

## Crowd Sourced Equity Funding – Discussion Paper – September 2013

### Introduction

The Corporations Committee of the Business Law Section of the Law Council of Australia welcomes the opportunity to make a submission on this discussion paper.

The Committee is generally in favour of encouraging a vibrant and thriving Australian innovation and technology sector and welcomes any steps that can be taken to that end.

While Australia has a venture capital industry and Government has made some financial and other contributions to encouraging innovation, these avenues are not providing all of the necessary solutions. New Australian funds are being established with a specific focus on investing in innovation and technology and the first significant IPO of an internet-based business, Freelancer.com, is under way. However, these developments also fall short of assisting a large segment of the market with the capital it needs.

This problem is commonly referred to as the 'valley of death'. The valley of death represents the stage in the growth cycle of an early stage business at which those early stage businesses have, on balance, not yet matured in their networks and risk profile to identify and attract sufficient capital from external sources to enable them to commercialise their products and services to a level at which the risk profile is sufficiently improved to enable sophisticated investors and professional investors to risk their capital in such companies.

In short therefore, it is the Committee's view that Crowd Sourced Equity Funding ('CSEF') is an appropriate vehicle for dealing with the above identified systemic market failure to fund early stage companies.

In the Committee's opinion, specific amendments to the existing regulatory structure for capital raising would provide the best means of addressing this current market failure. The Committee does not believe that the approach of creating a self-contained statutory and compliance structure for CSEF is appropriate. In our view, a self-contained structure would throw up discrepancies in the regulatory environment for capital raising that could be exploited to the detriment of what is arguably a successful regime in its current application for more sophisticated businesses.

### Questions in the Discussion Paper

#### 1. Question 1

In principle, the Committee considers that any laws regarding CSEF should be incorporated into the corporation's legislation rather than in new legislation. The

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corporation's legislation already deals with capital raising, investor protection and regulatory supervision and enforcement and any CSEF laws would fit logically with and complement this legislation.

2. **Question 2**

The Committee does not consider that CSEF should be confined to 'sophisticated, experienced and professional investors' but should be open to any type of investor. However, the Committee does not advocate a 'free for all' but favours the use of protective mechanisms for 'unsophisticated investors' along the lines provided for in the JOBS Act.

The small scale offering exemption should be varied (discussed further below).

3. **Question 3**

The Committee does not believe any changes are required to the current regulatory regime relating to managed investment schemes in relation to the operation of CSEF. Any use of CSEF should in its view be limited to direct offers by an issuer operating the underlying business. Accordingly, there should be no need to structure investments through a managed investment scheme and no need to make adjustments to the regulatory regime that applies to managed investment schemes.

There are a number of key restrictions under the corporation's legislation that, in the Committee's opinion, restrict the ability of companies to raise capital cost effectively through a CSEF approach. These include:

- the terms of the personal offer small scale offering exemption. In particular, the fact that the number of issues is limited to 20 in any 12 month period; and
- the restrictions on the advertisement and hawking of securities.

In general terms the Committee advocates a relaxation of these provisions to enable a more broadly directed offer of securities to persons other than those to whom an offer of securities could be made without the need for a formal disclosure document.

While the Committee's inclination is to limit the compliance burden on companies seeking to utilise the CSEF regime, in order to maintain the integrity of the current regulatory framework (particularly as it relates to the benefits of relaxed regulation accorded to proprietary companies), the Committee suggests that any ability to utilise CSEF be limited to entities that are public companies limited by shares. The cost and expense of converting to a public company would not be great and while the additional costs of ongoing compliance as a public company may be greater for the issuer, the stricter corporate governance requirements (particularly around director conflicts of interest, disclosure of constitution and accounts with ASIC and potential application of the takeovers regime under the corporations legislation) provide a check and balance which could assist in protecting persons who will most likely be minority retail investors. Consideration should be given to reducing or eliminating the fees payable to ASIC for public company filings for CSEF entities.

4. **Question 4**

4.1 **Types of issuer**

The Committee agrees that the type of issuer should be restricted to 'genuine start ups'.

#### 4.2 **Types of permitted securities**

CSEF capital raisings should be restricted to an issue of ordinary shares only. Market practice would suggest that any subsequent capital raising from sophisticated investors may require the issue of preference shares with superior rights to the ordinary share capital. Investors holding ordinary shares would be entitled to the protection of the 'class rights' provisions under the *Corporations Act*. Appropriate disclosure should be made to CSEF investors as to the risks associated with future capital raisings causing dilution or a potential impact on the rights attached to the ordinary shares.

