

5 February 2016

Committee Secretary  
Senate Economics Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Dr Dermody,

**Submission by the Australian Small Scale Offerings Board (ASSOB) to the Inquiry into Corporations Amendment (Crowd-sourced Funding) Bill 2015**

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**1. Summary**

- 1.1. The Australian Small Scale Offerings Board (ASSOB) is generally supportive of the Corporations Amendment (Crowd-sourced Funding) Bill 2015 (the **Bill**).
- 1.2. Having said that, ASSOB is concerned about the level of responsibility and costs this Bill imposes on intermediaries. In particular, ASSOB is concerned that the level of costs associated with compliance and associated risk to intermediaries may become too high for raises below \$500,000.
- 1.3. In ASSOB's submission, this Bill needs to make crowdfunding an attractive capital raising option for companies, while still balancing the interests of the intermediaries and investors. As an established crowdfunding platform, this Bill needs to provide us with the ability to build a business model that works and is viable. The issues that are raised in this submission will make it very hard if not impossible for intermediaries to develop a business model that is sustainable and so this legislation will not have the effect that is desired.
- 1.4. The parts of the Bill which ASSOB considers will be unworkable and detrimental to the development of equity based crowdfunding as an alternative funding source in Australia include:
  - a. We note that the requirements to obtain an AML are very onerous and would like some assurance that the ministerial right to waive such an obligation would be the rule rather than being exercised on a discretionary basis for each licence applicant.

We submit that requiring intermediaries to have an AML will make their businesses commercially unviable;

- b. With regard to the ‘gatekeeper’ obligations, ASSOB already conducts the majority of these checks (save for the assets and revenue test) as part of the due diligence process and would not publish offer documents if we were not satisfied as to those checks. However, we note that it is going to be a major exercise and significant cost to intermediaries to establish the written policies and procedures needed to demonstrate compliance and to ensure intermediaries’ staff are appropriately trained. Further, compliance monitoring will need to be built into the IT of the intermediary’s platform which will be a further cost;
- c. We are concerned about intermediaries finding appropriate insurance cover for this new licenced activity, as insurers are unlikely to be able to assess the risks involved in the newly regulated environment. There is no mention in the Bill of any safe harbor for directors or officers of either the Issuer or the intermediary, nor are there any exemptions from the normal AFSL requirements for intermediaries;
- d. The gross assets and turnover caps, which include related parties’ assets and turnover, are going to be extremely difficult for intermediaries to assess (particularly without audited accounts which from experience very few if any companies in the start-up and earlier stage actually have). Further, the Bill should not serve to put companies off having experienced directors on their boards due to the ‘related parties’ provision, therefore depriving these companies of invaluable experience and guidance from directors who have been involved in (and continue to be involved in) successful businesses;
- e. ASSOB considers that the enforced three-month closing date of each offer is absurd. Raising within the start-up and earlier stage market requires a considerable amount of work to explain to investors the new concept / product / service that is to be commercialized. Often it takes a concerted education campaign to potential investors to explain the offer - a campaign that takes well above the suggested 3 month time limit. ASSOB submits that offers ought to be able to be open for 12 months at least;
- f. ASSOB currently utilises an independent third party trust account and share registry who handles all applications and application monies for a fee. We submit that requiring the intermediaries to handle all application monies will place an additional and unnecessary financial burden on them;



- a. Subscribed to the ASSOB Platform (**Subscribers**);
  - b. Agreed prior to subscribing that they acknowledge the warnings as prescribed in the Class Order; and
  - c. By subscribing, have elected to be interested in receiving information about “offers of these kinds”.
- 2.5. ASSOB’s Subscribers are a broad spectrum of retail, overseas, sophisticated / professional investors and wholesale AFS licensees - inarguably the ‘crowd’, and we provide these potential investors with access to investment in a variety of equity based opportunities.
- 2.6. For those companies that successfully raise equity capital using the ASSOB Platform, we can report that on average they raise around \$750,000 and the average investment is approximately \$25,000 per investor.
- 2.7. ASSOB’s goal is to assist the Issuer in attaining the greatest chance of investment success by presenting quality promotional materials coupled with safeguarding the investor as much as possible from Issuer malfeasance. We publish material about individual Issuers (Profile Page) only after our Team has completed due diligence on the company and its directors (approving the suitability of the company for promotion) and after having reviewed and approved the investment material for inclusion (approving the suitability of the language and content of the investment opportunity for promotion).
- 2.8. ASSOB monitors the Issuer during its time on the ASSOB Platform to ensure its capital raising progress is correctly published on the Profile Page, to assess the excluded investor categories and the types of investment made to reflect the true state of the fundraising, and to ascertain if the company is adhering to its offer terms and corporate governance requirements.
- 2.9. ASSOB already has strict Rules of Admission which have to be adhered to by Issuers, including:
- a. Australian domiciled companies only, with public companies preferred (in 2016 ASSOB will accept unlisted public companies only due to the higher level of compliance, which affords as much protection to investors as possible);
  - b. Issuers must retain a professional share register and an external trust account operator;

