provisions of the Act were quite unknown to the majority

of the members of the business community and their advisers, or because the relevant provisions of the legislation left so much to be desired in clarity and meaning and the body of decided law on its provisions so scarce that other structures were sought which would enable the participants and their advisers to set out on a venture with some confidence as to the consequences of particular eventualities and fact situations as might arise from time to time.

Yet, since 1976 the number of limited partnerships formed in Queensland has increased from 1 to 130. From this fact alone it must be admitted that the business community and their advisers at least are now aware of the possibilities afforded by the legislation, and if it is correct that the present legislation is ill-drafted and cumbersome then obviously the participants in limited partnerships have concluded that the structure offers them advantages not shared by corporations, trusts or ordinary partnerships and that these advantages far outweigh the deficiencies of the legislation and the paucity of the law on the subject.

An examination therefore of -

I the present law in Queensland relating to limited partnerships;

II the arguments for and against the State offering a limited partnership structure to the community;

III the possibility of updating that law,

is properly within the purview of the Law Reform Commission.

A paper of this nature by necessity must first examine the law on the subject to such a degree that the subsequent discussion on the arguments for and against limited partnerships can be seen more clearly in perspective and to explain why particular provisions are suggested in the draft legislation. The difficulty in this area is that authorities are few and the answers to possible fact situations are accordingly sometimes not capable of quick resolution.

SCOPE OF PAPER

This paper will therefore examine each of those three areas in the following way:-

I Examination of the law of limited partnerships in Queensland:-

- A. history of the Queensland provisions;
- B. legislation in other states and jurisdictions;
- C. the effect of Sections 53 - 68 of the Mercantile Act 1867-1974:
  - (1) Nature of Limited Partnerships - Legal Personality;
  - (2) Formation of Limited Partnerships
    - (a) Number of Members
    - (b) Types of Business Permitted
    - (c) Who may be Partners
    - (d) General Partners
    - (e) Special Partners
    - (f) Contributions by Special Partners
    - (g) Firm Name
    - (h) Registration
    - (i) Principal Place of Business
    - (j) Time for Registration
    - (k) Inspection of Certificate
    - (l) Certificate of Registration;
  - (3) False Statements in Certificates;
  - (4) Limitation of Liability;
  - (5) Loss of Limited Liability;
  - (6) Duration of Limited Partnerships;
  - (7) Rights and Obligations of Partners inter se;
  - (8) Rights and Obligations to Third Parties;
  - (9) Dissolution and Winding up;
  - (10) Suits Against Limited Partnerships;
  - (11) Conflict of Laws;

(12) Limited Partnerships in relation to certain Acts.

II Consideration of the arguments for and against limited partnerships;

III Reform of the legislation:

A. Comments on the Queensland position;

B. Basis for New Act;

C. Proposed Act.

I LAW OF LIMITED PARTNERSHIPS IN QUEENSLAND

A. History of Queensland Act

It is not appropriate in this short paper to relate the history of the concept of limited partnerships as it has evolved over the centuries. (See Lindley p.783). Suffice it to say however that the concept is one which did not originate in England and until the Limited Partnership Act 1907 could not be formed there. Other jurisdictions around the world however have for some centuries permitted their formation. The structure is a widely recognised and used one in the United States.

The concept was introduced into Australia in 1863 by the New South Wales Act 17 Victoria No. 19 - an Act to legalise Partnerships with Limited Liability - and when Queensland separated from New South Wales in 1859, the provisions of the Act became part of the law of Queensland. In 1867, the provisions were taken into the Mercantile Act (except for some minor words which were deleted) as Sections 53 to 68 inclusive.

Since 1867, there have been no significant amendments to any of those Sections. The Act which Mr. Nichols described in the New South Wales Legislative Council on the 21st June, 1853 as "a crude piece of legislation" has not been updated.

A comparison between the 1781 Irish Act (21 and 22 George III C46) under which Limited Liability Partnerships could be established in that country and the Mercantile Act 1867-1974 shows that the provisions of the two Acts are close and lead to the conclusion that the present provisions of Sections 53-68 of the Mercantile Act in the

first instance owe their origin to the 1781 Irish Act. It is not within the scope of this paper to closely compare their respective provisions and in some respects the Irish Act is superior to the Mercantile Act.

B. Legislation in Other States and Jurisdictions

The first State in Australia to have provision in its legislation for the formation of limited partnerships was New South Wales, but that legislation was repealed by the Companies Act of 1873. A form of limited partnership was re-introduced in New South Wales under the Mining Partnership Act of 1900, but this in turn was repealed in 1967.

The only other States of Australia to have introduced limited partnership legislation have been Tasmania and Western Australia:-

(a) The Western Australian Act is the Limited Partnership Act 1909 (Number 17 of 1909) and follows closely the English Limited Partnership Act of 1908;

(b) The Tasmanian Act is the Limited Partnership Act of 1908 (8 Edward VII Number 6) and although it follows closely once again the English Partnership Act of 1908, does differ in some minor aspects.

It can be said that the Queensland legislation to the extent that it does not follow the provisions of the English Limited Partnership Act 1908 is out of line with the other States. As will be seen later in this paper the legislation effective in England, Western Australia and Tasmania is in many respects superior to that effective in Queensland. There are no doubt many shortcomings in the English legislation, and to that extent it should be updated but, by comparison, the extent of reform required in the Queensland provisions leads one inevitably to suggest that the Queensland legislation should be repealed and replaced in its entirety, so long as of course sufficient justification can be found for retaining such a structure.

Since the legislation in England, Western Australia and Tasmania is so close, it is not intended to examine those Acts separately. Comments on those Acts, and in particular their shortcomings will be made later in this paper. References in this paper to other jurisdictions are in the main to those Acts, although some reference is made to the other jurisdictions.

Limited partnership legislation has been introduced into United States, Canada, New Zealand and South Africa and as previously mentioned the United States Uniform Limited Partnership Act was revised in 1976. References to the Canadian act are to The Limited Partnership Act of Ontario. Each of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Quebec,and Saskatchewan have passed similar legislation.

It is appropriate to set out the following information on the number of limited partnerships which have been formed in each of Western Australia and Tasmania.

Western Australia

Year	Number of Partnerships Registered
1976	12
1977	18
1978	3
1979	10
1980	26
1981	105
1982	246
1983	37

Tasmania

Year	Number of Partnerships Registered
1976	5
1977	3
1978	2
1979	7
1980	4
1981	1
1982	9
1983	8

47 were still current at the end of 1983.

By way of comparison the number of limited partnerships formed in Queensland over those years have been as follows:

Queensland

Year	Number of Partnerships Registered
1976	1
1977	4
1978	5
1979	17
1980	22
1981	21
1982	16
1983	20

130 were still current at the end of 1983.

No figures are as yet available for England.

C. Effect of Section 53 - 68 inclusive of the Mercantile Act 1867-1974

In the legislation in England, Western Australia, Tasmania and Queensland, it is either stated in the respective Limited Partnership Act or in the Partnership Act itself that subject to the provisions of the Limited Partnership Act, the Partnership Act and the rules of equity and of common law applicable to partnerships except so far as are inconsistent with the express provisions of the Act, shall apply to limited partnerships.

In other words, the body of law represented by the provisions of the Partnership Acts, the myriad of cases and principles which have been established over the years are all applicable to limited partnerships. Where inconsistent the limited partnership legislation will prevail. It is not possible to therefore set out in this paper the entire law relating to limited partnerships nor the extent to which the body of law relating to partnerships is not inconsistent with the limited partnership legislation. What is proposed to be examined are the provisions of Sections 53 - 68 inclusive of the Mercantile Act 1867-1974, and the consequences which they have. In this way, the effect of limited partnership legislation on the law of partnership can be judged and the shortcomings of that legislation can be clearly seen.

However, prior to examining those provisions the following table can be set out, showing which provisions of the Mercantile Act would be likely to be inconsistent with either the rules set out in the Partnership Act or the rules of equity or common law:-

	Mercantile Act	Partnership Act	Equity/ Common Law
1.	Restriction on type of business (s.53)	No restriction	No restriction

Note: In general terms a partnership can carry on any business so long as it is not illegal; "Business" includes every trade, occupation or profession (Section 3). The restrictions in Section 53 of the Mercantile Act are one of the important limitations on the scope of the business of limited partnerships.

2.	Limitation of liability	No limitation (s.12)	No limitation

Note: No limitation exists under the Partnership Act or Common Law in relation to an ordinary partnership unless by agreement with creditors.

3.	Special partners to contribute specific sums of money (s.54)	No special requirement	No special requirement

Note: There appears to be no special requirements for ordinary partnerships for the contributions of partners to be made specifically in money; it is quite conceivable that the contribution can be agreed as being specific items of property.

4.	Formation procedure (ss. 55-58)	No special procedure	No special procedure

Note: The specific procedure prescribed by Section 55-58 of the Mercantile Act are unique in the realm of partnerships; although in most cases a partnership would be formed upon the signing of a Deed of Partnership in the contribution of specific assets and the registration of a business name open to public inspection, nothing like the detailed directions in Sections 55-58 need be complied with.

	Mercantile Act	Partnership Act	Equity/ Common Law
5.	Limitation on certain partners from conducting business (s.56)	No limitation (s.8)	No limitation

Note: Although special partners are not to be involved in the conduct of limited partnership business, if they do so then it is anticipated that the same results would apply as if they were ordinary partners under Section 8 of the Partnership Act; in other words the statutory agency imposed by Section 8 is equally applicable to a limited partnership and a special partner would have the power to bind the firm although for him individually only on pain of losing his privileged position.

6.	Partnership to use firm name (s.55)	No such requirement	No such requirement

Note: Although in Section 3 of the Partnership Act the name under which a business is conducted by partners is called its firm name, there is no specific direction similar to Section 55 that the business must be carried on under that name only although in practice it would be unlikely to be otherwise.

7.	Duration limited (s.59)	No limitation	No limitation

Note: An ordinary partnership could last well in excess of the seven year limitation expressed in Section 59; see further below.

8.	Renewal procedure (s.60)	No such requirement	No such requirement

Note: This follows on from the requirements of Section 59 of the Mercantile Act which is quite outside any requirements of the Partnership Act or Equity or Common Law.

9.	Limitation on withdrawal of capital (s.61)	No such requirement	No such requirement

Note: As ordinary partners have an unlimited liability (Section 12) it is unnecessary to place any restriction on withdrawal of capital.

	Mercantile Act	Partnership Act	Equity/ Common Law
10.	Prosecution of actions by and against general partners	Actions in firm name or partners	Action in firm name or partners

Note: This is one of the special features of a limited partnership; note however that in some cases an action can be taken against special partners. A creditor of an ordinary partnership, however, can commence action against any one or more partners.

11. Dissolution -

	Mercantile Act	Partnership Act
for fixed term	at end of term (s.63)	at end of term (s.35)
single venture	not permitted (s.59)	on completion (s.35)
undefined period	not permitted (s.59)	on notice (s.35)
by court	permitted (s.63)	permitted (s.38)
by death	recognised (s.63)	recognised (s.36)
by insolvency	recognised (s.63)	recognised (s.36)
charging shares	not permitted	permitted (s.36)
unlawful business	dissolved (s.63)	dissolved (s.37)
non s.53 business	not dissolved	not applicable

Note: It is difficult to be categorical in some of the circumstances set out above; particularly in relation to single ventures and undefined periods.

Further, the following table shows what provisions of the Partnership Act would apply to a limited partnership and what provisions would not apply:

	Partnership Act	Would Apply	Would Not Apply
1.	Definition (s.5)	Yes	-

Note: Limited partnership is as much a relationship with the persons who are carrying on the business as an ordinary partnership.

2.	Rules for determining (s.6)	-	Yes

Note: Bearing in mind the precise procedure laid down by Section 55-58 of the Mercantile Act, a limited partnership can only be found to exist between persons if that procedure has been followed.

3.	Postponement of rights (s.7)	Yes	-
4.	Power to bind firm (s.8)	Yes	-

Note: This Section would apply to a special partner. It is suggested that special partners power to bind the firm is the same as general partners; this Section is not inconsistent with the Mercantile Act provisions.

5.	Partners bound (s.9)	Yes	-

Note: In the same way as Section 8 would apply to a limited partnership, this Section would have application as it is not inconsistent with anything expressly contained in the Mercantile Act.

6.	Credit for private purpose (s.10)	Yes	-

Note: This Section is not inconsistent with the Mercantile Act provisions.

7.	Restriction on powers (s.11)	Yes	-

Note: This is not inconsistent with the provisions of the Mercantile Act.

Partnership Act	Would Apply	Would Not Apply
8. Liability of partners (s.12)	-	Yes

Note: This obviously has no application to a limited partnership, being the major difference in concept between limited and ordinary partnerships.

9. Liability of firm for wrongs (s.13)	Yes	-

Note: This is not inconsistent with the provisions of the Mercantile Act, except perhaps where it results in a money judgment.

10. Misapplication of money (s.14)	Yes	-

Note: This would apply to a limited partnership.

11. Liability for wrongs (s.15)	Yes	-

Note: It is suggested that this Section would apply except to the extent to which it might cut across the limitation on liability imposed by Section 54 of the Mercantile Act.

12. Improper use of trust property (s.16)	Yes	-

Note: There is nothing in principle to stop the application of this provision to a limited partnership.

13. Persons liable by holding out (s.17)	-	Yes

Note: If a special partner by words (spoken or written) or by conduct represents himself as a partner in a particular firm within the meaning of Section 56 of the Mercantile Act then he would be liable as a partner; however, if a special partner simply permits a general partner to make it known that he is a special partner but does not transgress the prohibitions in that Section, he would not be so liable.

Partnership Act	Would Apply	Would Not Apply
14. Admissions and representations (s.18)	Yes	-

Note: This would seem to apply to a limited partnership.

