



Committee Secretariat  
Commerce  
Parliament Buildings  
Wellington

6 September 2012

## **NZVCA SUBMISSION ON COMPANIES AND LIMITED PARTNERSHIPS AMENDMENT BILL**

- 1 The NZVCA is a not-for-profit industry body committed to developing a world-best venture capital and private equity environment for the benefit of investors and entrepreneurs in New Zealand. Its core objectives include the promotion of the industry and the asset class on both a domestic and international basis. NZVCA members cover the whole spectrum of investment in New Zealand private enterprise, including angel investment, seed and early-stage venture capital through to development capital and private equity (including management buy-outs and buy-ins).
- 2 The NZVCA would be happy to discuss the issues raised in this paper further. Please contact:  
  
Nick Wells (Treasurer, NZVCA) on 09 357 9004 or [nick.wells@chapmantripp.com](mailto:nick.wells@chapmantripp.com).
- 3 This submission takes a high level approach to the majority of the amendments proposed by the Companies and Limited Partnerships Amendment Bill (*Amendment Bill*).
- 4 New Zealand is known as a country where it is easy to establish and conduct business. This needs to be balanced with a robust regime that is trusted internationally. The Amendment Bill seeks to strengthen the regulatory regime for companies and limited partnerships to ensure New Zealand remains a “trusted place to do business”.
- 5 The NZVCA agrees in principle with these objectives. However, the NZVCA is concerned that some of the proposed reforms may increase costs of doing business in New Zealand and act as a deterrent for international capital and the desire for New Zealand to become a “fund hub”. Given New Zealand’s reliance on foreign capital, we are wary of any legislative steps that may unintentionally create soft barriers to doing business in New Zealand.

### **New Zealand based directors/general partners and Registered Agents**

- 6 The Amendment Bill requires any company or limited partnership without directors and/or general partners who are resident in New Zealand (or an “enforcement country”) to appoint a New Zealand registered agent who is responsible (and in some cases, personally liable) for the administrative affairs of the company or limited partnership.
- 7 The NZVCA is concerned that these changes (particularly when viewed together with the suggested introduction of criminal liability for directors and personal liability for registered agents) go too far and may have the effect of deterring individuals from acting as directors or registered agents. Not only does this have the unfortunate consequence of making it harder for New Zealanders to do business, but it also:

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- 7.1 makes it difficult for New Zealand to attract international business interests; and/or
- 7.2 increases compliance costs.
- 8 These consequences would be regrettable, not only given the stated aim of the proposed regulatory reforms is to increase (international) confidence in New Zealand and ensure New Zealand remains a trusted place to do business, but because it would make it harder to achieve the wider goal of New Zealand as a “fund hub”.
- 9 We also query whether the New Zealand director/general partner/resident agent concept effectively addresses the harms that the Amendment Bill aims to eradicate. The existence of a resident agent legally responsible for an entity’s administrative affairs alone, may not be sufficient to prevent overseas controlling interests from establishing or using a New Zealand shelf company for illegitimate business interests.
- 10 While the concept of approved “enforcement countries” helps to narrow the scope of these changes, given these countries are still to be prescribed in regulations, there is uncertainty as to which jurisdictions will be approved and the impact this will have. We understand that Australia will be included, however to afford greater certainty to the regime, it would be helpful to have an early indication of any approved jurisdictions that that will be granted “enforcement country” status.
- 11 We propose that the Select Committee reconsider the New Zealand director/general partner/resident agent concept and in particular, the nature of the obligations and liabilities imposed on resident agents. We are aware of the difficulties similar requirements in Australia have caused and therefore wonder if we should make our regime more competitive by taking an alternative approach.
- 12 It seems; like the criminalisation of directors (on which we repeat the submissions made by Chapman Tripp); while we have a nut of an issue here in terms of ensuring appropriate and legally compliant entities are maintained on our register - the approach taken in the Bill takes a sledgehammer to crack or resolve the perceived problems. The sensible use of the enforcement country regime could ameliorate some of our concerns - if the regime remains as it stands we would suggest that regime is cast reasonable widely to ensure the appropriate balance between competitiveness and legal robustness is maintained.

### **Qualifications of General Partners and requirement to appoint a registered agent**

#### ***Issue***

- 13 As amended s 18(1)<sup>[1]</sup> states that “any person who is qualified under section 19A or 19B may be a general partner of a limited partnership.” However, the suggested qualifications only deal with general partners who are natural persons and partnerships.

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<sup>[1]</sup> Section references refer to the Limited Partnerships Act 2008 as amended by the Companies and Limited Partnerships Amendment Bill.

- 14 As drafted, this seems to have the (likely unintended) effect of disqualifying other entities (like companies) from being general partners – as those entities would not meet the qualification criteria.

*Requirement to appoint a registered agent*

- 15 Under the new section 8(4) limited partnership must appoint a registered agent unless that limited partnership has a general partner that is a New Zealand (or enforcement country) based natural person, partnership or company.