- c. Every Director of the Issuer must declare to the veracity of the statements made in the offer document prior to it being published;
  - d. Quarterly activity statements must be published on the Issuer's Profile Page that includes:
    - i. A statement confirming solvency;
    - ii. A summary of how investor funds have been spent and if different to the 'Use of Funds' schedule (outlined in the offer document) an explanation of why those spending changes were made;
    - iii. A general summary of the company's progress toward the milestones that were stated in the capital raising offer document;
    - iv. Any changes, news or events (good or bad) that affect the company.
  - e. Issuers must provide their audited financial statements and copies of notices and minutes of Annual General Meetings to ASSOB which must be published on their Profile Page;
  - f. Issuers must maintain their ASSOB Profile Pages with up to date company information and are expected to deal with their shareholders and potential investors with the utmost commitment to true and fair disclosure.
- 2.10. The ASSOB platform comprises of an Offerboard for Issuers that are raising capital and a 'Compliance' listing for those companies whose capital raising has completed. Companies that are Compliance listed must continue to comply with the corporate governance requirements contained in ASSOB's Rules of Admission, even though they are no longer raising capital. ASSOB encourages Issuers to maintain a Compliance listing after their capital raising has concluded, as it provides investors with a platform through which they can easily monitor the companies in which they have invested and keeps the Issuer accountable to its new shareholders through the quarterly activity statements published on the Profile Page.
- 2.11. ASSOB underwent a management change in April 2015 and the new management team include:

- a. **Ashley Zimpel - Executive Chairman (56 yrs.) BA, History / Politics (University of WA):** Ashley has had extensive domestic and international stockbroking and investment banking experience with a career spanning over 30 years of establishing and developing capital market, corporate finance and public company businesses. He was a partner at stockbroker Hattersley Maxwell Noall, Executive Director at Australian Gilt Securities Ltd (Reporting Bond Dealer to the Reserve Bank of Australia), and held senior positions at Bankers Trust Australia (Senior Banker) and Macquarie Bank in Sydney. He was a co-founding partner and Executive Director of what is now Rand Merchant Bank Australia. He has served as Executive Chairman of ASX listed Aquaculture Company Marine Produce Australia which is today Australia's largest producer of sustainably farmed Barramundi.
- b. **Will Leitch - Executive Director and CEO (37yrs.) Bachelor of Business Valuation (University of South Australia, MBA (University of Adelaide):** Will completed his MBA in 2003 specialising in Corporate Strategy and Finance, and then worked in the UK for five and a half years for Alliance Boots (the parent entity for Boots the Chemist) and directly for Stefano Pessina, one of the top 200 richest people in the world. During this time, Will led corporate strategic reviews for a business with an annual turnover in excess of A\$40 billion per annum. Will also developed joint ventures and commercialised new business opportunities, models and product lines for Alliance Boots across South East Asia.
- Will returned to Australia, working for Viterro where he developed the Australasian Strategy for the company, as well as acquiring and disposing of companies across the globe and working with business units to drive strategic competitive advantages, innovation and company development. Prior to joining ASSOB Will established his own consultancy company where he specialised in commercialisation strategies for major Australian brand name companies, as well as start-up businesses.
- c. **Norman Virgo – Executive Director (63yrs.) Dip.Ed. (Uni SA) Dip FMBM:** Norman has over 25 years' experience in growing successful companies in the service, facilities, training and franchise areas following a short but successful high school teaching career. In 1985 he co-established a health club network that grew to be the Australian market leader and in 2001 attracted \$25m in private equity capital for a national expansion. He held key executive positions and moved to Perth in 2002 as part of the roll-out. In 2004 Norman was appointed CEO of "Safeguard" a major data

encryption venture whose parent was listed on the ASX. Returning to Adelaide in 2007 he joined a national independent finance company as Finance Manager. He was involved in capital equipment and aircraft financing, leasing, commercial mortgages, SMSF and business lending. In addition Norman was then appointed Investment Manager of a Debenture Company focused on structuring fixed interest securities to wholesale investors. Norman brings a wealth of practical and real-world experience to ASSOB.