15. Notice to partners (s.19)	Yes	-

Note: This would also seem to apply to a limited partnership; no doubt in general terms it would apply only to a general partner but in relation to any special partner who might come within the expression "habitually acts in the partnership business" then the Section may well apply to him.

16. Liabilities of incoming/ outgoing partners (s.20)		
s-s(1)	-	Yes
s-s(2)	Yes	-
s-s(3)	Yes	-

Note: It is suggested that Sub-section (1) would not apply simply from the fact that a fresh partnership would need to be formed; Sub-sections (2) and (3) would apply in relation to general partners and to special partners at least to the extent of their stated subscription.

17. Guarantees (s.21)	Yes	-

Note: There is nothing in principle to suggest that this would not apply in relation to limited partnerships; a "change in the constitution of the firm" would come about as a result of the operation of Section 63.

18. Variation of partners rights (s.22)	Yes	-

Note: There is nothing to suggest that this should not apply to a limited partnership; there would be nothing to stop general and special partners varying any original partnership deed without further registration and publication procedures being followed.

Partnership Act	Would Apply	Would Not Apply
19. Partnership property (s.23)	Yes	-

Note: In practice this would apply to property in the name of general partners although there would appear to be nothing in principle to preclude special partners from owning partnership property to the extent to which this does not bring them into the direct conduct of partnership business; there would appear to be a material difference between special partners owning partnership lands and buildings from which a business is conducted (which would appear to be in order) on the one hand but actually owning trading stock used in the partnership business on the other.

20. Property bought with partnership money (s.24)	Yes	-

Note: This would certainly apply to a limited partnership and could be a most valuable safeguard to the rights of special partners.

21. Conversion into personal estate (s.25)	Yes	-

Note: This likewise would apply to a limited partnership.

22. Procedure against partnership property (s.26)	Yes ((2),(3))	Yes (1)

Note: As the Mercantile Act makes specific provision as to actions against a limited partnership, it is suggested that Sub-section (1) would be inapplicable; however Sub-sections (2) and (3) would appear to apply.

Partnership Act	Would Apply	Would Not Apply
23. Rules as to duties and interests (s.27)	Yes ((1),(2), (3),(4),(6), (7),(8),(9))	Yes ((1),(5))

Note: Rule (1) would apply except the direction that each owner is to contribute equally towards losses. Rule (2) would appear to apply except to the extent that it might cut across the direction of Section 54 of the Mercantile Act. Nothing in the Mercantile Act would prevent the operation of Rule (3). Likewise, Rule (4) would be equally applicable to a limited partnership. Rule (5) would apply to a limited partnership so long as a special partner was prepared to lose his privileged position. Likewise, there is nothing in principle why Rules (6), (7), (8) or (9) should not apply to a limited partnership.

24. Expulsion of partner (s.28)	-	Yes

Note: This would apply to a limited partnership necessitating the registration and publication procedures referred to in Section 63.

25. Retirement from partnership at will (s.29)	-	Yes

Note: As it has been suggested that a limited partnership cannot be entered into for an indefinite period, this Section would not apply. Once the time fixed for a limited partnership has come and gone then the special partners would lose their privileged position.

26. Continuance of partnership (s.30)	-	Yes (except to impose liability for partner- ship debts)

Note: Section 59 sets the time limitation on limited partnerships.

27. Duty of partners to render accounts (s.31)	Yes	-

Note: This provision is somewhat similar to Section 61 of the Partnership Act and would apply.

Partnership Act	Would Apply	Would Not Apply
28. Accountability for private profits (s.32)	Yes	-

Note: There is nothing in the Mercantile Act which would preclude the operation of this Section.

29. Duty of partner not to compete (s.33)	Yes	-

Note: Again there is no inconsistency between this Section and the Mercantile Act.

30. Rights of assignee of shares (s.34)	Yes	-

Note: The procedures permitted by this Section would not appear to be in conflict with any of the provisions of the Mercantile Act.

31. Dissolution by expiration or notice (s.35)	[see previous table]	

Note: The application of this Section must be read subject to the directions of the Mercantile Act placing a seven year limit on durations.

32. Dissolution by insolvency or death (s.36) or partner charging share	Yes	-

Note: As has been seen in the discussions, this Section would apply to a limited partnership.

33. Dissolution by illegality (s.37)	Yes	-

Note: A limited partnership would be in exactly the same position as an ordinary partnership if it conducted an unlawful business (see Section 53 of the Mercantile Act).

34. Dissolution by court (s.38)	Yes	-

Note: Section 63 of the Mercantile Act would apply in the provisions of this Section by its use of the words "except by operation of law".

Partnership Act	Would Apply	Would Not Apply
35. Rights of persons dealing with firm (s.39)	-	Yes (except s-s(3))

Note: It is difficult to be categorical as to the operation of this Section; it would probably not apply where the registration of publication procedures had been followed.

36. Right of partners to notify dissolution (s.40)	Yes	-

Note: General or special partners would be entitled to take advantage of this Section.

37. Continuing authority on winding up (s.41)	Yes	-

Note: This would apply to a limited partnership in the same way as an ordinary partnership.

38. Rights as to application of partnership property (s.42)	Yes	-

Note: Likewise the rights of partners of a limited partnership can be preserved by the operation of this Section.

39. Apportionment of premium (s.43)	Yes	-

Note: This would apply to a limited partnership although its application may well be a rarity.

40. Rights where partnership dissolved for fraud (s.44)	Yes (except s-s(2) may be limited)	-

Note: This would apply to a limited partnership although the operation of Sub-section (2) may be limited.

41. Right of outgoing partner (s.45)	Yes	-

Note: There is nothing in the limited partnership Act to preclude the operation of this Section.

Partnership Act	Would Apply	Would Not Apply
42. Retiring or deceased partner's share (s.46)	Yes	-

Note: This Section would apply to a limited partnership.

43. Rules for distribution of assets (s.47)	Yes (except s-s(1) is limited)	-

Note: This would apply to a limited partnership except that Sub-section (1) would be limited by Section 54 of the Mercantile Act.

In other sections of this paper some of these provisions will be examined again in more detail.

.(1) Nature of Limited Partnership - Legal Personality

At the very outset the nature of a limited partnership must be established. If it is found that the effect of the provisions of the Mercantile Act is to establish a separate entity with a separate personality, then different results could follow than would otherwise be the case.

This point was answered in 1931 by Farwell J. in Re Barnard (1972 1CH 269 at 272): "It is well settled that an ordinary partnership is not a legal entity like a limited company and although the Limited Partnership Act 1907 recognises a limited partnership and requires it to be registered and gives liberty to inspect the register, it does not create it a legal entity. It is merely a combination of persons for the purpose of carrying on a particular trade or trades, and in no sense strictly a legal entity". It should also be borne in mind that the Partnership Act provides specifically that a limited partnership is a partnership for the purposes of that Act.

It should however be remembered that no particular words are necessary to create a corporation, so long as the intent is clear: (Riverton Conservators v. Ash (1829 10B & C 349 at 384)), ex parte Newport Marsh Trustees (1848 16 SIM.346) and see generally "Halsbury's Laws of England" (Volume 9, page 743). Section 53 of the Mercantile Act provides that "limited partnerships may be formed ...", such a partnership must be registered, Section 55 speaks of "capital" and "common stock", suits are conducted by and against general partners only and the limitation of the extent of a special partner's loss is akin to the position of a shareholder in a company. The essential element of the combination of limited liability and

unlimited liability so far as particular participants are concerned, sets limited partnerships aside and to some extent at least takes on some of the trappings of incorporation.

It is well settled that an ordinary partnership is not distinct from its members and that the word "partnership" describes a relationship and not a separate legal entity. It is a product of judicial decisions and not statutes (see Lindley on Partnership, page 3 and compare Scottish law referred to by Lindley on page 5).

It is suggested therefore that notwithstanding these types of observations and notwithstanding the references in Section 53 - 68 of the Mercantile Act which generally one would associate with corporations, the statements of Farwell J. above are correct and apply equally to the Queensland position. This must be the case if nothing else because of the direction in the Partnership Act itself.

(2) Formation of Limited Partnerships

(a) Number of partners allowed -

The English, Tasmania and Western Australia Acts state specifically the number of persons who may group together into a limited partnership. This is one of the first differences to be noted between legislation in those States and in Queensland and New Zealand. Prima facie in these two jurisdictions the number of persons grouping together is unlimited and the first question to be answered is what is the effect of the provisions of the Companies (Queensland) Code, Section 33(3).

Section 33(3)(a) of the Companies (Queensland) Code provides that an association or partnership consisting of more than 20 persons that has for its object the acquisition of gain by the association or partnership or individual members of the association or partnership shall not be formed unless it is incorporated under the Code or is formed pursuant to another Act or letters patent. Under paragraph (b) a person who participates in the purported formation of an association or partnership in contravention of paragraph (a) is guilty of an offence.

Therefore an association or partnership will not contravene the Code if -

(a) it is incorporated under the Code;

or (b) it is formed pursuant to an Act;

or (c) it is formed pursuant to letters patent.

The question is whether a limited partnership registered under the Mercantile Act but consisting of more than 20 special and general partners in any combination ".... is formed pursuant to an Act ...." within the meaning of Section 33(3).

In In re Ilfracombe Permanent Mutual Benefit Building Society [1901] 1 Ch.102 at 113 Wright J. said: "I am inclined to think that 'formed under the provisions of some other Act of Parliament' must mean formed and having its existence recognised by another Act of Parliament." At first sight, this could well be taken to be a reference to a distinct legal person in the form of a corporate body so that there is an obligation on all associations or partnerships consisting of more than the stated number to seek incorporation under the Code or under some other Act where the association or partnership has for its object the acquisition of gain for itself or its members.

As to the meaning of "gain" in section 33(3), see Re Padstow Total Loss and Collision Assurance Association (1881) 20 Ch. 137, In re Ilfracombe Permanent Mutual Benefit Society [1901] 1 Ch. 102, Shaw v. Benson (1883) 11 Q.B.D. 563. But not all Associations formed for the purpose of carrying on business with the object of gain by its members are required by Parliament to be incorporated as is witnessed by the provisions of the Friendly Societies Act 1913-1978 [Property of the society is held by trustees: section 29 and 30; a society can however convert to a company: section 37].

In other words, the phrase ".... is formed in pursuance of some other Act ...." does not carry with it any suggestion that the association or partnership is to be incorporated. This interpretation finds support in the wording of Section 33(3) itself when it speaks of "an association or partnership ... shall not be formed ...." so that so long as the stated number is not exceeded, the association or partnership is described as "formed".

There are cases to support this interpretation of Section 33(3). For example, Shaw v. Simmons (1883) 12 Q.B. 117 in which an association was formed with more than 20 members but before the Companies Act 1862. New members were continually replacing old members and the question was whether the association was one which was formed after the commencement of the Companies Act on the basis that a new association was formed each time there was a change of members. Day J. held that the association was not formed within the meaning of the Act. "The question is whether the Act should be read so as to give to the word "formed" - a company "formed" after the commencement of this Act - this strict technical meaning, or whether the word should be taken in its ordinary and popular sense. If, when the question is asked, "When was this company formed?" we find, as we should, that the invariable reply would be, "It was formed in the year 1861", why are we to say, on the contrary, that it was not then formed, but was formed when the last person who desired to borrow money from it became a member." Accordingly, the decision was to accept the popular meaning. Other cases support this meaning [see Smith's Trustees v. Irvine and Fullarton Property Investment and Building

Society (1903) 6 Fraser (Ct. of Sess.)99, In re Padstow Total Loss and Collision Assurance Association (1881) 20 Ch. 137 and Marrs v. Thompson (1902) 86 L.T. 759 in which Channel J. was obviously of the view that the word "formed" in the Companies Act is wider than the word "registered" in the Friendly Societies Acts. See also "Law of Partnership" by Webb and Webb (Butterworths, 1972) pp.206--207]. Further, in Section 5(3) of the Partnership Act 1891-1965, a limited partnership is referred to as being "formed" under the Mercantile Act, in Section 53 of the Mercantile Act limited partnerships are said to be "formed for the transaction" of certain types of business and the wording in Section 55 is "All the persons forming any such partnership ....".

A partnership which is established in the manner described in the Mercantile Act is therefore ".... formed pursuant to an Act ...." as required by Section 33(3) and accordingly can consist of as many partners, special or general, as there are persons willing to become involved. This view finds support in Webb & Webb, Principles of the Law of Partnership (2nd ed.) p.201] [see contrary Fletcher, K.L. "Limited Partnerships and the Future", Qld. Law Society Journal, Volume 7 No. 2 p.55.

If the actions of the promoters of limited partnerships are any indication of what the law is on this point then certainly this proposition is correct - several limited partnerships have been formed under the Mercantile Act over recent years comprised of well in excess of 20 partners.

(b) Type of business permitted -

Section 53 of the Queensland Act provides that the limited partnership may be formed for the transaction of agricultural, mining, mercantile, mechanical, manufacturing or other business but not for the business of banking or insurance. Once again this is another departure from legislation which follows the English Act but is in line with the Irish Act.

Why banking and insurance were excluded may on some view of it be a little difficult to understand, but it is interesting to note that a similar exclusion in relation to bankers and discounters of money for shopkeepers was made also in the Irish Act of 1781.

A limited partnership is pursuant to Section 5(3) of the Partnership Act 1891 to 1965 a partnership within the meaning of that latter Act and that latter Act in turn applies to such partnerships except so far as inconsistent with the provisions of the Mercantile Act. One is therefore entitled to transpose from the Partnership Act the definition of the word "business" defined in Section 3 as including every trade, occupation or profession. The list appearing in Section 53 of the Mercantile Act is, it is suggested, in no way to be taken as cutting down the generality intended by Parliament.