- 16 As a result of this amendment, where a general partner is based in New Zealand (or an enforcement country) but is not a natural person, company or partnership, the relevant limited partnership will be required to appoint a registered agent. Again, this effect is likely to have been unintended.

**Solution**

- 17 It is clearly understood that other entities (including companies) can be general partners (for example see s 8(4)(c) and the explanatory note on clause 46 of the Amendment Bill), therefore, we recommend amending s 18(1) to clarify that any person may be a general partner of a limited partnership, subject to the following qualifications:

17.1 A natural person must be qualified under s 19A; and

17.2 A partnership must be qualified under s 19B.

- 18 Section 8 should also be amended to ensure the registered agent requirements are not triggered where a general partner is tied to New Zealand, but does not otherwise fall within the categories listed in Section 8(4).

**Timing of replacement of registered agents**

**Issue**

- 19 Section 77H(2) provides that, where the limited partnership is required to have a resident agent, on removal of that agent the limited partnership must replace them within 20 working days. A failure to do so gives the Registrar the right to deregister the limited partnership (s 77H(3)).
- 20 In contrast, the proposed consequential amendment to s 86(1)(ca) provides that a terminating event occurs if a limited partnership is 10 working days without a registered agent. While this is consistent with timeframes for other terminating events in s 86 (eg. where there has been no general partner, limited partner or partnership agreement for 10 working days or more), it is inconsistent with the replacement obligation in s 77H(2).
- 21 In practice, this inconsistency means a limited partnership will only have 10 working days to replace a resident agent before the authority of the general partner(s) will be limited to actions required to wind up the limited partnership.

***Solution***

- 22 We suggest an amendment to the proposed section 86(1)(ca) to provide that a terminating event will occur where a limited partnership is without a registered agent for 20 working days.

**Powers of Registrar to deregister limited partnerships**

**Issue**

- 23 The Amendment Bill gives the Registrar the ability to place “notes of warning” on the register in certain situations. In addition, the occurrence of certain events may lead to the Registrar moving to de-register a limited partnership.
- 24 However, these events are not limited to scenarios where the Registrar believes the limited partnership is no longer carrying on business.
- 25 The Registrar may also de-register limited partnerships in a series of quasi-“fault” scenarios, including where the Registrar reasonably believes the limited partnership, general partner or officers have intentionally provided inaccurate information, persistently failed to comply with their duties, or failed to appoint a registered agent.
- 26 In some cases, the Amendment Bill deems that prior to de-registration, the limited partnership has ceased to carry on business, has fully discharged its liabilities and has distributed its surplus assets, or the limited partnership has no surplus assets and no creditor has applied to appoint a liquidator (see s 77J). In practice, this may not always be the case.
- 27 We are concerned that the Registrar’s ability to de-register a limited partnership in these sorts of circumstances inadvertently results in the general partner(s) having inadequate opportunity to wind-up the affairs of the limited partnership prior to de-registration

***Registered Agents***

- 28 We are also concerned that the Amendment Bill sets out two contradictory approaches for dealing with a limited partnership’s failure to appoint a registered agent, which may result in uncertainty.
- 29 As noted above, s 86(1)(ca) provides that the failure to have registered agent for a period of 10 working days is a terminating event (which leads to compulsory wind up by the general partner(s) and ultimately, deregistration).
- 30 In contrast, s 77H(3) provides that the Registrar may deregister the limited partnership where the limited partnership has not appointed a replacement resident agent within 20 working days.

***Solution***

- 31 The Amendment Bill outlines a number of trigger events which may result in an exercise of the Registrar’s powers of de-registration.
- 32 We submit that rather than moving straight to de-registration by the Registrar, these trigger events should give rise to a terminating event (under section 86) and/or be grounds for the

court ordered appointment of a liquidator (under section 90). This will allow for a natural wind-up process.

**Identical amendments to the Companies Act**

- 33 To the extent the Amendment Bill proposes to make the same or similar changes in respect of the Companies Act, we submit that, to the extent applicable, those amendments should be reconsidered in light of the issues discussed above.

Please contact us if you have any further details.

In a personal capacity I also reiterate this submission. As the independent expert to the Select Committee in relation to New Zealand's Limited Partnership Legislation it seems we are at risk of undoing some of the competitive but appropriately balanced features of our Limited Partnership regime. Our regime was designed to include, and we believe is appreciated in New Zealand and by many amongst our trading partners for, a number of positive and commercial features. The regime provides a robust commercial vehicle for sectors as diverse as Iwi and Private Equity and presents a balance between the commercial needs of the market with fundamental and appropriate risk considerations. As set out above, some of the proposed changes need to be rebalanced against the commercial imperatives that drove the original creation of our Limited Partnership regime.

Kind regards

**New Zealand Private Equity & Venture Capital Association Inc**



Nick Wells  
Treasurer