- d. **Rodney Payne – Executive Director (57yrs.) B. EC. (Sydney University):** Rodney has extensive experience in Australian and Global financial markets. Rodney worked for Bankers Trust from 1983 through to 2000, including part of the Management Committee. Rod Managed Derivatives and Trading Risk and was a Global Partner. From 1987 – 1990, Rod Co-managed the set-up of the New Zealand arm of Bankers Trust as well as running all dealing operations for Bankers Trust New Zealand. Between 1990 – 2000, Rodney managed the trading businesses for Bankers Trust Australia.

From 2000 – 2002 Rodney was a Founder and Senior Managing Director, Zurich Capital Markets which he started with funding from Private Equity partners the Murdoch and Packer families. From 2003 to 2009 Rodney was a Director for Hokkaido Investors where he developed 100 apartments and 20 houses.

Rodney has been a Board Member of AFMA (Australian Financial Markets Association).

- e. **Greg Goodman – Executive Director and COO (67yrs.):** Greg established Compliance Australia, the holding company for Governance Advisory Services in early 1998 and is the major shareholder. Previously Greg held various positions with Bankers Trust Australia Limited over a twenty-one-year period, including Regional Head of Compliance, Head of Administration, Head of Human Resources and Chief Financial Officer. Greg is an experienced advisor, director, committee member and practitioner in corporate governance, risk management, compliance and business ethics. Greg was with Arthur Andersen as head of their compliance consulting



practice for approximately 2 years. His passion is in aligning corporate culture to support excellence in governance, risk and compliance programs.

Highlights of Greg's career include:

- Director New City Properties Australia Ltd;
- Director of Alliance Holdings Australia Ltd;
- Member of the Corval Partners Compliance Committee (current);
- Chairman of the Optimal Funds Management Compliance Audit and Risk Committee (current);
- Chairman of the Austcorp Group Audit, Risk & Compliance Committee;
- Chairman of the Austcorp Funds Management Compliance Committee;
- Chairman of the Tidewater Funds Management Compliance Committee (current);
- Chairman of the Mariner Securities Ltd Compliance Committee;
- Chairman of the BNP Paribas Asset Management Compliance Committee;
- Member of the Brookfield Multiplex Funds Management Compliance Committee;
- Managed the licence application and development of the corporate governance, compliance and risk programs for Hills Motorways;
- Managed the project for the Prime Infrastructure Trust in obtaining the first AFSL licence issued by ASIC;
- Managed the AFSL licence application for Duke Energy Australia Pty Ltd;
- Advised Westpac Institutional Bank on the establishment of their compliance program;
- Designed and implementing the compliance program for Westpac Broking;
- Provided compliance support services to the Responsible Entities for the Stadium Australia Trust and the MTM Entertainment Trust;
- Managed the review of the anti-money laundering program for Westpac Institutional Bank;
- Conducted a Corporate Governance review for Optimal Funds Management;
- Conducted a Corporate Governance review for Centric Wealth Group.

- f. **Allana Leitch - Legal Counsel (33yrs.) Bachelor of Laws and Legal Practice Flinders University (Hons):** Allana began her legal career with Minter Ellison in Adelaide in 2003. Allana then spent two years working for a boutique legal firm in London where she gained international experience. She returned and joined Finlaysons in Adelaide in 2010, when she worked on behalf of some of Australia's major banks and insolvency practitioners. Allana joined ASSOB Australia as their Legal Counsel in 2015.

- 2.12. ASSOB's new team is excited about crowdfunding in Australia and have a wealth of experience in financial services businesses. ASSOB's engagement of Greg Goodman, who has many years of experience as head of compliance for large companies such as Bankers Trust



Australia Limited and Arthur Andersen, shows ASSOB's evident dedication to issues of compliance.

### 3. **ASSOB's Submission on the Bill**

3.1. We note that this being an inquiry before the legislation committee, it does not have particular terms of reference and submitters are invited to address any aspects of the Bill that are of interest or concern to them. We will therefore address the various Divisions of the Bill by number with our comments below, with a note that we have also considered the associated Explanatory Memorandum and draft Regulations.