It is therefore suggested that any lawful business may be conducted by a limited partnership with only the exceptions of banking and insurance.

There is always a question of whether the business conducted by a partnership is illegal. "In order that a partnership may result from a contract, such contract must not be illegal" (Lindley page 127). Accordingly where to attain the objects of a partnership would be contrary to law, or where that object is legal the manner of attaining it would itself be contrary to law, the partnership is illegal (Lindley page 127). The importance of this principle must be borne in mind, where it is intended to use a limited partnership in the conduct of a business or profession which is not permitted by statute.

In other words it is suggested that the only impact that the provisions of Section 53 of the Mercantile Act have in this area is to add to any prohibitions otherwise imposed by the common law or by statute, the fact that the conduct of banking or insurance business through a limited partnership is unlawful.

(c) Who may be partners -

The English, Tasmania and Western Australian legislation provides specifically that a body corporate may be a limited partner. Neither the Queensland nor New Zealand Act make any reference to this point, and it is curious why it was thought necessary to specifically include such a provision. Perhaps it was to overcome any doubts. It appears that a corporation may be a partner in the U.S.A.: Port Arthur Trust Co. v. Muldrow (155 Tose.612).

Although it is an oversimplification and although it is unnecessary to reproduce here the many references

relating to the law on who may become members of a partnership, in general terms "... there is no class of persons who being of sound mind and over eighteen are rendered incapable of becoming members of a partnership" (see Lindley page 49).

Specifically, reference is made in the standard texts to companies, infants, aliens, married women, mentally disturbed persons and bankrupts (see Lindley pages 49-63). It is suggested that there is nothing in the Queensland Act which would preclude a person who being otherwise capable according to the law of partnerships, of being a partner, from being either a general or a special partner.

In the U.S.A., another partnership may not become a special partner (Re Reimers (107 Misc. 322, 176 NYS 430)), an infant could become a general partner (Continental National Bank v. Strauss (137 NY 148)) and an estate was able to become a limited partner (Meyer v. Bates 278 App. Div.613).

It is of course an interesting question of policy as to whether a limited liability company should be allowed to be a general partner.

(d) General partners -

Section 54 provides that every limited partnership "may consist of general partners who shall be jointly and severally responsible as general partners are now by law". The use of the word "may" is curious and perhaps confusing. Prima facie, it imports a discretion and ".... must be construed as

discretionary unless there be anything in the subject matter ...." or in any other part of the statute, to show that [it is]... meant to be imperative" [per Crompton J. in Re Newport Bridge 121 E.R. 142]. No doubt it can be argued that a limited partnership can therefore be formed with only one general partner. But Sections 55, 56, 62, 64, 65, 67 speak in terms of "general partners" and Section 56 requires the style of the partnership to contain at least the name of "one such partner".

In other words, the true meaning of the Act may well be that a limited partnership to be properly formed shall consist of general partners. Against this proposition however, is that there can be no apparent purpose in requiring at least two general partners and it should be remembered that under the original 1781 Act there need only be one general partner. Yet on balance and primarily because of the wording in Section 56, it is suggested that there should be at least two general partners and this certainly appears to be the view of promoters of recent limited partnerships.

Whether one or more, the general partner's position is identical to that of a member of an ordinary partnership and is liable for all debts and obligations without limit.

(e) Special partners -

Section 54 also provides that every limited partnership may consist of persons to be called special partners. Once again it is considered that

the use of the word "may" is somewhat confusing but on balance it is suggested that there may be one or more special partners. Once again support for this is derived from Section 56 - the words "and another" or "and others" clearly suggest that there may be one or more special partners. Special partners are obliged to contribute to the common stock specific sums in money as capital but beyond their contribution they are not liable for any debt of the partnership except in those circumstances provided by the other Sections of the Act (some of these statements are discussed later).

(f) Contribution by special partners -

If the liability of special partners is to be limited to a specific contribution, the next question is how that contribution is to be made. In England (Section 4(2)) it may be by way of a sum or sums or property valued at a stated amount.

The words in Section 54 of the Mercantile Act however are quite clear - a special partner ".... shall contribute to the common stock specific sums in money ....". The following points give some indication to the meaning of this provision -

(i) a bank guarantee is not cash: Rayner & Co. v. Rhodes (1926 24 L.L.R. 25);

(ii) payments (in compliance with the terms of promissory notes given at the time of formation) subsequent to formation are not within the terms of the Section: Whittemore v. MacDonnel & Ors.

(1857) 6 U.C.C.P. 547 See also Patterson v. Holland (1858) 7 Gr.1, Watts v. Toft (1858) 16 U.C.Q.B. 256, Benedict v. Van Allen (1859) 17 U.C.Q.B. 234;

(iii) special partners who, having given promissory notes, pay in accordance with the terms thereof not in money but in work are outside the Section: Whittemore v. MacDonnel & Ors. (supra);

(iv) transferring a debt is not sufficient: re Butriulle Estate (66 DLR 232).

(v) payment by cheque a week after filing a certificate is not sufficient: Durant v. Abendroth (69 NY 148).

In the Canadian legislation the words are "actual cash", whereas in the Mercantile Act the words are "specific sums in money". In the original Irish Act, references also are to "money" or "cash". In this context Perdue, J.A. held in Slingsby Manufacturing Co. v. Geller (1907 17 Man.R. 120 at 146) that a cheque would be sufficient for the Canadian legislation. Although one appreciates readily that there is a vast difference between a bank guarantee or property or chattels and "specific sums in money", there can be no real validity in any argument which would attempt to draw a distinction between a contribution by way of a cheque which is cleared on presentation and "specific sums in money". Therefore it would be sufficient for the Mercantile Act for the special partners to make their contribution to the common stock by way of cheque so long as obviously it is cleared on presentation.

Care in complying with the terms of this provision is vital as will be seen from the consequences flowing from the provisions of Section 57 in relation to filing a false statement on initial registration of the partnership.

(g) Firm name -

A limited partnership must have a firm name. Section 55 provides that all the persons forming any such partnership shall before commencing business sign a certificate containing the style of the firm under which the partnership is to be conducted. Section 55 provides that such style or firm shall contain the names of the general partners only or the name of one such partner with in either case the addition of the words "and another" or "and others". The privileges of the Act are lost if in carrying on the business the name of any special partner is used with his consent or privity.

Under the Business Names Act 1962 to 1979, a "business name" is defined as a name, style, title or designation under which a business is carried on and "carrying on business" includes establishing a place of business and soliciting or procuring any order from a person in the State (Section 3). Section 5 of the Act then prohibits a person either alone or in association with other persons from carrying on business in Queensland under a business name unless either the business name consists of the name of that person and the name of each other person if any in association with whom that person is so carrying on business without any addition or the business name is

registered under the Act in relation to that person and each other person if any in association with whom that person is so carrying on business.

Registration of the style under which a limited partnership may carry on business would be required under this Act. One question which can arise is whether a limited partnership (e.g. "John Smith and others") can carry on business under another name (e.g. Acme Meats) so that in the Business Names register the person shown as carrying on Acme Meats is "John Smith and others". In other words, is a limited partnership restricted to the name shown in the certificate registered under Section 57. Undoubtedly it is so restricted - to do otherwise would be a breach of Section 55.

Although it may be asked whether there is any conflict between the prohibitions in the Mercantile Act dealing with the prohibition of special partners allowing their names to be used in any dealings of the partnership and the obligations under the Business Names Act to register a name under which persons are carrying on business, it is suggested that there is no breach simply from the fact of registration under the Business Names Act. The meaning of "carrying on business" in Section 3 of the Business Names Act is obviously wide enough to encompass the activities of both general and special partners in a limited partnership.

Note that the name does not disclose the fact that the partnership is limited. Notwithstanding the number of general partners, the words "and another" or "and

others" has to form part of the name. Perhaps this is intended to operate as a cautionary sign to persons dealing with the partnership in the same way as the obligation on corporations to add "Limited" or "Ltd." is intended to operate.

Although it must be admitted that this may well be the intention of the legislation, it can hardly be seriously suggested that the addition of such words is likely without more to alert a potential creditor to the nature of the partnership with which he is dealing. No doubt through time and experience the commercial world would react otherwise. Further, there must also remain some serious doubts as to whether a party who was formerly an ordinary partner under a normal partnership would receive a limitation on his liability if the firm changed to a limited partnership, but continued to deal without special notice to its previous customers.

(h) Registration -

Section 55 provides that all the persons forming a limited partnership shall before commencing business sign a certificate containing -

(i) the style of the firm;
(ii) the names and places of residence of all the partners;
(iii) who are general and who are special partners;
(iv) the capital contributed by each special partner and by the general partner (if any);
(v) the general nature of the business to be transacted;

(vi) the principal place at which it is to be transacted;

(vii) the time when the partnership is to commence;

(viii) the time when the partnership is to terminate.

Although a partnership between the special and general partners may operate as an ordinary partnership prior to registration of the certificate, the relationship does not receive the privileges of the Act until registration is effected. It is no doubt a proper requirement of the legislation that registration be effected. Persons having knowledge that they are dealing with a limited partnership are entitled to protect their interests by being able to ascertain who are special partners and what are their contributions (see also the position in U.S.A. in Hooper v. Hall (75 NM 751) and Brown v. Paniser (1979 99 Cal.App. 3d. 429).

One question is whether a partnership which was formed some time ago as an ordinary partnership and which has been operating as such since then can by complying with the Act switch over without more ado to limited status or whether only fresh partnerships are permitted. Probably fresh partnerships are not required - the reference in Section 55 to "such partnerships" is to "limited partnerships" in Section 53 and it is suggested that there is nothing in the theory of the Act to limit its scope. Of course the question of the effect of publication would be vital so far as prior creditors were concerned.

Each partner is required to have his signature (in principle there would appear to be no reason why a

special partner could not sign by his agent; this is confirmed in U.S.A.: Micheli Contracting Corp. v. Fairwood Associates (1979 3d. Dept.) 68 AD 2d. 460) witnessed by a Justice of the Peace and the certificate is registered at the office of the "Registry of Deeds in Brisbane in a book kept for that purpose".

At present, this is effected under the provisions of Section 241-249 of the Property Law Act 1974-1981 under the supervision of the Registrar of Titles at Brisbane. For the purposes of the Real Property Acts, Queensland is divided into three divisions having Deputy Registrars at Brisbane, Rockhampton and Townsville, but no provision is made similarly for the purposes of this Act and registration has to be made in Brisbane. The Register must be open for inspection by the public but it would not seem to follow that the Registrar of Titles would not be precluded from having duplicate Registers at Rockhampton and Townsville for ease of inspection.

Section 241(2) of the Property Law Act provides that a reference in any Act or instrument to, or to registration of an instrument under, the Registration of Deeds Act 1843 or The Titles to Land Act, 1858 (both of which Acts it repealed) shall be construed as a reference to Division 3 dealing with the registration of deeds. Although Section 57 of the Mercantile Act does not specifically refer to the 1843 Act, it is suggested that given the history of the legislation, the reference in that section to "registry of deeds" may be thought a reference to that Act. Further, under Section 241(1)(C) any instrument,

record or document which prior to the passing of that section, might have been registered under the 1843 Act may be registered in accordance with Division 3 of Part XVIII.

From what is set out above, it appears that the procedures and provisions of Division 3 of Part XVIII of the Property Law Act are the procedures and provisions under which registration prescribed by Section 57 is to be effected.

A copy of the certificate is required by Section 58 to be published for four weeks after the date of registration. Publication must take place once at least in the Queensland Government Gazette and in some newspaper printed nearest to the intended principal place of business of the partnership.

There are at least three interpretations on publication -

(a) publication is made once in the Gazette and once in the stipulated newspaper (that is, once in each), and thereafter a period of four weeks must elapse before business commences;
(b) publication is to be made each day for four weeks, the only restriction being one of which is to be in the Gazette and one in the stipulated newspaper;
(c) publication is to be made once a week for four weeks, one of which is to be in the Gazette and one in the stipulated newspaper.

It is suggested that the third alternative is the correct interpretation as the emphasis appears to be on separate weekly acts of publication but it is obviously difficult to be too sure.

Should the procedures for publication prescribed by Section 58 not be followed precisely, then that section provides that the partnership shall be deemed general. In Inspector of Awards v. Langham [1943] G.L.R. 271 the formalities of the New Zealand Act were not complied with and the partnership was held to be general. See also Coleman v. Bellhouse (1859) 9 Upper Canada Common Pleas Reports 31. Note that the words in Section 58 are "in some newspaper printed nearest to the intended principal place of business ....". It does not refer to circulating nearest to the intended principal place of business and it would seem necessary (although ludicrous) for the persons charged with the formation of such a partnership to enquire where the newspaper in which they intend to publish the certificate is printed.

(i) Principal place of business -

Where the principal place of business of a partnership is situated is a question of fact in each case. There is some support for the proposition that the principal place of business is the place where the administrative headquarters of the partnership are situated. In Section 58 the words are ".... the intended principal place of business ...." and in Section 55 the certificate is to contain details of "the principal place at which (the business) is to be transacted".

As this has therefore to be stated in the certificate it would seem to be of no consequence that the business was subsequently transacted elsewhere so long as (no doubt) the parties to the certificate bona fide believed that the business would be transacted at the place stated. The provisions relating to publication are obviously intended to be a mechanism whereby the fact that a limited partnership has been formed is to come to the notice of parties with whom it might deal. In the Mercantile Act there is no requirement for re-publication should the principal place of business be changed after formation or at any other time in the future.

