

QUEENSLAND LAW REFORM COMMISSION

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A BILL TO ESTABLISH LIMITED LIABILITY PARTNERSHIPS

REPORT NO. 34

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A Report of the Queensland Law Reform Commission

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Queensland

Report of the Law Reform Commission
on a Bill to Establish Limited
Liability Partnerships.

Q.L.R.C. 34

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The Honourable N.J. Harper, M.L.A.,
Minister for Justice and Attorney-General,
BRISBANE.

Item no.5 of the Law Reform Commission's current programme requires the Commission:

"To examine the law in relation to Limited Liability Partnerships."

On the 31st July, 1984 the Commission published a working paper containing a commentary and draft bill to amend the law with regard to the above. In preparing the working paper the Commissioner had had the assistance of Mr. J.G. Mann of Messrs. Chambers McNab Tully and Wilson. The Bill was drawn on the basis that since the general body of Partnership Law would, in the main, be applicable to Limited Partnerships, the special legislation would only have to outline the procedure for securing limitation of liability for those who wished to form a partnership on that basis. The working paper was widely circulated to persons and bodies known to be interested from whom comment and criticism were invited.

The Commission now submits its report concerning this matter which has been compiled after a consideration of the comments received. It will be noted that the original draft bill has been revised in some areas, mainly as a result of suggestions and criticism received.

Signed: Hon. Mr. Justice B.H. McPherson
(Chairman)

Signed: Hon. Mr. Justice G.N. Williams
(Member)

Signed: Mr. F.J. Gaffy Q.C.
(Member)

Signed: Mr. R.E. Cooper Q.C.
(Member)

Signed: Sir John Rowell
(Member)

Signed: Mr. J.R. Nosworthy
(Member)

SUMMARY

The statutory provisions which presently regulate Limited Liability Partnerships are ss. 53-68 of "The Mercantile Acts, 1867 to 1896". In addition and to the extent they are not inconsistent with those provisions the general rules of law and equity and the provisions of "The Partnership Acts, 1891 to 1965" apply to Limited Partnerships.

Broadly speaking, the feature which distinguishes Limited Partnerships from ordinary partnerships is that some members of the former who are designated "Special Partners" are able by complying with the Act to limit their liability for debts and obligations of the partnership to the extent provided for in the Act.

The Act requires that such partnerships should also include at least one general partner who is liable for debts and obligations to the same extent as partners in Ordinary Partnerships.

In a published working paper the Commission discussed at some length the history of Limited Partnerships and concluded there were good reasons for their continued existence and that they were particularly useful for small businesses which wished to avoid the formality and complexity of the Companies Code. It was considered that the provisions of The Mercantile Acts referred to above were not satisfactory and it is recommended they be repealed and a new Act enacted.

The principal provisions of the new Act are:

s. 7 Which modifies the General Partnership law.

- s. 8 The requirements which are to be met in forming a limited partnership including the particulars to be lodged with the Commissioner for Corporate Affairs to secure registration.
- s.9&10 Liability of General Partner and Special Partner respectively.
- s.11 Name of partnership. It was considered important that the name be such that persons would be aware of the nature of the entity with which they were dealing.
- s.12 Changes can be made in the partnership during its lifetime.
- s.13 How the partnership can be dissolved.
- s.14 How legal proceedings can be brought by or against the partnership.
- s.15 Transmission of register to Commissioner for Corporate Affairs.

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".

The fact that, for a long time, few limited partnerships were registered, might lead to a conclusion 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.

The number of limited partnerships formed in Queensland since 1976 is listed later in this report. This number indicates that the business community and their advisers at least are now aware of the possibilities afforded by the legislation, and even 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.

LAW OF LIMITED PARTNERSHIPS IN QUEENSLAND.

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 a Limited Partnership 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 1853 by the New South Wales Act 17 Victoria No.9 - 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.

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. In many respects the legislation effective in England, Western Australia and Tasmania is superior to that effective in Queensland. There are no doubt many shortcomings in the English legislation, and to that extent it should be updated. By comparison, the extent of reform required in the Queensland provisions suggests that the Queensland legislation should be repealed and replaced in its entirety.