3.2. As a general comment on the Bill, we will note at the outset that in our experience, the capital that is required by Issuers is within the range of \$500,000 - \$5 million. It is our view that start-up and early stage businesses that want to impact on the national and international stage require funding that fits within this range and the only way they can achieve this is to sell equity. As such, we submit that that the Bill should be predominantly seeking to accommodate this section of the capital raising market (rather than focusing too heavily on the \$1 - \$500,000 range).

### 4. **Division 2: Eligibility Requirements**

4.1. We note that, with regard to eligibility requirements ss 738G and 738H set out:

- a. an eligible CSF company must satisfy gross assets and turnover caps (gross assets of Issuer and related parties less than \$5 million and consolidated annual revenue of less than \$5 million);
- b. 'Related parties' can include a holding company, subsidiary, sister company or an entity controlled by a person who controls the company or an associate of that person; and
- c. Neither the company, nor any related party, is a listed corporation.

4.2. ASSOB considers that it is going to be difficult assessing whether companies are eligible CSF companies due to the related parties provision in the assets and turnover caps, particularly without audited accounts (which from experience very few if any companies in the start-up and earlier stage actually have). We will need to obtain a very clear picture of the capital raising entity and all related companies together with trustworthy figures regarding assets and turnover of all related parties.

- 4.3. Our understanding of this provision is that it does not seek to prohibit eligible CSF companies from having directors who are also directors of a listed corporation or an unlisted company who exceeds the gross assets and revenue cap - so long as the common director is not in control of both entities (in accordance with s 50AA if the Act). If this interpretation is correct, then ASSOB supports it as Issuers need good directors with commercial experience in order to help them become successful businesses. Knowledge and skills in personnel are what most investors look at first, so they will not invest in companies if the directors have no business expertise.
- 4.4. The Bill should not serve to put companies off having experienced directors on their boards due to the 'related parties' provision, therefore depriving these companies of invaluable experience and guidance from directors who have been involved in (and continue to be involved in) successful businesses.
- 5. Division 3 - The Role and Obligations of a CSF Intermediary**
- 5.1. We note that CSF Intermediaries will be required to hold an Australian Financial Services Licence (AFSL) and may also be required to obtain an Australian Market Licence (AML).
- 5.2. ASSOB, in conjunction with its related Sponsor company ASSOB Capital Pty Ltd, was already considering obtaining an AFSL so does not have a problem with being required to hold an AFSL. However, we note that the requirements to obtain an AML are very onerous and would like some assurance that the ministerial right to waive such an obligation would be the rule rather than being exercised on a discretionary basis for each license applicant.
- 5.3. ASSOB submits that requiring intermediaries to have an AML will make their businesses commercially unviable.
- 5.4. We presume that the new class of financial product will sit inside the existing AFSL licensing regime, which requires the holder to have Responsible Managers with relevant experience in that product. In the assessment of Responsible Managers, will experience in running an equity crowdfunding platform pursuant to s 708 of the Act and the Class Order be sufficient?
- 5.5. With regard to the 'gatekeeper' obligations contained in s 738Q and Regulation 6D.3A.11, ASSOB already conducts the majority of these checks (save for the assets and revenue test) as part of the due diligence process and would not publish offer documents if we were not satisfied as to those checks. However, we note that it is going to be a major exercise and significant cost to intermediaries to establish the written policies and procedures needed to demonstrate compliance and to ensure intermediaries' staff are appropriately trained.

Further, compliance monitoring will need to be built into the IT of the intermediary's platform which will be a further cost.