What of the case in which the intended "principal place of business" is out of Queensland? It may well be argued that the Mercantile Act provisions must contemplate such a place being situated only in Queensland. However, there would not appear to be anything in principle which would preclude the Courts of Queensland recognising the limitation of liability on special partners where they had formed a limited partnership, whose principal place of business happened to be out of Queensland. What the position would be for those special partners under the law of the place where the partnership operated is another question. And what of the case where there is intended to be more than one principal place of business? It appears that in England this may well be possible, but it is suggested that in Queensland this is doubtful. Although it is possible to apply the publication requirement to separate places by reference to advertising in separate newspapers printed near to each separate principal place of

business, the thrust of the section would not appear to contemplate this result. However, it must be admitted that the contrary argument is certainly open. (See Lindley page 795 and note 46 with respect to the Companies Act 1948 Section 399).

(j) Time for registration -

Under Section 55, the persons forming the partnership must sign a certificate before commencing business. Section 57 then prescribes that the certificate is to be acknowledged and registered and Section 58 provides for publication. In other words, the procedure shortly put is -

(a) sign a certificate;
(b) acknowledge that certificate before a Justice of the Peace;
(c) register the certificate;
(d) publish a copy of that certificate.

Unless each step is complied with, the special partners will not get the benefit of the Act (e.g. if the certificate is not properly acknowledged: Solomot v. Bek Development Co. (245 Cal. App. 2d. 488)) although the parties themselves may be bound inter se (see e.g. in U.S. Hooper v. Hall (75 NH 751).

Since Section 57 specifically states that "No such partnership shall be deemed formed until such certificate .... shall be acknowledged .... and registered ...." and since the words ".... such partnership" no doubt refer to "limited partnership" in Section 55, it can be argued that any business conducted before acknowledgment and registration would

be as a general partnership. But on registration the limited partnership would appear to be properly formed. If publication is not concluded, the partnership is general only and any business conducted then is in that guise and without the limitation afforded by the Act. The contrary argument must however be recognised namely, that until all four steps are completed, no business can be conducted and if any is so conducted, the requirements of the Act can never be met or its protection gained.

(k) Inspection of Certificates

Section 57 provides that the certificate is to be registered in the office of the Registry of Deeds in Brisbane. No particular person is nominated as having charge of the certificates but this is at present assumed by the Registrar of Titles. The Act does not stipulate any fee to be charged for inspections nor does it provide for any filing fee on initial registration or subsequent renewal.

The right to inspect has been said to carry with it the right to make copies or extracts [Mutter v. Eastern and Midlands Railway (1888) 38 Ch. 92].

Once again the Acts based on the English legislation are superior to the extent that rules can be made from time to time.

(l) Certificate of Registration

It should be noted that there is no provision in the Act for the certificate once registered to be

conclusive evidence that the partnership is registered in accordance with the provisions of the Act. It would be inappropriate no doubt for the Act as presently drafted to do so since it includes amongst those circumstances in which the privilege of liability is lost, circumstances associated with acts prior to registration of the certificate in the Registry of Deeds under Section 57.

Once again great care must be exercised in and about the formation of such a partnership. In principle there can be no justification for not incorporating a provision similar to Section 549 of the Companies (Queensland) Code to the effect that the certificate of incorporation is conclusive evidence that the requirements of the Act were complied with. If publication is an integral part of the formation of a limited partnership, then the Act could provide for publication prior to registration and not after, as at present. Proof of publication could be easily ascertained by way of declaration as is required by many Acts in Queensland. The possibility of such a provision will be examined again later in this paper.

(3) False Statements in Certificates

Under Section 56, should (e.g.) a special partner concern himself in the business of the partnership, then such partner is deemed to be a general partner with respect to that Contract. However under Section 57 ".... if any false statement shall be made in any such certificate ...." all the persons interested in the partnership shall be liable for all the engagements thereof as general partners. Compare U.S.A. Abendroth v. Van Dolsen (131

V.S. 66), Chick v. Robinson (CA6) 95 F 619, Durant v. Abendroth (69 NY 148). This Section therefore throws upon each of the special partners an obligation to actively satisfy himself that (e.g.) each of his fellow special partners has contributed ".... specific sums in money ...." to the common stock.

The proviso to Section 57 states that no clerical error or matter not of substance shall be deemed false within the meaning of the Section unless some person may have been prejudiced thereby in which case the special partners shall be liable to the persons so prejudiced. The term "clerical error" speaks for itself but it would be a question of law as to whether an error was or was not a matter of substance. It is considered that although errors relating to the places of residence of any of the partners and errors such as spelling or typing errors would not be of substance, errors relating to who were to be the special partners, the amount of capital contributed, the nature of the business and the principal place of business particularly would be matters of substance. This is a point on which there is no authority.

Any statement in the certificate which is false will lead to a loss of limited liability for all special partners unless the false statement is a clerical error or not of substance. But even if they are not of substance, liability will be incurred if the party aggrieved can show that he has been prejudiced thereby. The Section does not state nor are there any authorities to assist one in defining precisely the degree to which that person has to be prejudiced and the nature of that prejudice. For example, if in a certificate the principal place of business is not clearly described, a potential customer

may be led to think that the partnership is more substantial than it is. Even assuming that (for the moment) this is not disputed in a particular case, what then is meant by the rest of the Section: ".... in which case the special partners shall be liable to the person so prejudiced". The question is, liable for what? In the example above the customer may have lost by being misled, but are the special partners liable as if they were general partners or only to the extent of the prejudice that the customer can prove? The latter is more likely to be the correct interpretation. The general partners would be fully liable for the contract and the intention of the Section is only to fix with liability the special partners to the extent of the prejudice.

(4) Limitation of Liability

In Queensland the position would appear to be that:-

(a) except where special partners are deemed to be general partners, no separate action can be taken against them nor can they be joined with general partners in any suits "respecting the business of any partnership that is established under this Act";

(b) where special partners are deemed to be general partners, they may be joined in a suit against general partners;

(c) where contributions have been withdrawn then although the special partners are liable to refund every sum received, they cannot be the subject of a separate action by a creditor but where a creditor obtains a judgment against

general partners that creditor is entitled to issue execution against special partners provided the leave of the Supreme Court is obtained.

If that is a correct summary of the position, the basic question will be what is the essential nature of the limitation on liability provided by the Act? In other words when in Section 54 it is provided that the special partners shall not be responsible beyond the amount they have contributed for any debt of the partnership, is this provision changing a fundamental principle of partnership law that each of the partners are responsible for the debts of the partnership (so that in a sense special partners are absolved from all liability and only their contributions and accretions thereto are at stake) or is it simply placing a limit on the extent of their responsibility?

This is a difficult question to answer, but it would appear that the Act has abrogated the general Partnership Law principle and under Section 62 all actions can only be prosecuted against general partners. However, special partners are still responsible to the creditors but with an upper limit on their liability to the amount they have stated on registration they would contribute. To this extent therefore it can be said that when general partners enter into an obligation which requires the payment of money, they do so as the agents of the special partners and in so doing commit them to a final liability commensurate with their contributions.

If it is therefore correct that the nature of the limitation of liability of a special partner is that a general partner can never commit a special partner to pay

more than his contribution in the discharge of any debts of the partnership incurred by them in the conduct of partnership business and that the special partner has no direct personal liability to any creditor of the partnership (except where he is deemed to be a general partner or where contributions are withdrawn and even then he still does not have any direct personal liability although execution might issue against him under Section 61), the next question is what is the extent and nature of a special partner's liability where the subject of a suit against the general partners is not for a debt, but, for example, any damages which might be awarded.

It should be remembered that under Section 64 "in all cases not hereinbefore otherwise provided for" all the members of the partnership are liable as general partners. What then are these "cases not hereinbefore otherwise provided for"? These cases would be those in which the Act has the effect of equating special with general partners and those cases in which the Act clearly delineates the privileged position of special partners.

The essential thing is that nowhere does the Queensland Act purport to extend the privileged position of special partners beyond that of a limitation of the extent of their liability so far as "debts" are contracted by general partners in the conduct of partnership business. Moneys becoming payable by general partners as a result of fines imposed by legislation would simply not be the subject of the limitation on the liability of special partners. Any prosecutions against a limited partnership under such legislation would be simply against all of the partners although obviously prosecutions for breaches of

statutes in the nature of active commissions of offences would be more likely to be against only those who actually commit them and, as only general partners are to conduct business, this is more than likely to be the general partners. The direction in Section 62 that all "suits" are to be against the general partners would simply not extend to such prosecutions. There would be no reason in principle to limit the operation of law relating to injunctions for example, or the law relating to the tracing of trust moneys by the directions in Section 54 which must be read strictly in the context of the intention of the legislation namely to provide a limitation on the debt liability of certain parties forming the business venture.

It is suggested therefore that the following is the position:-

(a) Prosecutions for breaches of statute - the directions in Section 62 would have no relevance to prosecutions under statute and the direction in Section 54 on the limitation of liability of special partners would likewise have no relevance;

(b) Civil actions (other than damages or money actions) - actions for injunctions or specific performance of contracts or actions with respect to the tracing of trust money would fall within Section 64 and all members of the partnership would be subject to the same liabilities as ordinary partners;

(c) Civil actions (damages or money actions) - where a judgment for a monetary sum is obtained

> (whether by way of damages or debt) against general partners (for example, as a result of the negligence of an employee for which the general partner/employer is responsible) then prima facie there is nothing in principle to exclude such a judgment debt from the ambit of Section 54 to the extent therefore that the special partner's liability to contribute to it is limited to his contribution. This proposition is relatively easier to understand when the damages are awarded for breach of contract than when they are awarded for negligence of an employee.

One aspect of the nature of a special partner's position which perhaps is not clear is whether he can put a limit on the extent to which creditors can go against partnership assets. For example, assume a limited partnership is formed by six special partners and two general partners and each special partner contributes $1000 as capital and that is stated in the certificate as the extent of each special partner's contribution and therefore his liability under Section 54. Assume that the partnership is formed for a real estate development business or a commodities futures trading and is highly successful so that the capital of the partnership is valued at $1m. Suppose a contract is entered into by the general partners but this time it is not successful and a claim is made on them for $500,000. Can the special partner purport to limit the creditor's claim to $6000? Suppose that the debt incurred had been $1.5m so that there was a deficiency? Clearly in the latter case, the special partners can simply walk away from the problem leaving the creditor to pursue the general partners but in the former case there can be little argument that the

creditor can pursue the full amount of his claim against all assets. It cannot be the case that the portion notionally shown in the partnership accounts as belonging to special partners is (except to the extent of $6000) beyond his reach.

One final point is that the limitation of liability contained in Section 54 does not have the effect of setting apart in any way a limited partnership from ordinary partnerships so far as the analysis in such cases as Commissioner of Taxation v. Everett (1982 A.T.C.) is concerned. The interest of a special partner is still a chose in action and he has equally an interest in all assets. The Section 54 limitation could not be said to alter this position.

(5) Loss of Limited Liability

It has been suggested in the previous section on the nature of limitation of a special partner's liability that he is in no more privileged position than a general partner in relation to any actions arising out of non-contractural obligations and that his privileged position is restricted to money claims whether arising out of debts (including judgment debts) through the specific borrowing of moneys or through the assumption of contractural obligations.

Even in these latter areas, specific events can have the consequence that the special partner loses that limitation on his liability.

The following circumstances will result in that loss:-

(i) carrying on banking or insurance business (Section 53);

(ii) failing to contribute specific sums of money (Section 54);

(iii) commencing business prior to signing of certificate (Section 55);

(iv) certificate failing to contain the required details (Section 55);

(v) certificate containing a false statement (Section 57);

(vi) special partner transacting partnership business (Section 56);

(vii) special partner allowing his name to be used or personally making any contract (Section 56);

(viii) failure to publish as required (Section 58);

(ix) failure to renew at expiration of seven years (Sections 59 and 60);

(x) failure to carry out required procedure on renewal (Section 60);

(xi) partner acting fraudulently (Section 66).

It will be seen that except for:-

(a) special partner transacting business;

(b) special partner allowing his name to be used personally or making any contract;
(c) failing to renew at expiration of seven years;
(d) failure to carry out required procedure on renewal;
(e) partner acting fraudulently,

all of the abovementioned cases are those in which the privileged position of a special partner is never attained.

Where a special partner transacts business in contravention of Section 56 then the limited partnership is not changed into a general partnership. The special partner is simply liable on that contract or in that matter as if he was a general partner (compare U.S. position in Abendroth v. Van Dolsen (131 US 66).

It should be noticed that where capital is withdrawn or books are not properly kept then the special partner's liability is still limited to the amount of his stated contribution. He does not become separately liable to creditors - Section 61 simply sets out the procedure whereby his original commitment can be enforced. (Compare U.S.A. Fuhrmann v. Von Pustan (126 App. Div. 629).

(6) Duration of Limited Partnerships

The parties to the original certificate must determine when the partnership is to commence and when it is to terminate. The only limitation on this is contained in Section 59 which states that no limited partnership shall be entered into for a period of longer than seven years. It is considered that a certificate stating that the partnership is to terminate at the will of one of the

.parties may well be outside the terms of the Act. Three sections are relevant to this question:

Section 55: requires the certificate to state the time when the partnership is to commence and when it is to terminate;

Section 59: states that no partnership shall be entered into for a longer period than seven years;

Section 60: states that a new certificate must be signed, acknowledged, registered and published upon every renewal or continuation of a limited partnership beyond the time originally agreed upon.

The strong implication is that a definite period not in excess of seven years is to be actually stated in the certificate at the outset. The emphasis is on time and time set at the outset on the formation of the partnership. Certainly it can be argued that a stipulation in an agreement that the partnership is to terminate at the will of one of the partners satisfies Sections 55 and 60 but it is difficult to see how such a provision satisfies Section 59. That Section requires, by the use of the phrase "be entered into", that the duration is to be set at the time the certificate is signed.

