

Proprietary companies win in equity crowdfunding bill

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Executive Summary

In Tuesday evening's budget, the Federal Government announced its plan to extend crowdsourced equity funding (**CSF**) to proprietary companies. A key criticism of the crowdsourced equity funding legislation (which will commence on 29 September 2017) was that it did not extend to proprietary companies. This meant that companies needed to convert their status to public companies in order to use the regime which was both costly and resulted in quite onerous compliance obligations.

This alert outlines what this means for small business and how this will open up CSF much more broadly in Australia if passed.

What changes might the CSF Bill bring?

The *Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Bill 2017* (**CSF Bill**) extends the CSF regime to proprietary companies fundraising from the public. Under the current CSF regime (which comes into effect on 29 September 2017) proprietary companies are not able to participate in a CSF offer and must first convert to (or be incorporated as) a public company. At present, proprietary companies are unable to have more than 50 shareholders or make a public offer, and so access to finance at their early stages to grow innovation has been inhibited. This is big news for the start-up community, and if implemented, brings Australia into line with the CSF regimes offered by countries including the UK, Canada, USA and New Zealand.

The following are the key practical matters that will impact the ability for proprietary companies to use CSF if the CSF Bill is passed:

Directorship

A proprietary company must have a minimum of two directors to be able to access the benefits of the CSF regime, the majority of which must ordinarily reside in Australia. Additional requirements may be specified in regulations from time to time. However, these are not as yet known.

Shareholder Caps

CSF shareholders will not be counted as part of the shareholder cap of 50 non-employee shareholders for classification as a proprietary company. This means a proprietary company will not be required to convert to a public company where, purely as a result of a CSF offer, the number of non-employee shareholders exceeds 50.

Additional ASIC Reporting Obligations

A proprietary company that undertakes a CSF offer will be required to include certain information as part of its company register and to notify ASIC of that information.

Financial Reporting

Proprietary companies who have an investment from CSF offers will be required to prepare annual

financial statements (which are compliant with accounting standards) and directors' reports while they have CSF shareholders. This is not generally required for a proprietary company who has not undertaken a CSF offer.

Auditing

Proprietary companies that have public investment in excess of \$1 million from CSF offers will be required to have their annual financial reports audited. Once this threshold is reached, steps must be taken by the company to have an auditor appointed within one month. Directors will be penalised for failure to do everything reasonably required to comply with the company's auditing obligations.

Related Party Transactions

Chapter 2E of the Corporations Act which applies to related party transactions will now apply to proprietary companies that have CSF shareholders. These provisions place a variety of limitations and compliance obligations when a company is dealing with related parties such as a director or controller and often require shareholder approval of such dealings.

Takeovers

Proprietary companies with CSF shareholders will be exempt from takeover rules in Chapter 6 of the Corporations Act, where the company's constitution provides a minimum level of protection to investors. This is proposed to be entrenched by way of a provision in the company's constitution that specifically requires someone who acquires a relevant interest in more than 40% of the voting shares in the company to offer to purchase all other voting shares in the company on the same terms within 30 days. If the company's constitution does not contain the appropriate minimum level of protection, then the usual takeover provisions will apply.

For a comprehensive summary of the key features of the Corporations Amendment (Crowd-sourced Funding) Act 2017 (CSF Act) (which comes into effect on 29 September 2017), please see our previous alert.

When will we see these changes come into effect?

The application of the CSF regime to proprietary companies will come into effect six months after the CSF Bill receives royal assent. While the CSF Bill has not as yet been passed and must go through the usual approval processes, the changes to be implemented by the CSF Bill are generally in line with those suggested by the opposition party in March of this year. If the CSF Bill is passed, the changes will evidently lag behind the implementation of the CSF Act on 29 September 2017.

Consultation Period

The closing date for submissions on the CSF Bill is Tuesday 6 June 2017. If you would like assistance with making a submission on the consultation materials, or would like to discuss how crowdsourced equity funding could benefit you or your company, contact HopgoodGanim Lawyers' [Corporate Advisory and Governance](#) team.

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