



Law Council
OF AUSTRALIA

Business Law Section

The Manager
Financial Innovation and Payments Unit
Financial Systems Division
The Treasury
Langton Crescent
PARKES ACT 2600
Via email: csef@treasury.gov.au

29 January 2016

Dear Ms Havyatt,

**Exposure Draft on Crowd-sourced Equity Funding Legislation and Regulations
2015 and Explanatory Material**

I have pleasure in enclosing two submissions in response to the Treasury's draft Crowd-sourced Equity Funding Legislation and Regulations 2015 and explanatory material. The submissions have been prepared by the Corporations Committee and the SME Business Law Committee of the Business Law Section of the Law Council of Australia respectively. The Committees are two of the fifteen specialist committees and one working party established within the Business Law Section to offer technical advice on different areas of law affecting business. Each of these committees approaches issues of law reform and practice from a different perspective, which reflects the primary focus of their respective committees.

If you have any questions in relation to the submissions, please contact either the Chair of the Corporations Committee, Rebecca Maslen-Stannage via email: rebecca.maslen-stannage@hsf.com or phone on 02-9225 5500, or the Chair of the SME Business Law Committee, Coralie Kenny, via email: coralie.kenny@gmail.com or vial phone on 0409 919 082.

Yours sincerely,

Teresa Dyson, Chairman
Business Law Section

Enc.

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Response to the Draft Crowd-Sourced Equity Funding Legislation and Regulations 2015 and Explanatory Material

Submission by the Corporations Committee of the Business Law Section of the
Law Council of Australia

29 January 2016

The Corporations Committee of the Business Law Section of the Law Council of Australia appreciates the opportunity to comment on the Exposure Draft of the Corporations Amendment (Crowd-sourced Funding) Bill 2015 (**CSEF Bill**) and Corporations Amendment (Crowd-sourced Funding) Regulations 2015 (**CSEF Regulations**) and explanatory material released on 22 December 2015.

The Corporations Committee has long argued that start-ups and emerging growth companies needed a simpler legislative regime than currently provided by the *Corporations Act 2001* under which they could raise equity capital at reasonable cost and is therefore generally supportive of this legislation and looks forward to its passage by Parliament at the earliest opportunity.

CSEF Bill

You will be aware that certain members of the Corporations Committee provided comments to you on an Exposure Draft of the CSEF Bill that was given to them on a confidential basis (**Confidential CSEF Bill**) by letter dated 9 November 2015 (**9 November letter**).

It appears to those members that the Exposure draft of the CSEF Bill that was released publicly on 22 December 2015 is identical to the Confidential CSEF Bill. The Corporations Committee does not know if this means that the matters raised in the 9 November letter have been discounted, the Minister has not yet finalised her consideration of any comments and suggestions provided during the 'confidential round' of seeking feedback and/or is waiting to see what recommendations are made by the Senate Economics Legislation Committee's inquiry into the CSEF Bill before finalising the legislation.

Assuming that the Minister has not yet formed a final view on the legislation, the Corporations Committee notes that it continues to press all of the matters it raised in the 9 November letter and trusts that they will be taken into account in the version of the CSEF Bill introduced into Parliament.

CSEF Regulations

The Corporations Committee makes the following comments on the CSEF Regulations:

1. **Regulation 6D.3A.01** specifies fully-paid ordinary shares as a class of securities for the purpose of section 738G(1)(c).

Given that start-ups often need to be flexible in the way capital is raised, the Corporations Committee is concerned that mandating that such capital can only be raised by the issue of fully-paid ordinary shares (compared with, say, preference shares, redeemable preference shares, options) is too restrictive.

2. **Regulation 6D.3A.03** specifies the wording of the risk warning to be included in an offer document.

While the Corporations Committee accepts that a risk warning is appropriate, the proposed risk warning may be counter-productive in that it seeks to cover too many possibilities of risk and loss.

The Corporations Committee prefers the approaches taken to risk warnings contained, for example, in New Zealand's Financial Markets Conduct Act 2014 or the just released Canadian participating jurisdictions Multilateral Instrument 45-108, *Crowdfunding*.

3. **Regulation 6D.3A.11** specifies the checks a CSEF intermediary needs to make to comply with its gatekeeper obligations under section 738Q(1).

As the Corporations Committee does not support the imposition of gatekeeper obligations on CSEF intermediaries, it does not support this Regulation.

4. **Regulation 6D.3A.12** specifies what constitutes a reasonable standard in relation to the checks mentioned in the above Regulation. Sub-regulation (5) specifies what criteria determines whether documentation is 'reliable and independent' and sub-regulation (6) states that any database maintained by ASIC is to be treated as reliable and independent documentation.

While the Corporations Committee appreciates the thinking behind sub-regulation 6, it notes that information in ASIC's database can also be out of date and inaccurate (query what happens with the database if and when it is sold to a private entity) and may therefore not be reliable and achieve the aims of the sub-regulation.

5. **Regulation 6D.3A.13** specifies the wording of the risk warning that CSEF intermediaries must place on their platforms.

As the above wording is the same as that contained in Regulation 6D.3A.03, the Corporations Committee repeats its observations in relation to that Regulation.

Explanatory Material

The Corporations Committee has no comments on the explanatory material accompanying the CSEF Bill and the CSEF Regulations.

Response to the Draft Crowd-Sourced Equity Funding Legislation and Regulations 2015 and Explanatory Material

Submission by the SME Business Law Committee of the Business Law Section of
the Law Council of Australia

29 January 2016

SME Business Law Committee Position on the Exposure Draft

The SME Business Law Committee has reviewed the Exposure Draft including:

- Corporations Amendment (Crowd-sourced Funding) Bill 2015 and the Explanatory Memorandum therefor; and
- Corporations Amendment (Crowd-sourced Funding) Regulation 2015 and the Explanatory Statement therefor.

The SME Business Law Committee supports the draft legislation and regulations that change the *Corporations Act 2001 (Cth)* to provide for a new regime to enable crowd-sourced equity funding. This regime will apply to unlisted public companies limited by shares where capital raising of fully paid ordinary shares would be undertaken through licensed intermediaries, and will provide for issuer eligibility criteria, issuer and investor funding caps and minimum disclosure content requirements.

The SME Business Law Committee is of the view that the proposed new regime should allow small start ups and innovators the opportunity to raise capital without having to comply with the current complex and costly prospectus regime otherwise applicable.

Further comment

The SME Business Law Committee again notes that fundraising on-line is also done through receipt of small gifts or donations to start ups and innovators or persons or entities with projects or causes that require monetary support. These gifts are not made in return for an issue of any equity (or debt) interest and it appears the donors are not concerned to participate in any success or growth of the enterprise, although some of these enterprises do provide the donors with a service or reward, such as an opportunity to meet the innovator or the receipt of a sample good or service.

Aside from such money raising enterprises having to ensure they are not misleading or deceptive with regard to consumers (donors) or fraudulent, there is currently no regulatory structure that applies to them because no equity or debt interests are issued to donors.

As no interest issues to donors, the legislation on anti-hawking and disclosures does not apply.

Clearly there are opportunities for unscrupulous operators to take advantage of the generosity of consumers (donors) in this unregulated environment and the risk accepted by donors would be dependent on each donor's risk appetite and funding ability.

The SME Business Law Committee considers that this 'online donation' funding should also be looked at by government given how accessible this method is both to willing donors and to unscrupulous operators.