But then does this preclude an agreement that it can be earlier terminated at will or on the happening of stated events? There is a good argument that it does not - Section 63 says that no dissolution shall take place (except by operation of law) before the time specified in

the certificate unless a procedure is followed. Accordingly, a partnership agreement could provide that it will be for a certain duration but can be dissolved earlier whereupon Section 63 is to be followed.

Section 60 as just noted, provides that no partnership shall be entered into for a period longer than seven years. But when does that seven year period run from? When it is "entered into"? Is it from:-

(a) signing of the certificate; or
(b) acknowledging by each partner; or
(c) registering of the certificate; or
(d) commencement of publication; or
(e) completion of publication?

It is suggested that because of the special nature of these partnerships, "entered into" should be read with Section 57 and accordingly the time will run from the date of registration. Certainly Section 58 requires a process of publication but the obvious emphasis in that Section is that if publication is not effected in accordance with the Act, the limited liability status of the partnership is never attained and it remains a general partnership.

At the end of the initial period of seven years or at the termination of any shorter period for which the partnership was formed, the partnership may be renewed upon the partners signing a fresh certificate in terms of the Act, acknowledging and registering it in the same manner as on initial registration, including publication.

But exactly what has to happen on renewal? Is it intended that upon renewal, the same procedure has to be gone through as on initial registration including the

contribution of specific sums of money and if so are the parties precluded from acknowledging that they have funds in the common stock which are intended to form the contribution to the renewed partnership? The special partners must contribute to the common stock "specific sums in money". Does it therefore mean that at the end of the term of the partnership, a complete dissolution and winding up has to take place followed by fresh contributions by the special partners if (for example) special partners are unable to raise the amount of cash required?

Section 60 provides that upon every renewal or continuation, the same procedure as for initial registration is to be followed. Note that it uses the word ".... or continuation ...."; perhaps one is therefore entitled to interpret the Act as not requiring a further contribution by the special partners of specific sums in money (compare U.S. Fifth Ave. Bank v. Colgate (120 NY 381)) but Section 55 requires the certificate to contain a statement of the amount of capital ".... which each special partner contributes ...."

Once again there is a point of procedure in the Act not clearly defined and leading to doubt and confusion. Points such as these are important - the penalty is loss of limited liability.

(7) Rights and Obligations of Partners Inter-se

Since a limited partnership is a partnership within the terms of the Partnership Acts and since that Act provides specifically that the rules of equity and common law applicable to partnerhips shall continue in force, the

rights and obligations of partners in a limited partnership are therefore regulated by -

(a) the provisions of the Partnership Act;
(b) the rules of law and equity applicable to partnerships;
(c) the terms of any Partnership Agreement;
(d) Sections 53 to 68 of the Mercantile Acts.

Some topics which can be mentioned here are -

(a) Management

It has already been seen that by Section 56 of the Mercantile Acts the business of the partnership is to be transacted only by the general partners; intrusion by special partners into that sphere loses for them the privilege of limited liability.

But in carrying on the business of the partnership, the general partners are liable to account to each other and to the special partners for their management of the business as other partners are liable according to the general law (Section 65).

Section 64 of the Queensland Act provides that in all cases not provided by its provision, the members of a limited partnership shall be subject to the liabilities and entitled to the rights of general partners. As one of the rights of a general partner is to share in the control and direction of the business, it is considered that any right given to special partners by the terms of the Partnership Agreement itself enabling them to have some control over the direction of the business is not a contravention of the prohibition in Section 56 that

only general partners shall transact the business of the partnership.

This right of a special partner must be exercised with care since the line between day to day advice and direction and carrying on the business is a fine one. In Whittemore v. MacDonell & Ors. (1857 6 U.C.C.P. 547) the special partners elected a Board of Directors to advise the general partner but the members interfered in the transaction of the business especially during the absence of the sole general partner in England. As a result it was held that the members of the Board lost the protection of the Act and became liable for the debts of the firm.
In transacting the business of the partnership, the general partners are bound to exercise diligence as ordinary partners and, subject to the terms of the Mercantile Acts relating to this type of partnership, would be bound by the terms of the Partnership Agreement itself.

Section 67 provides specifically for an obligation on the general partners to cause regular books of accounts to be kept. Such accounts must also be open for inspection at all reasonable times by the special partner. Should default be made in either of these obligations, then the special partners are entitled to have the partnership dissolved and accounts taken. This is a serious obligation in the general conduct of the management of the partnership affairs since by Section 68 if the special partners do not ensure that such accounts are kept then they can be liable as if Section 61 applied. The terms of Section 68 can lead to this result even if the accounts contain any false or deceptive entries.

Therefore by Section 67 and 68, the special partners have an onerous obligation to ensure that not only are books kept but that they are correctly kept.

Since Section 56 of the Mercantile Act does not contain any express prohibition on a special partner binding his firm but simply leaves it on the basis that if he transacts the business of the partnership, or if in carrying on the business or in any contract he allows his name to be used or if he personally makes any contract respecting the concerns of the partnership then he loses his limitation of liability, it is suggested that as there is therefore no express prohibition on a special partner entering into the partnership affairs, there is no reason why he cannot bind the partnership and in that contract at least, although he would lose his limitation of liability, it is suggested that the other partners would be bound.

(b) The capital of the partnership

Section 54 places upon the special partners the obligation to contribute to the common stock specific sums in money as capital.

The only safe way in which special partners can treat those words is to make a contribution in cash. Contributions in kind or services or the transference of a debt are insufficient. It has been seen that unless this is followed strictly, the certificate subsequently lodged for registration would contain a false statement leading to loss of the limited liability privilege for special partners.

There is no obligation on general partners to contribute to the common stock of the partnership (Section 55) but it is considered contributions by special partners can take place from time to time.

There does not appear to be any objection to varying proportions of contributions between special partners.

Since by Section 54 the liability of special partners is limited to the contribution to the common stock of the partnership, it would be illogical for the Act not to place a prohibition on withdrawal of capital.

Accordingly by Section 61 it is provided that no part of the capital can be withdrawn below the aggregate amount stated in the certificate. This lends some support to the proposition above namely that increases in capital can take place from time to time by contributions of special and general partners; it would appear that such capital can be reduced without infringing Section 61 so long as the aggregate amount stated in the certificate is never reduced. No doubt this could then mean that on registration the capital to be contributed by special partners could be $1.00 with the real contributions to establish the business being made subsequently. Such subsequent contributions could be reduced so long as the capital is never reduced below the $1.00 stated in the certificate.

If however the capital is reduced below such aggregate amount so that at any time during the continuance or at the termination of the partnership the assets shall not be sufficient to pay the partnership debts, the

special partners shall severally be liable to refund every sum they have received in diminution of such capital and can be recovered by the general partners and may in the case of any judgment having been obtained against the general partners be recovered by the plaintiff against the special partners provided the leave of the Supreme Court is obtained. Note that the obligation in Section 68 on special partners to make sure that proper accounts are kept can in the cases referred to therein lead to a similar right in plaintiffs who have obtained judgments against general partners.

As a general partner has unlimited liability there is no necessity for Section 61 to state the consequence for them of a reduction of capital below the certified amount.

(c) Admission and withdrawal of members

To admit a new member to a limited partnership would require the termination of the partnership then current and for the registration procedure to be followed once again. The legislation based on the English Act is more comprehensive in this field also which simply provides for a further statement specifying this type of change to be sent to the appropriate registrar.

A general or special partner wishing to withdraw from the partnership needs to come within the terms of Section 63. This provides that a limited partnership can only be dissolved -

(i) by effluxion of time initially stated for its duration;

(ii) by registration of a Notice of Dissolution signed, acknowledged, registered and published in the same manner as the original certificate setting up the partnership;

(iii) by operation of law.

It is considered that if any such change is required then there would need to be a dissolution of the then current partnership (by way of filing of the Notice of Dissolution by consent referred to in Section 63) and for a fresh partnership to be formed.

The questions which Lindley poses include:-

(a) Do the provisions of the Act prevent a limited partner from retiring from the firm before the partnership has come to an end?

It should be recalled that a limited partnership is a partnership within the meaning of the Partnership Act. There is nothing to prevent partners agreeing in the Partnership Agreement that a partner can retire from the firm, but that the partnership will continue and be constituted by the remaining members. The only restriction on this would be that under Section 63 of the Act, the dissolution would need to be publicised in the way required and a new registration procedure concluded in the same way as on initial formation.

(b) If he dies or becomes bankrupt during the continuance of the partnership, has his Executor or his Trustee in Bankruptcy a right to withdraw his share?

Once again it would appear to be quite open on death or bankruptcy of a partner for a new partnership to be formed, provided that once again the dissolution procedure and the formation procedure are strictly adhered to. All that would be necessary to establish is at the date of the dissolution the capital of the firm remains as stated in the certificate. The new firm could, it is suggested, be formed possibly through distribution in specie of the individual partners' interests. This however would depend on the nature of the assets at the time. If a distribution in specie was not possible, then it may well be necessary for fresh contributions to be made. But bearing in mind that the quantum of the contributions is not regulated by the legislation, only their retention, this would not appear to be insuperable.

(8) Rights and Obligations to Third Parties

Much of what has already been canvassed in this paper is applicable under this heading and accordingly only some specific points need be made.

Section 56 provides that the general partner only shall transact the business of the partnership. The general partner would however still be bound by the terms of any relevant partnership agreement which could regulate his rights and obligations and the scope of his authority.

Once again the general provisions of partnership law would apply in this area. The only difference is that the provisions of the Mercantile Acts forbid a special partner from transacting any business. Section 56 says that if in the carrying on of such business or in any contract

connected therewith, the name of any special partner shall be used with his consent or privity or if he shall personally make any contract respecting the concerns of the partnership every such partner shall be deemed a general partner with respect to the contract or matter in which his name has been so used or as to which he shall have so contracted. This Section only refers to the particular special partner and the particular matter; it does not destroy the privileged position of the other special partners nor does it preclude the special partner from relying on that privilege in contracts and other business validly conducted by the general partner as contemplated by the terms of the Section.

Reference should be made to the previous discussion of the circumstances in which the privileged position of a special partner is lost.

Subsequent to the registration of a Notice of Dissolution under Section 63, a special partner is entitled to receive back his contribution without attracting the penalty of Section 61. It is considered that if at the date on which the Notice of Dissolution is registered there are debts owing to sundry creditors of the business, the special partner's liability will never be more than his original contribution. A similar result would apply on the death of a special partner.

Proceedings by or against a limited partnership are prosecuted by and against the general partners only (Section 62). For those cases in which special partners become general partners, they may be joined in a suit as a defendant. It will no doubt arise that a plaintiff sues both general and special partners, the case turning on

whether the privileged position of the special partner has been lost by his actions or non-actions.

It is suggested that the phrase "... liable civilly to the party injured to the extent of his damage" does not refer to loss of limited liability but only to damage as a result of the fraud. (S.66)

If a general partner wishes to become a limited partner, then there is nothing in the Act which would preclude this. So long as the necessary certificate is signed, acknowledged, registered and published in accordance with the provisions of Section 60, the general partner can assume the position of a special partner. In these circumstances however that partner should specifically bring to the notice of all parties with whom they have previously contracted if they carry on business under the old name, the fact that he is now a special partner. Certainly, the change in the general partner's liability will not be effective until advertising has been completed in the Gazette.

(9) Dissolution and Winding-up

Partnership Act.

As already seen, Section 5(3) of the Partnership Act 1891-1965 provides that a limited partnership is a partnership within the meaning of the Act and the rules of law declared by it are to apply to a limited partnership except so far as the express provisions of the Mercantile Act are inconsistent. Sections 35-47 of the former Act deal generally with the dissolution of partnerships and its consequences. Therefore, those sections would apply to a limited partnership unless there is something in the

Mercantile Act inconsistent with their provisions. The applicability of these provisions to limited partnerships and their inconsistency or otherwise with the provisions of the Mercantile Act have been dealt with earlier in this paper.

Companies (Queensland) Code.

It has already been seen that Groves v. Mathea (1898) 9 Q.L.J. 32 states that Section 63 of the Mercantile Act does not preclude a dissolution order being made by the Court. But what of the provisions of the Companies (Queensland) Code - do they apply?

Until the 1st January 1914 a limited partnership in England could be wound up as ordinary partnerships or under the provisions of the Companies (Consolidation) Act 1908 (see In re Hughes & Co. [1911] 1 Ch. 342 and Re Beer, Brewer and Bowman (1916) 113 L.T. 990) but after the passing of the Bankruptcy Act 1913 the possibility of a limited partnership being wound up under the provisions of any Companies legislation has effectively ceased. That position was confirmed under the Companies Act 1948 Section 398. In New Zealand, a special partnership cannot be wound up as an unregistered company under the Companies Act of 1955 (s.387(c)), but contrast Section 6(4) of the Western Australia Act.

But the position in Queensland is quite different. Under Division 6 Part XII of the Companies (Queensland) Code a partnership, association or other body (whether corporate or unincorporate) that consists of more than five members may be wound up. There is no exclusion of a limited partnership from the application of this provision.

No doubt therefore the Division could apply in relation to a limited partnership formed under the Mercantile Act and carrying on business in Queensland but what of the situation in which a limited partnership is formed in Western Australia or Tasmania or even overseas and establishes a place of business and acquires assets here - can it be said that the Division would apply to such a partnership? The answer to this question is difficult. Section 470(1) sets out the circumstances in which a Body to which the Division applies may be wound up but that sub-section does not answer the question as to whether the jurisdiction of that Division extends to such a body. It may well be that if the question of jurisdiction is answered by determining the existence of some commercial subject matter for which an order can operate (see Bangue des Marchands de Moscou (Koupetschesky) v. Kindersley) (1951) Ch. (112) then if such a limited partnership has assets in Queensland (although formed out of Queensland) the jurisdictional requirement may therefore be satisfied.