#### 4.3 **Maximum funds that an issuer may raise**

The Committee considers that there should be a cap on the amount of capital that an issuer utilising CSEF should be permitted to raise. In the Committee's experience, the application of the current personal offers small scale offering rules does not generally negatively impact on the ability of a company to raise a sufficient dollar amount of capital. Said another way, the \$2 million ceiling under that rule is not what is preventing early stage companies from successfully raising capital to grow their businesses. Rather, it is the restriction on the number of issues that can be made that is problematic in assisting companies to navigate the valley of death. However, we note that ASIC Class Order 02/273 in relation to business matching services provides relief for capital raisings up to \$5 million. The Committee recommends that such an amount (indexed as appropriate) would provide a workable threshold that would enable companies to utilise CSEF to address the valley of death concerns.

In addition to this restriction, the Committee advocates a limit on the amount that any one investor may invest under any CSEF exemptions. Further work should be undertaken prior to setting such limit, although the Committee expects that a limit of \$5,000 or less may be appropriate. However, the existing tests for exemption from the need for a formal offer document under section 708 of the *Corporations Act* should apply equally to a CSEF capital raising (such that there would be no limit on the amount that any individual could invest if they fall within one of those exemptions and are not a "retail" investor under the terms of a CSEF capital raising).

#### 4.4 **Disclosure by an issuer to investors**

The Committee considers that the standard for disclosure should be the same as for capital raisings by a proprietary company. Accordingly, companies should ensure that the information that they provide is not misleading or deceptive. The Committee **does not** advocate that such an exercise should require the same regulatory compliance as is currently required for public offers under the *Corporations Act*. However, the Committee considers that consideration could be given to requiring elements of any disclosure to be mandated in a particular form that is directed specifically at protecting less sophisticated CSEF Investors. In particular, it seems appropriate that a form of template disclosure document could be mandated (or at least the form of certain disclosures could be required to be included in order to identify key risks of which a less sophisticated retail investor should be aware).

#### 4.5 **Controls on advertising**

As with disclosure, the Committee advocates certain mandatory disclosures be required in conjunction with any advertisement of an offer of securities. However, issuers should have capacity to advertise their offer broadly. The purpose of a CSEF capital raising is to open up the offer to a broader range of potential investors. Restrictions on when and how a company can advertise will negate the impact of this approach. However, the Committee advocates that advertisements should be limited to information that identifies the name and business of a company, the investment opportunity and where the potential investor can obtain a formal offer document.

#### 4.6 **Liability of issuers**

The Committee considers that directors of issuers should be as liable for the issue of a misleading and deceptive offer or disclosure document as any other issuer. However, in considering what defences to a claim for liability should be provided, consideration must be given to the costs of complying with the current defences relating to misleading and deceptive statements; under the public company offer regime, the cost of these defences would be prohibitive and negate the effectiveness of a CSEF model. Further consideration should be given to a basis that provides appropriate defences to directors, who have acted honestly and reasonably in their conduct without putting them to the expense of having to undertake full verification as would currently be required for a public company issue under the *Corporations Act*.

Further consideration should also be given to the question of the inclusion of forecasts or other forward-looking information in any disclosure or offer document.

#### 4.7 **Ban on secondary market**

The Committee considers that a ban on secondary market sales is appropriate. CSEF is directed at new capital raisings for a company. If a relatively low threshold is placed on the amount an investor can invest (thereby protecting them from putting too many of their assets into one investment), it appears appropriate to then place a restriction on the time for which an investor must hold their investment. There should be 'carve-outs' from any such restriction in conjunction with a formal takeover offer in respect of the issuer.

### 5. **Question 5**

The Committee considers that the current regulatory regime as it applies to intermediaries (as adjusted pursuant to Class Order 02/272 ('**Business Matching Class Order**')) could be slightly adapted to provide the relevant exemptions necessary to facilitate CSEF capital raisings.

In short, the Committee does not believe that the operator of an internet based matching platform through which issuers can advertise offers to attract investors, should be required to hold a full AFSL or be taken to be advising on or dealing in securities merely by enabling investors and issuers to find each other. However, to the extent that the operator of such platform makes a market or moves beyond purely administrative actions in collating acceptances then they should be appropriately licensed and to the extent that additional services are provided to issuers in relation to the preparation of offering documentation or the sourcing of investors (outside of that online platform), they should be appropriately licensed.