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

Western Australia

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

Tasmania.

<u>Year</u>	<u>Number of Partnerships Registered.</u>
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

<u>Year</u>	<u>Number of Partnerships Registered.</u>
1976	1
1977	4
1978	5
1979	17
1980	22
1981	21
1982	16
1983	20
1984	11

No statistics were available for England.

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. However, it has not been possible to 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.

Reform of the Legislation.

The philosophy underlying the concept of Limited Liability Partnerships was fully canvassed in the Commission's working paper no.27 dated 31st July, 1984 and need not be repeated in this report. However, in order to appreciate the need for revised legislation the following points should be made in relation to the legislation as it presently exists.

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 such things as the provision of personal services would hardly be sufficient. The contribution of property to a stated value might be acceptable as long as some method of valuing that contribution were 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 were 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. A certificate at least could be issued and a person could rely on it as conclusive evidence. 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. There should be no limitation on the duration of a limited partnership. Its duration should be regulated in the same way as general partnerships.
6. 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.
7. 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 philosophy of the sections is wrong.

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) 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 consequences 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.

- (b) Proposed Policy: 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. Therefore it is intended to 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;
2. The partnership would need to trade under a firm name with the addition of the words "a limited firm" and there would be restrictions 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.

The Commission has decided not to make any recommendation to preclude a corporation from being a general or special partner. The Commission, however, realises that this is a matter of policy in respect of which the Government may have definite views.

Proposed Act.

It is suggested that the following could form the 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 shall commence on

3. Citation - This Act may be cited as the Limited Partnership Act 198 .

4. Repeals and Application. (1) Sections 53-68 of The Mercantile Acts, 1867-1896 are repealed.

(2) Notwithstanding subsection (1), the provisions of section 53-68 of The Mercantile Acts, 1867-1896, shall continue to apply to a limited partnership formed or purporting to have been formed under those provisions.

(3) After the commencement of this Act, every limited partnership formed or purporting to have been formed under the provisions of those Acts shall comply with the provisions of section 12 hereof.

5. Interpretation - In this Act unless the contrary intention appear:-

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

"General partner" means any partner whose liability is not limited in accordance with this Act.

"Liability" means any debt, obligation or liability however arising.

6. Definition and constitution of limited partnership.

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

7. Modification of general law in case of limited partnership.

(cf. U.K. 1907 s.6)

(1) Except where inconsistent with the provisions of this Act the law relating to partnerships including the provisions of The Partnership Acts, 1891-1965 shall apply to a partnership formed under this Act.

(2)(a) A special partner shall not take part in the management of the partnership business, and shall not have power to bind the firm:

(b) If a special partner takes part in the management of the partnership business he shall be liable for all liabilities of the firm incurred while he so takes part in the management as though he were a general partner.

(3) A special partner may by himself or his agent at any time inspect the books of the firm and enquire into the state and prospects of the partnership business, and may advise and consult with the partners thereon.

(4) The mental illness of a special partner shall not be a ground for dissolution of the partnership by the court unless the share of the mentally ill partner cannot be otherwise ascertained and realised.

(5) In the event of the dissolution of a limited partnership its affairs shall be wound up by the general partners unless the court otherwise orders.

(6) Subject to any agreement expressed or implied between the partners and to the provisions of this Act -

- (a) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the general partners;
- (b) A special partner may, with the consent of the general partners, assign his share in the partnership, and upon such an assignment the assignee shall become a special partner with all the rights of the assignor;
- (c) The other partners shall not be entitled to dissolve the partnership by reason of any special partner suffering his share to be charged for his separate debt;
- (d) A person may be introduced as a partner without the consent of the existing special partners;
- (e) A special partner shall not be entitled to dissolve the partnership by notice.

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 body corporate constituted or registered in Australia may be a general or special partner of a limited partnership.