Given therefore that the Division would appear to apply to limited partnerships consisting of more than five members whether formed in Queensland or elsewhere, the provisions of that Division are in addition to and not in derogation of any other law with respect to the winding up of such a body. Section 470(1) states that a body to which the Division applies may be wound up under Part XII and that Part XII applies to such a body with such adaptations as are necessary including certain stipulated adaptations.

The questions which then arise are:-

(1) Are any adaptations necessary in the application of Part XII in the winding up of limited partnerships?

(2) What is the effect of the stipulated adaptations when applied to the winding up of limited partnerships?

Taking each of these questions in turn:-

(1) Apart from the express provisions of Division 6, are any adaptations to Part XII required in its application to limited partnerships?

Bearing in mind of course that the essential nature of a limited partnership is a limitation on the liability of special partners to contribute to the debts incurred by the partnership, the concept of a contributory for the purposes of the application of Part XII to the winding up of limited partnerships must be different from that implied by Section 360(1). For the purposes of Division 6 the contributory is defined in Section 471(1) to include every person:-

(a) who is liable to pay or contribute to the payment of:-
  (i) any debt or liability of the Body;
  (ii) any sum for the adjustment of the rights of the members amongst themselves; or
  (iii) the costs and expenses of winding up; or
(b) Where the body has been dissolved in the place in which it was formed or incorporated - who immediately before the distribution was so liable.

That Sub-section then provides that every such contributory is liable to contribute to the property of the body all sums due from him in respect of such liability. Section 360(1) can therefore have no application to such a circumstance. The wording in Section 471(1) "liable to contribute to the property of the body all sums due from him in respect of any such liability" must, based on the definition of the essential nature of a liability of a special partner quoted above,

be always read subject to the terms of Section 54 of the Mercantile Act. It follows therefore that a special partner will be a contributory so far as Section 471(1) is concerned, subject however to that limitation. It should be noted that the effect of Section 471(2) on the death or bankruptcy of any contributory is to apply the provisions of Section 362.

Not all of the persons set out in Section 363 may apply to the Court for the winding up.

An examination of the other provisions of Part XII shows that with some exceptions each would apply, and leads to the conclusion that a limited partnership may be wound up under the provisions of the Companies (Queensland) Code.

It must, of course, be admitted that this analysis would be quite irrelevant if a narrow interpretation was given to the words "except by operation of law" appearing in Section 63 of the Mercantile Act. As previously suggested however, those words should be given a wide interpretation.Before leaving this Section with respect to the dissolution or winding up of limited partnerships, the provisions of Section 473 and Section 474 of the Companies (Queensland) Code must also be noticed. Both of these Sections apply to a body referred to in Section 469(1)(b). Accordingly prima facie they apply to a limited partnership. Section 473 would apply to such a partnership formed in Australia and Section 474 would apply to a partnership formed outside Australia. In the former case, where such a body has been dissolved and there remains in the State any outstanding property which was vested in the body, to which the body was entitled or over which it had a disposing power at the time it is

dissolved but which was not got in, realised upon or otherwise disposed of or dealt with by the body or its liquidator, the estate and interest in the property at law or in equity of the body or its liquidator at the time when the body was dissolved together with all claims, rights and remedies that the body or its liquidator then had in respect to the property, vests by force of that Section in such person as is entitled to the property according to the law of the place of incorporation or formation of the body. In the case of a limited partnership formed outside Australia the vesting is in the Commission.

Bankruptcy Act.

A distinction, no doubt, has to be drawn between the insolvency of a limited partnership and the bankruptcy of either a special or a general partner. In discussing the effect of the bankruptcy of either a special or a general partner, no doubt further distinctions have to be made when the general partner happens to be a corporate body.

Section 7(3) of The Bankruptcy Act 1966 provides: "Subject to such modifications and adaptions, if any, as are prescribed by the Rules, the provisions of this Act apply to and in relation to limited partnerships as if they were ordinary partnerships and upon all the general partners of a limited partnership becoming bankrupt, the assets of the limited partnership shall vest in the Trustee". There appear to have been no rules made under this provision. Note that the words of Section 7(3) refer to the bankruptcy of the general partners. In "Australian Bankruptcy Law and Practice" (5th edition at Par. 530) there appears this statement: "Note that a limited partnership would be a rarity in Australia ...." In that

paragraph also the English case of In re Barnard, Martins Bank v. Trustee (1932) 1 Ch.269 is quoted as a reference to the administration of the assets of a limited partnership and the general partners; in that case it was stated that in administering the assets of a limited liability partnership the following procedure should apply -

(a) the firm assets are to be applied to the firm debts;

(b) then special partners are to be repaid their contributions;

(c) the balance will be the separate estate of the general partner and out of that will be paid the general partner's private debts and any other debts incurred by him on behalf of other limited partnerships. This order of administration of assets appears to be founded upon the English Section 33(6) which has a corresponding Section in Section 110 of The Australian Bankruptcy Act of 1966.

As no rules have been made with respect to limited partnerships, it must be taken that the general provisions of the Act apply to limited partnerships as if they were ordinary partnerships.

(10) Suits By and Against Limited Partnerships

Order 54 of the Supreme Court Rules provide for the manner in which actions can be taken by and against firms and persons carrying on business. There are no specific provisions covering actions by and against limited liability partnerships.

It can however, be argued that because Section 5(3) of the Queensland Partnership Act of 1891 provides that a limited partnership formed under the provisions of the Mercantile Act is a partnership within the meaning of this Act, and the rule of law declared by this Act applies to such a limited partnership, except so far as the express provisions of that Act are inconsistent with such rules, accordingly Order 54 can equally apply to limited partnerships.

This certainly appears to be the approach in England.

However, whereas under the English Limited Partnership Act, no provision is made or direction given to actions by or against a limited partnership, Section 62 of the Mercantile Act provides specifically that all suits respecting the business of any partnership established under that Act shall be prosecuted by and against the general partners only. Does it therefore follow that Order 54 of the Rules of the Supreme Court is inappropriate to actions by or against a limited partnership in Queensland? It must be remembered also, that under the Mercantile Act the firm name under which the partnership can carry on business, is to contain the names of the general partners only. Although from this at least there is nothing inconsistent with the Mercantile Act in adopting the view that a limited partnership is to be treated under Order 54 in the same way as any other partnership, it hardly seems that special partners could be brought into the action, and it would hardly be consistent with the prohibition of special partners from engaging in the business of the partnership to commence an action as permitted by Order 54 Rule 1. Also the ability to serve originating proceedings upon some one or more or

.the partners would seem to exclude the possibility of service upon the special partners. It is stated in the White Practice that this also extends to excluding a limited partner from defending an action. Accordingly, if a special partner wishes to enter an appearance as a partner, then although the words of the Rule entitle him to do so, it is doubtful if he should; it is suggested in the White Practice that he describe himself as "a limited partner in the defendant firm".

The provisions of Order 54 Rules 2, 3 and 4 with respect to the disclosure of partners' names appears to be quite inappropriate to a limited partnership, as such information is available in the Public Register.

The provisions of Order 54 Rule 10 no doubt apply to the position of general partners in the same way as ordinary partners are affected. However, in relation to special partners it is considered that there can be no execution against the property of a special partner. This is based on the proposition that as the special partner is only liable to the extent of the sums he has contributed, and as such sums must remain in the partnership, there should be no reason to have recourse to any property of the special partner. However, of course, it is not beyond the realms of possibility for a special partner to have extracted his capital from the partnership in which case, Section 62 of the Mercantile Act will enable the creditor to have recourse to the special partner and accordingly an application on the Order Rule 54 Rule 10 (second paragraph) would be appropriate.

It is interesting to note that under Section 62 it is provided that an action can be taken against a special

partner in those cases in which he may be deemed a general partner; the Section provides that a special partner may be "joined in the suit as a defendant at the discretion of the party suing".

(11) Conflict of Laws

An examination of the relationship between a limited liability partnership, its members and third parties so far as conflict of laws is concerned poses difficult questions. Obviously particular fact situations have a material bearing on a final analysis in this area and only general statements can be made in a paper such as this.

There at least two ways of analysing the conflict of law aspects of limited partnerships, namely:

(1) by reference to status;
(2) by reference to agency.

Hepburn (Limited Partnerships in Canada) says that the common law of particular States would recognise the existence of status conferred by the lex domicilii even though that State may not itself recognise a similar status; and that the application of the conflict rules governing agency means that a limited partners position should be governed by the proper law of the contract concluded by the general partners.

Yet Hepburn also notes that the difficulty with the status analysis is to determine whether being a limited partner is an incident of the status that will be governed by the law of the transaction or whether it is incidental to the recognition of status. Further, the agency analysis would

be qualified to some extent by the knowledge possessed by the third party at the time of contract that he is dealing with a general partner.

There are broadly, three circumstances which can be looked at under this heading -

(a) Recognition of Queensland limited partnerships in: (i) those States of Australia and (ii) countries, which permit the formation of limited partnerships;
(b) Recognition of Queensland limited partnerships in: (i) those States of Australia and (ii) countries, which do not permit such partnerships;
(c) Recognition in Queensland of limited partnerships formed in: (i) those States of Australia and (ii) countries which permit the formation of such partnerships.

To determine the possible result for each of the abovementioned circumstances, the following points can be made:-

1. A foreign corporation has standing to sue in England even though it has not been incorporated under English law (Henriques v. Dutch West India Co.) . Likewise a foreign corporation can be sued in England (Newby v. Van Oppen) (1872) 7 Q.B.D. 293. In relation to an unincorporated body however, the case of Von Hellfield v. Rechnitzer (1914) 1 Ch. 748 held that such a body which under the law of its origin can sue or be sued in its collective name, but does not otherwise possess a separate personality, does

not have the standing apart from Statute to sue or be sued in its collective name;

2. "The body, which is distinct from the natural persons composing it, can have rights and be subject to duties, and can own property, must be regarded as having a legal personality, whether it is, or is not, called a corporation" (per Latham, C.J. in Chaff and Hay Acquisition Committee v. J.A. Hemphill and Sons Pty. Ltd.) (1947) 74 C.L.R. 375 at 385;

3. Under the provisions of the Companies (Queensland) Code, it is provided in Section 5(1) that a "foreign company" means -

(a) any body (including a society or association) incorporated outside the State, not being -
  (i) a recognised company;
  (ii) a corporation sole; or
  (iii) a body corporate that is incorporated in Australia or an external Territory and is a public authority or an instrumentality or agency of the Crown in right of the Commonwealth, in right of a State or in right of a Territory; or

(b) an unincorporated society, association or other body formed outside the State that under the law of its place of formation may sue or be sued or may hold property in the name of the secretary or other officer of the society, association or body duly appointed for that purpose and which does not have its head office or principal place of business in the State.

4. It does not follow that if in Queensland, a foreign corporation will be recognised that this is based on any doctrine of comity; it has been suggested in some spheres, that such inter-recognition is based on some sort of doctrine of that nature with the consequent argument that if a limited partnership is recognised in Queensland by Queensland Statute Law, that a Queensland Court would likewise recognise the limitation of partners under a limited partnership formed in a State or country which provides for the registration of such partnerships;

5. In the case of Re Barnard (1932) 1 Ch. 269 at 272 it is stated that a limited partnership is not a legal entity distinct from its members; certainly as already seen this would be the case in Queensland;

6. The position in Australia is somewhat complicated by the possible application of the full faith and credit provisions of Section 118 of the Australian Constitution read in conjunction with Section 18 of the State and Territorial Laws and Records Recognition Act. It is of course, trite to say that the full faith and credit provisions otherwise requiring a State to give effect in a substantive sense to the laws of another State, have been read down by the High Court to the extent that the opinion is now held the provisions are evidential only. (Harris v. Harris (1947) V.R. 44, Permanent Trustee Co. Limited v. Finlayson (1967) 9 F.L.R. 424, Merwin Pastoral Co. v. Moolpa Pastoral Co. (1933) 48 C.L.R. 565, Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20) However, it is of interest to note that in the context of the doctrine of comity

mentioned above, Nygh ["Conflict of Laws in Australia" (Butterworths), p.677)] states: "In the absence of Parliamentary direction, Section 118 of the Constitution cannot be regarded as more than a general direction to observe a Federal comity. It may prevent a State from applying its own law where it has no legitimate interest in the matter, though such a case would be exceedingly rare".

Turning to the specific circumstances mentioned above, the following comments could be made in relation to each -

(a) If Nygh's statement in relation to Section 118 of the Constitution is correct, then it should follow that a limited partnership formed in Queensland and commencing to carry on business in Tasmania or Western Australia would receive the recognition which no doubt the special partners would wish if the venture failed for any reason. But if a special partner found that a Court in any of these States was not prepared to accept even such a limited interpretation of Section 118 of the Constitution, he may also be able to argue that a limited partnership should be recognised as a foreign company under the Companies Code.

(b) A Queensland limited partnership which commences to transact business in one of the other States of Australia which by its own Statute does not recognise its partnership, should be recognised as such in those States on the basis of the "Federal Comity" mentioned above and if not on

that basis, then on the basis that such should be recognised as foreign companies.

(c) Recognition in Queensland of a limited partnership formed in either Tasmania or Western Australia would follow along similar lines as that mentioned under (a) above;

(d) If the principle of comity is correct, then the Courts of England should be obliged to recognise a limited partnership formed in Queensland. There do not appear to be any cases which support this proposition.

(e) Once again on the principle of comity, at least it is anticipated that a Queensland Court would extend recognition for a limited liability partnership formed in a state or country in which such partnerships are recognised, otherwise a limited partnership should be recognised as a foreign company.

It is interesting to note that although the U.S.A. Limited Partnership Act deals specifically with foreign limited partnerships (which are defined as meaning a partnership formed under the laws of another State), it was apparently held that the Courts would recognise the right of a limited partnership to conduct business in another State: Cheyenne Oil Corp. v. Oil & Gas Ventures (42 Del. Ch. 100) Gilman Paint & Varnish Co. v. Legum (197 17d 665).