### 6. **Question 6**

#### 6.1 **Permitted types of intermediary**

The Committee considers that there should not be any requirement for intermediaries to be registered or licensed to the extent that they simply provide an internet based platform for investors and issuers to find each other and do not otherwise provide any financial services that go beyond mere introduction services. In short, the Committee sees the role of unregistered intermediaries as being limited to facilitating the advertisement of offers of securities by an issuer and the administration of paperwork and processes in connection with the offer. To the extent that intermediaries have more than a passive role in providing a platform (such as advising the company utilising the CSEF regime or working with ASIC to prevent fraudulent use of the platform or involvement of bad actors) then the Committee's view is that such intermediaries should be required to be licensed in some manner (even if not subject to the full licensing regime under the *Corporations Act*).

The Committee advocates that particular restrictions be placed on issuers in connection with the holding of investment funds pending minimum thresholds being met.

## 6.2 **Intermediary matters related to issuers**

- 6.2.1 The Committee does not favour the use of restrictions as to the nature of projects or businesses that can raise funds through CSEF (subject to the usual restrictions on projects unable to be pursued under the law).
- 6.2.2 On the basis that intermediaries would, in the Committee's view, merely provide a platform by which investors and issuers can find each other (and a process to manage the purely administrative actions relating to an offer) the Committee is not convinced that they should be required to undertake any particular due diligence on issuers or their management.
- 6.2.3 On the basis that intermediaries would, in the Committee's view, merely provide a platform by which investors and issuers can find each other (and a process to manage the purely administrative actions relating to an offer) the Committee is not convinced that they should be required to undertake any particular due diligence on the business that issuers conduct.
- 6.2.4 The Committee does not believe that intermediaries should be held liable for losses resulting from misleading statements from issuers made on their websites.
- 6.2.5 The Committee does not believe that intermediaries should be held liable for losses resulting from fraudulent activities of issuers carried out through their websites save to the extent that the intermediary can be shown to have been a knowing or reckless party to the fraud.
- 6.2.6 The Committee does not see a problem with an intermediary being remunerated by reference to the amount raised through their platform (on the basis that the actions of an intermediary are to bring investors and issuers together and to undertake merely administrative actions in relation to the offer). However, the Committee recommends that restrictions are placed on intermediaries to avoid conflicts of interest by reference to any share ownership or other arrangements (particularly through the provision of other capital raising services).
- 6.2.7 Similar restrictions should be placed on issuers in relation to access to investment funds as currently apply under the *Corporations Act* in relation to conditional offers of securities.

## 6.3 **Intermediary matters related to investors**

- 6.3.1 The Committee does not see a need for screening or vetting by intermediaries of investors. The question of whether issuers should be required to comply with any anti-money laundering requirements needs consideration. Any restriction that is required must be cost effective for the issuer if it is not to negate the purpose of a CSEF regime.
- 6.3.2 The Committee recommends that intermediaries operating an internet based platform should be required to make certain mandated disclosures as to the risks of an equity investment and disclaimers as to liability resting with the issuers.
- 6.3.3 Intermediaries should be required to restrict offers to the caps on amounts raised and individual limits referred to above.

- 6.3.4 Intermediaries should not be permitted to offer investment advice to investors in relation to any particular offer.
- 6.3.5 There should not be a restriction on intermediaries soliciting transactions on their websites. The purpose of such intermediary sites is to create an effective market place by which investors can find issuers and vice versa. Market forces should be allowed to create the 'winners' of the best such providers.
- 6.3.6 Intermediaries should not control or manage investor funds, which funds should in the Committee's view flow to the issuer to be managed in accordance with the current requirements under the *Corporations Act* in relation to moneys being held on trust for investors pending the meeting of minimum acceptance conditions.
- 6.3.7 The Committee suggests that the provision of facilities to enable investors to communicate with the issuer could be built into a CSEF platform. However, this should be market driven and such communications should be at the direction and control of those parties (not the intermediary).
- 6.3.8 The Committee does not favour intermediaries being made liable to investors. Any liability that might arise to investors, should be dealt with in the ordinary course of contracting. The Committee suggests that issuers should satisfy themselves that an intermediary has the necessary insurance cover for fraud, negligence or other loss that an issuer may incur to an investor arising from the use of the intermediary.
- 6.3.9 The Committee recommends that disclosure of fees due to an intermediary should form part of the disclosure required in connection with an offer, but only to the extent that such information is material for an investor and is not misleading or deceptive in its own right.
- 6.3.10 The Committee does not see the intermediary's role as being to protect investors.