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

- (i) the firm name;
- (ii) the registered office of the firm;
- (iii) the full name and residential address (or registered office in case of a company) of each general partner;
- (iv) the full name and residential address (or registered office in the case of a company) of each special partner;
- (v) a statement that the partnership is limited;
- (vi) a statement of the amount specified as a money sum that each special partner is liable to contribute.
- (vii) such other particulars as may be prescribed under this Act.

(4) Upon registration of the statement referred to in sub-section (3) 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 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 liabilities of the firm in the same manner and to the same extent as partners in a partnership that is not a limited partnership.

10. Liability of special partner. (1) Subject to this section a special partner shall be liable for and may be required to contribute to or pay:-

- (a) the liabilities of the partnership;
- (b) the costs and expenses of winding up the partnership; and
- (c) any sum required for the adjustment of the rights of the partners among themselves.

(2) Subject to sections 7(2)(b) and 11 of this Act, the amount that a special partner shall be liable to contribute or pay shall be limited to so much of:-

- (a) the amount stated in accordance with section 8(3)(vii); or
- (b) where that amount has been altered in accordance with section 12, the amount so altered -

as remains unpaid.

(3) A special partner shall not be liable for or required to contribute to or pay any liability for the partnership incurred after:-

- (a) he ceased to be a partner; and
- (b) a statement in accordance with section 12 has been filed.

11. Name of limited partnership. [cf. Cos. Act 1961, s.113]

(1) The name of the limited partnership with the addition of the words "a limited firm" shall appear in legible characters on every business document of or purporting to be issued by or on behalf of the limited partnership.

(2) Any partner or other person who on behalf of a limited partnership:-

- (a) issues or authorizes or knowingly acquiesces in the issue of any business document upon which the name of the partnership and the addition required by subsection (1) do not appear; or
- (b) signs or authorizes to be signed or knowingly acquiesces in the signing of any business document upon which the name of the partnership and the addition required by subsection (1) do not appear -

is guilty of an offence and liable to

(3) A partner or other person who on behalf of a limited partnership contravenes subsection (2) shall be liable to any person who suffers loss in reliance upon the business document unless that loss is made good by the limited partnership.

(4) In this section "business document" includes any contract, offer, order for goods, order for services, statement of account, invoice, bill of exchange, promissory note, cheque, negotiable instrument, indorsement, order, receipt, letter of credit, or official notice or publication.

12. Registration of changes in partnership

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

- (a) the name of the partnership; or
- (b) the registered office of the partnership; or
- (c) the number of general partners; or

- (d) the number of special partners; or
- (e) the liabilities of any partner by reason of his becoming a special partner instead of a general partner or a general instead of a special partner; or
- (f) the partners or the name or residential address (or registered office in the case of a company) of any partner; or
- (g) the amount that a partner is liable to contribute or pay, 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 subsection 1 hereof upon the introduction of a special partner, such statement shall include a statement of the amount specified as a money sum that such special partner is liable to contribute.

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

(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 subsection (1) hereof, the Commissioner for Corporate Affairs shall not effect any change in the register unless there shall at all times thereafter be at least one general partner.

13. Dissolution of limited partnership.

(1) Subject to the terms of the partnership agreement, a limited partnership shall be dissolved upon the death, bankruptcy, retirement or mental illness 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 with the consent of all remaining partners.

(2) Subject to the terms of the partnership agreement, the death, bankruptcy, retirement or mental illness of a special partner or the dissolution of a corporate special partner shall not dissolve the partnership.

(3) Upon dissolution of a limited partnership or upon all the 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 of the notice the partnership shall cease to be a limited partnership.

14. (1) Legal proceedings. Legal proceedings (other than proceedings for an offence) may be brought by or against the general or special partners of a limited partnership in the name of that partnership.

(2) Proceedings by way of execution or to enforce a judgment obtained in an action against a limited partnership sued in its name shall not issue against the property or person of a special partner except with the leave of the Supreme Court and upon application in accordance with the Rules of the Supreme Court.

15. Transmission of register. On the commencement of this Act the register kept for the purpose of section 57 of The Mercantile Acts, 1867-1896, shall be transmitted to and held by the Commissioner for Corporate Affairs and shall continue to be open to inspection by any person.