(12) Limited Partnerships in Relation to Certain Acts

There are provisions in several Queensland Acts such at the Real Property Acts 1861 and 1877, Land Tax Act 1915-1981, Stamp Act 1894-1982 and the Income Tax Assessment Act 1936 of the Commonwealth which could affect the operations of a limited partnership business. The effect of these provisions would have to be assessed on the circumstances of each limited partnership.

II ARGUMENTS FOR AND AGAINST LIMITED PARTNERSHIPS

Recent publicity has tended to suggest that the legislation enabling the formation of limited partnerships should be repealed. The argument is that because certain persons have gone out of their way to use limited partnerships for tax avoidance schemes, tax avoidance can be combated by repealing the legislation. This argument is quite illogical. The repeal of the legislation would simply force tax avoiders into more convoluted documentation and deprive persons with legitimate business aspirations of the opportunity of structuring their venture in a simple way whilst at the same time enabling some of them to enjoy a limitation of liability. Limited liability is a recognised, accepted and legitimate aspect of modern business.

There are good arguments to suggest that limited partnerships are not as attractive as they could be because of the nature of the legislation which has been examined earlier in this paper. The fact that the legislation is not clearly drafted and creates problems is of course no argument for its repeal. The answer in those cases is to update the legislation and to encourage the draftsman to more clearly direct his mind to the consequences of the provisions before him. The United States is about the only country which has set out to update its legislation due apparently to the strict construction placed on their Acts which (it has been said) was defeating their purpose of bringing into trade and commerce funds from those who were prepared to contribute capital upon limited liability in return for a share of profits. (See Plasted Products Corp. v. Helman (CA & Mass.) 271 F 2d. 354).

Lindley states five (5) advantages of limited partnership:-

1. Where use is made of the Limited Partnership Act 1907, the attendant publicity would be much less than in the case of a private company formed under the Companies Act 1948. No doubt by this it is meant that there is no requirement to set out on registration the terms of the contract by which the parties will be bound which is normally represented by the Memorandum and Articles of Association of an incorporated company. Likewise once registration has been effected, there is no requirement similar to the requirements under the Companies (Queensland) Code to file an annual return which, except in those cases where accounts are not required, can disclose to the world all of the financial information of that company.

   Should such disclosure be made where there is a limitation on the liability of any person with whom one is dealing? If this is taken as a justifiable social requirement, then so long as a party is aware that he is dealing with an entity which might include a person who is enjoying the limitation of liability, there can be no justification for requiring full disclosure. Similarly, there can be no justification to deny persons the opportunity of forming an entity which would enjoy some anonymity and non-disclosure of its structure and financial standing on a public register.

2. A return of capital under the Companies Act is not in ordinary circumstances practicable, but this can be effected in the case of limited partnership. So long as one is prepared to accept the consequences of

doing this, then it can of course be done and it could be an advantage in the eyes of persons entering into the venture. The contrary argument may well be that persons with whom the partnership might deal should not be running the risk that the capital which they thought was available to meet liabilities has dissipated. It is suggested however that on the other hand the provision under the Act rendering a special partner liable as if he was a general partner where there is a return of capital may well go a long way to protecting outside creditors.

3. Limited partnerships are taxed in the same way as ordinary partnerships and are not subject to corporation tax. This can be an advantage depending on the particular case. To the participants in a partnership which might "enjoy" losses for some time, this advantage cannot be denied.

4. Trustees can, if they have sufficiently wide powers of investment, safely participate in limited partnerships since they are not exposed to unlimited personal liability. For those cases in which this is a relevant consideration, the point is well made.

5. A possible saving on formation. Lindley goes on to point out that since the advent of ready-made companies, the lower cost for the formation of a limited partnership is no longer a valid factor. It is suggested that as presently worded the provisions of the Mercantile Act would in most cases mean a greater cost for the formation of a limited partnership than a simple private company. However depending on the nature of the transaction, it is not

inconceivable that the cost of the formation of a public company may well be in excess of the costs for the formation of a limited partnership, even though each is composed of the same number of persons.

In addition to the five factors mentioned by Lindley, the following points can also be made:-

1. Limitation of Liability. It is an accepted principle in the modern commercial world that certain people in a venture be permitted to enjoy limitation on their liability. The fact that there can be a limitation on a person's liability does not carry with it necessarily any suggestion that they would be involved more readily in speculation. On the contrary it may well be that in certain cases the fact that unlimited liability cannot be avoided may well be a dampener to endeavour.

2. Conceptually simple. In the case of a small family business it is often difficult for the layman to grasp the concept of the private company. It is suggested that on the other hand the formation of a limited partnership may well in many cases be grasped more readily and understood more easily.

3. Ease of formation. Although formation under the present Act (particularly the requirement of the Property Law Act) is not easy, formation could be simpler than the incorporation of a private company. So long as in all dealings with creditors the partnership is required on its letterhead and on all other documents to bring to the attention that it is a limited partnership, the publication requirement could be dispensed with.

4. Implied authority. Lindley points out that with an ordinary partnership goes an implied authority in each partner to bind the firm in all matters within the scope of the partnership business, and that a limited partnership enables a partnership to be formed which does not display that characteristic. Once again the prohibition on special partners joining in the partnership business necessarily carries with it the fact that the business can only be conducted by those who have unlimited liability and it is therefore those who would be the subject of financial examination by any prudent potential creditor or contractor.

5. Management. At present only those with unlimited liability can manage the business. This seems to be an unnecessary restriction - so long as a party knows that he is dealing with a limited partnership how can it matter that a special partner is taking part in its management.

Finally the essential question which remains is whether the State should continue to provide a choice in the structuring of a business venture to take advantage of limitation in the liability of some of the participants or whether the State should require participants in such a venture who seek that privilege to form a company under the Companies (Queensland) Code.

Some fundamental issues concerning the regulation of business entities is then called into discussion. Anyone endeavouring to decide whether the formation of limited partnership should be permitted by the State will have to confront and answer at least of the following points:

1. Should there be some upper limit on the number of persons who can form into a business association without the State requiring them to incorporate under the Companies (Queensland) Code? If the intention of Section 33(3) of that Code is to put an upper limit on that number before incorporation is required which would include ordinary partnerships, then why should limited partnerships not be similarly restricted.
2. Should there be any minimum contribution by general or special partners? Since this is not a requirement of the Code there would seem to little support for such an argument.
3. Should limited partnerships have the same degree of regulation as companies? In other words, should the legislation impose upon general partners duties and responsibilities as are imposed on directors of companies? This no doubt goes hand in hand with the question as to whether there should be any upper limit on the number of participants in a limited partnership.
4. Are the formation of limited partnerships circumventing the prospectus requirements of the Code? There have been suggestions that, by the formation of a limited partnership, the exemption in the definition of "prescribed interest" in so far as it refers to a partnership can be circumvented. It is suggested, however, that the argument is not so much an argument against limited partnerships but against a tightening of the definitions in the Companies (Queensland) Code to the extent to which companies may be partners and the extent to which they are not companies leads to a

consideration of whether fund raising in general by individuals or ordinary partnerships should be regulated; it should noted in passing that Section 26 of the Business Names Act 1962-1979 already regulates this to some extent at least. But it is certainly open to argument that these matters are irrelevant as to whether limited partnerships per se should or should not be a permitted structure or as to whether the legislation relative to that structure should be updated.

5. Should Part XII of the Code apply? It is difficult to see why it ought to apply. It should be remembered that it is no longer possible to wind up a limited partnership under the Companies Act in England. Given the difficulties of amending the Code to exclude limited partnerships from its operations and given that there does not appear to be any serious problems which are posed by the application of that Part to limited partnerships, it is suggested that the matter could be left as it is.

6. Should a limited partnership be permitted to carry on business under any business name or should it have a particular style as at present? Essentially this question is whether a general partner should in dealings with parties in some way bring to their attention the fact that he is a general partner of a limited partnership. Should a limited partnership include on its letterhead, invoices etc. some wording such as "a limited firm" or "a limited partnership"? Or should no requirement be made

and simply permit a general partner to carry on business under any business name. It is interesting to note that in some legislation there is no special style under which a limited partnership is to carry on business. There seems to be no good reason why a general partner should not be permitted to simply carry on business under any business name without the addition of any sign as a warning to the outside world. Any prudent person contemplating dealing with another carrying on business under a business name or in his own right whether a natural person or company will usually enquire as to their financial standing. It is suggested that there should be some way in which a person should be able to find out that he is dealing with a limited partnership and this could well be best served by requiring them to add the words "limited firm" after their firm name. Registration would then be required under the Business Names Act and it could there be shown that the party is the general partner of a limited partnership which would then give them a lead to the limited partnership register.

7. Should there by any restriction upon who can act as general partners particularly if a general partner is a private company with a paid up capital of $2.00? This impinges again upon the question as to whether there should be some minimum capitalisation. As it is not a requirement under the Companies Code it is suggested that it should not be a requirement for this legislation.

8. Should special partners be precluded from taking part in the management of partnership business? In Inspector of Awards v. Langham (1943) G.L.R. 271 at 273 Tyndall J. said:

> "It is obvious that the rights of limited partners are purposely made inferior to those usually enjoyed by ordinary partners in consideration of the special statutory dispensation of limited liability."

Perhaps the reason why special partners are forbidden to take part in the day to day management of the business is to ensure that any potential creditor does not contract on the basis of who appear to be liable for business contracts. In a recent article (Joint Venture - A Future for the Limited Partnership by C.R. Vaughan and P.J. Purton, Journal of Planning and Environment Law, April 1982 p.228) which is highly in favour of the use of limited partnerships, this passage occurs:

> "While it is not suggested that they [special partners] should be able to control the general partner it is difficult to see the continued justification for such a restriction when it does not exist in the case of, for example, corporations or general partnerships or indeed even trusts where the beneficiary is in effect absolutely entitled."

If by use of such signs as "limited firm" on all invoices etc. a party is aware of the nature of

> the entity with which he is dealing, then one could agree but not otherwise.

As already mentioned, it has been suggested that because limited partnerships have by many over recent years been used for certain income tax minimisation schemes or more correctly in tax deferral schemes, that this in itself is just cause to abolish this avenue. If this reasoning was taken to its logical conclusion, it would be necessary for the State to abolish companies, charities, trusts and ordinary partnerships since each is given under the Income Tax Assessment Act certain rights and advantages which in the eyes of some have been abused by many. The use of the entity for tax purposes is irrelevant. It would be ludicrous to hold otherwise.

To quote again from the article in the Journal of Planning and Evironment Law referred to above:

> "... it would seem that far greater use might be made of the limited partnership. It could become an important means of investing not only in property but also in industry, commerce, banking, financial services and other activities. It could represent a simple means of enabling risk capital to service the small entrepreneur on whom the Government is placing such reliance.
>
> One must not underestimate the psychology of individual willingness to act collectively in a syndicate provided that a reliable and trustworthy general partner exists. The limited partnership vehicle offers a means of encouraging the individual and does not involve major new initiatives whose consequences are so frequently unpredictable."

III REFORM OF THE LEGISLATION

A. Comments on Queensland Legislation

As previously mentioned the Queensland, New Zealand, Canadian and South African legislation can be treated as one group. Accordingly, many of the following comments are applicable to the legislation in each of those jurisdictions.

To summarise some of the obvious shortcomings in the legislation in this group the following points can be made:

1. There should be no express limitation on the nature of a business which can be conducted by a limited partnership. In the same way that there is no limitation expressly set out in the Companies (Queensland) Code or in the Partnership Act, it seems quite unnecessary for limited partnership legislation to relate to such matters which can be conveniently regulated by individual Acts concerning themselves with particular activities in business such as banking or insurance.
2. If contributions are to be made by special partners to the capital of the partnership then although one can agree that such things as the provision of personal services is hardly sufficient, the contribution of property to a stated value may be acceptable so long as, of course, some method of valuing that contribution can be clearly established.
3. The requirement for the firm to contain the words "and another" or "and others" would appear to be inadequate if the inclusion of these words is intended to act as a warning to persons dealing with a limited partnership; in Canada only the names of the general partners can be inserted without the addition of the word "company" or any other general

term. It is suggested that such words as "a limited association" or "a limited partnership" or preferably "a limited firm" would be more appropriate.

4. The registration procedures quite obviously should be streamlined. In particular, parties should on formation be able to feel secure that they have complied with the Act. Minor deviations from the requirements should not mean a loss of limitation of liability. At one time in the United States these problems were overcome by providing that substantial compliance was enough (U.L.P.A. Section 2(2); United States v. Coson, (CA9 CAL 286 F2D 453). If it is thought that publication is an integral part of the procedure and it is suggested that it is not, then registration should not take place until publication has been concluded. A certificate at least should be issued so that a person can rely on the conclusive nature of the certificate and not be forever and a day concerned as to minor defects in the procedure prior to registration. Any inaccurate statement such as the contribution of capital and the fact that it has been contributed should not render the partnership general but should simply impose upon those who have not complied an obligation enforceable by creditors or general partners along similar lines to present Section 61 of the Queensland Act.

5. As mentioned, if publication is considered essential then the publication procedure should be clearly spelt out.

6. There should be no limitation on the duration of a limited partnership. Its duration should be regulated in the same way as general partnerships.

7. If it is thought necessary to put a limit on that duration then the procedure for continuation should be quite simply stated without the present procedure.
8. There should be a simple procedure for the admission or withdrawal of partners so that any fresh partnership formed need not itself go through the complete procedure again.

There is no suggestion that the foregoing is an exhaustive list. Obviously the drafting of the sections creates many interpretation problems but the major shortcoming of the Act is that there are many major questions which are not answered. What will be suggested later, however, is that the basic philosphy of the sections is wrong.