## 7. **Question 7**

Please see above the Committee's view that only ordinary shares should be capable of being offered under a CSEF offer and that full disclosure should be made to investors of the implications of future issues of shares of different classes. Disclosure as to the differences between shares and debt securities and legal and beneficial interests could be part of the generally mandated disclosures that the Committee has advocated.

## 8. **Question 8**

### 8.1 **Permitted types of investors**

The Committee does not consider that there should be any restriction on who may be a CSEF investor (subject to the current restrictions on who may legally hold shares in the company such as, for example, the standard rules of capacity).

### 8.2 **Threshold sophisticated investor involvement**

The Committee does not consider that sophisticated investors need to hold at least a certain threshold in an enterprise before it can make a CSEF offer to other investors. However, the Committee suggests a protection against mis-selling of a CSEF opportunity to a broad cross section of the community would be for any company that wishes to make use of a CSEF offer to be able to demonstrate a particular level of

equity contribution (or government grant funding) in the target business. In this way, a level of protection is offered in that the issuer has committed its own funds to the development of the underlying business at a level that ensures that there is something more than a mere idea that is being funded through the equity issue. Having said this, there is currently no restriction on the public at large funding a mere idea through the issue of some form of gift or donation. Arguably therefore, extending such an approach to CSEF actually provides a potential benefit to investors that they do not have under the current regime.

### **8.3 Maximum funds that an investor can contribute**

As noted above, the Committee advocates a limit on the amount that any one investor may invest under any CSEF exemptions. Further work should be undertaken prior to setting such limit, although the Committee expects that a limit of \$5,000 or less may be appropriate. However, the existing tests for exemption from the need for a formal offer document under section 708 of the *Corporations Act* should apply equally to a CSEF capital raising (such that there would be no limit on the amount that any individual could invest if they fall within one of those exemptions and are not a “retail” investor under the terms of a CSEF capital raising).

### **8.4 Risk acknowledgment by the investor**

The Committee agrees that the terms of any CSEF offer should require an investor to acknowledge the risk of the investment and the fact that they may lose all of their capital or subsequently find that the capital structure of the company could see their economic interest significantly decrease notwithstanding a successful business.

### **8.5 Cooling off rights**

The Committee does not support a “cooling off” mechanism in a CSEF offer, save for the requirement that each CSEF offer must set a condition for a minimum level of subscriptions (to ensure that the proposed business plan can be implemented).

### **8.6 Subsequent withdrawal rights**

The Committee does not support investors having a right to subsequently withdraw from the offer, subject to the specific terms of the offer. An issuer requires certainty if this form of capital raising is to be useful in addressing the ‘valley of death’ concerns.

### **8.7 Resale restrictions**

The Committee suggests that restrictions be placed on the ability of investors in a CSEF offer to on-sell their shares within a minimum period of time (likely 12 months), otherwise than in connection with a formal takeover transaction (or other formal merger).

### **8.8 Reporting**

The Committee does not consider that intermediaries should have any ongoing reporting obligations to investors. Any reporting or advertisement on the intermediaries website should be a matter for the intermediary and its contract with an issuer. Issuers should have obligations to report to investors in accordance with ongoing obligations under the *Corporations Act* (subject to any greater obligation agreed to pursuant to the terms of the offer).

## 8.9 **Losses**

The test for inadequate disclosure should be a misleading and deceptive conduct test, of a lesser standard than that applicable to general public offers. See our comments earlier. Recourse should be available against directors of the issuer (subject to appropriate defences that protect directors who have acted honestly).

## 9. **Question 9**

The Committee strongly advocates incremental adjustments to the Corporations Act to accommodate CSEF, rather than a stand-alone, self-contained regime. There needs to be a basis to integrate the use of CSEF without cutting across the existing framework in the Corporations Act for capital raising by proprietary companies and other public companies outside of the CSEF context.

## 10. **Question 10**

The Committee does not raise any other matters at this time.

In summary, the Committee supports liberalising the existing exemptions from the current fund raising provisions in order to provide for a CSEF structure that enables an entity to source small amounts of risk capital from a broad and diverse cross section of the public. This should, in all cases, be subject to appropriate checks and balances that seek to protect investors from inappropriate operations.

### **Further discussion**

The Committee welcomes further discussion of the foregoing. Please do not hesitate to contact the Committee Chair Marie McDonald on 03-9679 3264 or Gerry Cawson on 08-7220 0922 to arrange any further discussion.

Yours sincerely,



**Frank O'Loughlin**