Again, however, the answers to many major points arising out of this legislation cannot simply be answered with confidence. But again it is suggested that the philosphy behind the Act should be looked at.

B. Basis for New Act.

The policy behind a Limited Partnership Act can be framed in one of two ways:

(a) Present Policy: This proceeds on the basis that the limitation upon the liability of certain partners should not be enjoyed unless:
    (a) they contribute money or property to the capital of the partnership on formation which is not to be returned until creditors have been paid.
    (b) that special partners are not to be visible so far as outsiders are concerned and accordingly should not have their name included in the name of the business, and

should not take part in any contracts or in the management of the business.

(c) that there should be a registration and publication procedure.

In effect special partners are sleeping partners. Each of the foregoing points can lead to difficulties for the legislation. Provision has to be made for consquences if contributions are withdrawn, or if special partners take part in the business which is in itself a question of degree and the registration and publication procedures then require directions on content and manner. Further, to make the limitation on liability dependent upon such points and to equate a special partner with a sleeping partner necessarily requires decisions to be made as to how actions against limited partnerships are to be commenced and what are the consequences of inadequacy of records. This then leads to questions such as what records should be required.

The trend towards an ever increasing body of statute law on limited partnerships should be questioned. The central point is after all that a limited partnership is simply an ordinary partnership some of the partners of which by force of statute enjoy a limitation on the liability which would be otherwise imposed upon them.

In other words, is it necessary, given that premise, to have an Act equally as detailed as the 1976 United States Uniform Limited Partnership Act. Unless good policy reasons can be put forward, one can question why it is necessary to change the general body of partnership law as would otherwise apply to a limited partnership in almost all aspects. To try and set

limited partnerships aside as something on the one hand not quite companies yet on the other hand more than partnerships leads one inevitably to set out on the drafting of an Act which in the end could be more detailed than the 1976 United States version.

(b) Proposed Policy: If a limited partnership is simply an ordinary partnership but by force of some registration procedure a limitation on the liability of some members is enjoyed then why not simply leave them to be regulated by the general body of partnership law as much as possible.

The thrust of the legislation should be that if an ordinary partnership wishes to be a limited partnership then a certain procedure is to be followed; in other words keep the Act as simple as possible and let most circumstances affecting it be regulated by the general body of partnership law.

On this proposal, this Act could enable a limitation on liability if:-

1. a statement is registered in the Office of the Commissioner for Corporate Affairs simply stipulating that there is a limitation upon the liability of particular members to an amount which would be stated therein and there would be no necessity for that amount to be contributed at that time;

2. the partnership would need to trade under a firm name with the addition of the words "a limited

firm" but there would be less restriction upon partners taking part in some partnership activities.

The following comments can be made on this proposal:-

1. There can be no doubt that there should not be any limitation of liability unless a registration procedure is completed. Any such registration should be in the office of the Commissioner for Corporate Affairs either at Brisbane, Rockhampton or Townsville. The present procedure should be repealed and replaced by a statement including:-
   (a) the firm name;
   (b) the registered office of the partnership;
   (c) who are the partners;
   (d) their stipulated amounts of liability.

2. There should be no publication procedure. This is not required on the formation of a company, a partnership or trust.

3. A limited partnership should be required to carry on business under a firm name which in turn should be similarly registered or indexed under the Business Names Act so that searches can be carried out. There seems little justification for not enabling a limited partnership to carry on business under any name that it might decide on. The firm name should however be followed by the words "a limited firm". Such expressions as "and another" or "and others" or "and company" do nothing to properly alert the public as to the nature of the entity with which they are doing

business. The words "a limited partnership" or "a limited association" are unwieldy.

4. It should not be a requirement that special partners contribute money or property at the time of formation nor should there be minimum capital. There is no present requirement on the formation of a company or partnership for there to be minimum capital or that it be contributed at the time of incorporation. All that should be necessary is the registration of the certificate indicating to the public the total extent to which a certain person will meet any liability of the firm and if at the relevant time the assets of the firm are not sufficient to cover the total liability then that person should be required at that stage to make the contribution. In this way all of the problems associated with the withdrawal of capital are circumvented.

5. The Commissioner for Corporate Affairs should issue a certificate of registration. This then could be conclusive evidence that the partnership is a limited liability partnership.

6. Any changes to the partnership such as the admission or withdrawal of partners should be recorded in the office of the Commissioner for Corporate Affairs in the same way as changes of directors are recorded in relation to companies.

7. It is difficult to dismiss any argument that a limited partnership should be brought into line with Section 33(3) of the Companies (Queensland)

Code but no upper limit should be placed in this legislation.

C. Proposed Act.

It is suggested that the following could be discussed as a basis for a new Limited Partnership Act for Queensland.

An Act to establish limited partnerships:

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same as follows:

1. Short Title
   This Act may be cited as The Limited Partnership Act 198 .

2. Commencement of Act - This Act should come into operation from the first day of January, 198 .

3. Citation -
   (1) In this Act the Mercantile Act 1867-1974 is referred to as the principal Act.
   (2) The principal Act as amended by this Act may be cited as The Mercantile Act 1867-198 .

4. Repeal of Sections 53 - 68 of the Principal Act.
   Subject to Section 5 hereof the principal Act is amended by omitting Section 53 - 68 inclusive.

5. Transitional -
   (1) Subject to Sub-section (2) hereof, notwithstanding the repeal of Section 53 - 68 of the principal Act the provisions thereof shall be deemed to continue in full force and effect in

relation to each and every limited partnership formed or purporting to have been formed prior to the date of commencement of this Act and further that all rights, duties, liabilities and obligations arising out of or incidental to the aforesaid provisions so repealed shall be deemed to continue in full force and effect as though this Act had not been passed, it being the express intention of this Act that its provisions shall apply only to each and every limited partnership formed or purporting to have been formed from and after the date of the commencement hereof.

(2) Every limited partnership formed or purporting to have been formed prior to the commencement of this Act shall from and after the date of such commencement comply with the provisions of Section 11 hereof.

6. Interpretation - In this Act unless the contrary intention appears:-

"Firm", "Firm Name", "Business", "Partnership" shall have the same meanings as in "The Partnership Acts, 1891 to 1965".

7. Definition of Limited Partnership.

(1) A limited partnership is a partnership formed and registered in accordance with the provisions of this Act.

(2) The Partnership Acts, 1891 to 1965, the rules of equity and of common law applicable to

partnerships shall apply to limited partnerships except so far as they are inconsistent with the express provisions of the lastmentioned Act and of this Act.

8. Formation of Limited Partnership.

(1) A limited partnership shall consist of two or more persons one or more of whom shall be general partners and one or more of whom shall be special partners.

(2) A company may be a general or special partner of a limited partnership.

(3) A limited partnership shall be formed upon the registration by the Commissioner for Corporate Affairs of a statement signed by each partner containing the following particulars:

(i) the firm name;
(ii) the general nature of the business of the firm;
(iii) the registered office of the firm;
(iv) the full name and residential address (or registered office in the case of a company) of each general partner;
(v) the full name and residential address (or registered office in the case of a company) of each special partner;
(vi) a statement that the partnership is limited;
(vii) the amount of the contribution made or to be made by each special partner (if more than one) as the amount to which he shall be liable for the debts obligations and liabilities of the firm;

(viii) such other particulars (if any) as may be prescribed by regulations made hereunder.

(4) Upon registration of the statement referred to in sub-section (ii) hereof the Commissioner for Corporate Affairs shall issue a certificate of registration of the limited partnership.

(5) A certificate of registration of a limited partnership shall be conclusive evidence of the matters stated therein, that all matters required to be done prior to its issue have been effected and that the limited partnership has been formed from and after the date shown therein.

(6) The Commissioner for Corporate Affairs shall keep a register of all limited partnerships registered as aforesaid and duplicate copies thereof shall at all times be kept at each office of the Commissioner which register shall be open for inspection by any person.

9. Liability of General Partner

A general partner shall be liable for the debts obligations and liabilities of the firm in the same manner and to the same extent as partners in a partnership.

10. Liability of Special Partner.

(1) The liability of a special partner in a limited partnership for all debts obligations and liabilities incurred by or on behalf of the firm and to contribute in any case in which there shall be a deficiency for the payment of debts obligations and liabilities of the firm and the costs charges and expenses of winding up and for the adjustment of the rights of the

partners amongst themselves shall be limited to the amount of the contribution made or agreed to be made upon the formation of the limited partnership in accordance with the provisions of Section 8 hereof or upon entry as a member of the limited partnership in accordance with the provisions of Section 14 hereof together with any sums or property withdrawn or returned subsequent to the firm incurring any debt obligation or liability.

(2) A special partner shall not be liable to contribute in respect of any debt or obligation contracted or incurred after he has ceased to be a member of the firm and after a statement is filed in accordance with Section 14 hereof.

11. Name of Limited Partnership.

(1) The name of the limited partnership with the addition of the words "a limited firm" shall appear in legible characters on every business letter, statement of account, invoice, order for goods, order for services, official notice, publication, contract, bill of exchange, promissory note, cheque or other negotiable instrument endorsement on or order in a bill of exchange, promissory note, cheque or other negotiable instrument, a receipt or letter of credit of or purporting to be issued or signed by and on behalf of the limited partnership and if default is made in complying with this Sub-section each of the partners is guilty of an offence.

(2) Any partner or any person on behalf of the limited partnership who:-

(a) issues or authorises the issue of any business letter, statement of account, invoice, order for

goods, order for services or official notice or publication of the limited partnership upon which the name of the limited partnership does not appear as required by Sub-section (1); or

(b) signs, issues or authorises to be signed or issued on behalf of the limited partnership any contract, bill of exchange, promissory note, cheque or other negotiable instrument any endorsement on or order in a bill of exchange, promissory note, cheque or other negotiable instrument or any receipt or letter of credit on which the name of the limited partnership does not appear as required by that Sub-section,

is guilty of an offence.

(3) If a partner of a limited partnership or any person on its behalf signs issues or authorises to be signed or issued on behalf of the limited partnership any contract bill of exchange, promissory note, cheque or other negotiable instrument or any endorsement on or order in a bill of exchange, promissory note, cheque or other negotiable instrument or any letter of credit on which the name of the limited partnership does not appear as required by Sub-section (1) he is liable to the holder of the instrument or letter of credit for the amount due on it unless that amount is paid by the limited partnership.

12. Management of Limited Partnership

(1) The management of a limited partnership shall be under the control of the general partner or general partners (if more than one).

(2) Any special partner who takes part in the control of the business of a limited partnership shall in

relation to any debt or obligation incurred as a result be deemed to be a general partner.

(3) A special partner shall not by reason only of exercising any rights and powers granted pursuant to the terms of this Act be deemed to be taking part in the control of the business of a limited partnership.

13. Rights of Partners

General and special partners shall have the right:

(1) to require the limited partnership to carry on such business only as may be recorded as the business of the partnership in the Office of the Commissioner for Corporate Affairs from time to time; and

(2) to enquire into the state of the conduct of that business; and

(3) to have access to partnership records and books at all times and to make copies of or take extracts therefrom; and

(4) to advise as to the management of the firm and its business; and

(5) to enter into contracts of service or services with the limited partnership.

14. Registration of Changes in Partnership.

(1) If during the continuance of a limited partnership any change is made or occurs in:-

(a) the firm name; or

(b) the nature of the business of the firm; or

(c) the registered office of the firm; or

(d) the number of general partners; or

(e) the number of special partners; or

(f) the status of general partners to special partners or vice versa; or

(g) the partners or the name or residential address (or registered office in the case of a company) of any partner; or

(h) the amount of the contribution referred to in Section 8(3)(vii) hereof, then -

a statement signed by or on behalf of each partner specifying the nature of the change shall within seven days be delivered to the Commissioner for Corporate Affairs who shall upon receipt thereof enter such change in the register hereinbefore mentioned.

(2) Where a statement is delivered in compliance with Sub-section 1(1) hereof upon the introduction of a special partner or partners, such statement shall include the amount of the contribution referred to in Section 8(3)(vii) hereof.

(3) Until such entry is made as provided for in sub-sections (1) or (2) hereof, any such change as aforesaid shall have no effect whatsoever.

(4) If default is made in compliance with the requirements of this Section each partner is guilty of an offence.

(5) Notwithstanding the provisions of sub-section (1) hereof, the Commissioner for Corporate Affairs shall not effect any change in the register unless there shall at all times be at least one general partner.

15. Dissolution of Limited Partnership.

(1) A limited partnership shall be dissolved upon the death, retirement or insanity of a general partner or upon the winding up of a corporate general partner unless the partnership business continues to be conducted by the remaining general partner or partners with the consent of all remaining partners or pursuant to any express term of the partnership agreement.

(2) Subject to the terms of any partnership agreement, the death, retirement or insanity of a special partner or

the dissolution of a corporate special partner shall not dissolve the partnership.

(3) Notwithstanding the terms of any partnership agreement, a special partner shall at all times have the right to dissolve a limited partnership should the general partners (if more than one) breach any of the provisions of Section 13(1), (2) or (3) hereof.

(4) Upon the dissolution of a limited partnership or upon all special partners ceasing to be special partners, a notice signed by each of the general partners shall be filed in the Office of the Commissioner for Corporate Affairs and upon registration the partnership shall cease to be a limited partnership for the purposes of this Act.

16. Limited Partnerships Registered Under Section 241-249 of the Property Law Act 1974-1976.

On the commencement of this Act the Registrar of Titles shall transmit to the Commissioner for Corporate Affairs the register presently held by him pursuant to the provisions of Division 3 Part XVIII of the Property Law Act 1974-1976 which shall be held by the Commissioner and be available for inspection by any persons in relation to any limited partnership registered prior to the commencement hereof.