- 5.6. In relation to the obligation to handle application monies appropriately (pursuant to s 738ZB), we note that currently ASSOB utilises an independent third party trust account and share registry so that investors are comfortable that their monies are being handled appropriately and in accordance with all anti-money laundering laws. We would like to continue using an independent third party for these services, and submit that requiring the intermediaries to handle all application monies will place an additional and unnecessary financial burden on them.
- 5.7. We note that there may be some difficulties with intermediaries finding appropriate Directors and Officers and Professional Indemnity insurance cover for this new licenced activity, as insurers are unlikely to be able to assess the risks involved in the newly regulated environment. There is no mention of any safe harbor for directors or officers of either the Issuer or the intermediary, nor are there any exemptions from the normal AFSL requirements for intermediaries.
- 5.8. Pursuant to s 912B(1) of the Act, *“If a financial services licensee provides a financial service to persons as retail clients, the licensee must have arrangements for compensating those persons for loss or damage suffered because of breaches of the relevant obligations under this Chapter by the licensee or its representatives.”* What does this mean for intermediaries? If we cannot find appropriate insurance to provide compensation, will the costs to Issuers (required by the intermediaries to cover the risk) be too high to make the crowdfunding worthwhile?
- 5.9. ASSOB fully supports there being no prohibitions on an intermediary's fees being calculated based on funds raised or an intermediary being remunerated in the form of securities in an issuer company in lieu of cash, so long as it is disclosed and prominently displayed on the platform.
- 5.10. We note that a 'crowd-funding service' will be provided to both the person seeking to apply for the CSF securities and the company making the CSF offer, and the Intermediary will be required to determine, at the time the crowd-funding service is provided, whether the person to whom the service provided is a 'retail client'. When assessing whether a company wanting to make a CSF offer is a 'retail client', does it include an assessment of the company's related parties? (For example, when assessing whether a potential Issuer is a small business, does this include the number of employees in a holding company, subsidiary company or sister company?)

**6. Division 3 - Process for Making a CSF Offer**

- 6.1. We note that the company must obtain certain consents of persons associated with the offer document prior to its publication (must obtain consent in writing of each person named as a director or proposed director, and obtain consent of anyone who has made a statement in the offer document). We presume that a 'statement' in this context will include a testimonial? This will make it difficult for Issuers to include testimonials in their Offer Document if the people that made the testimonial is liable to be sued for inducing someone else to invest in the company.
- 6.2. We note that s 738N of the Bill prescribes rules for when a CSF offer is 'open', when it may and when it must be 'closed', and the conditions that must be satisfied before an offer can be 'complete', including that the offer must be closed at the earliest of the following times:
- a. Three months after the CSF offer is made (the three month time limit cannot be extended for any reason);
  - b. The closing date of the offer;
  - c. When the intermediary considers the offer to be fully subscribed;
  - d. When the company withdraws the offer; or
  - e. When the company's gatekeeper obligations require the intermediary to remove the offer document from the platform.
- 6.3. ASSOB's main concern relates to that the proposed maximum amount of time that an offer can be open on the platform being 3 months - a time limit which is not able to be extended, even by issuing a Supplementary or Replacement Offer Document. Raising within the start-up and earlier stage market requires a considerable amount of work to explain to investors the new concept / product / service that is to be commercialized. In our experience, new Issuers require a sustained education campaign (often up to 20 weeks) until investors will feel comfortable enough to invest. As such, some raises on the ASSOB Platform take 12 months, particularly when explaining a new and complex business model, and sometimes the raises are extended via a supplementary or replacement offer document. ASSOB submits that offers ought to be able to be open for 12 months at least.

**7. Division 4 - Defective CSF Offer Documents**

- 7.1. We note that it is proposed pursuant to ss 738V-X (inclusive) that the intermediary has an obligation to notify all applicants that accepted the offer prior to its suspension that they have one month from the date of the notice in which to withdraw their acceptance and obtain a refund of application money paid.
- 7.2. In reality, ASSOB submits that this will mean that intermediaries will need to hold all monies until the raise has closed in order to protect against potential refunds in the event that an offer document is found to be defective and a supplementary or replacement offer document is required. This will mean that Issuers will need to wait until a raise has been completed to obtain their investment monies and will therefore make this type of funding unattractive to Issuers.

**8. Division 6 - Investor Protections**

- 8.1. With regard to the additional protections which are proposed to apply to retail clients:
- a. ASSOB supports smaller parcel sizes, however we would prefer an investor cap of \$20,000 per issuer via a particular intermediary within a 12 month period (rather than the \$10,000 in s 738ZC);
  - b. ASSOB also supports unconditional cooling-off rights in s 738ZD, however we would prefer it to be within 2 business days of the application being made (as we consider that 5 business days is unnecessarily long).
- 8.2. In relation to the amendments restricting the advertising of CSF offers or intended CSF offers, we note that pursuant to s 738ZG(6) an advertisement or publication will not contravene the advertising restrictions where it includes a statement that a person should, in deciding whether to make an application under the offer, consider the CSF offer document for the offer and the general CSF risk warning. ASSOB supports this approach.

**9. Division 7 - Corporate Governance Concessions**

- 9.1. We note pursuant to s 738ZI that a company that is registered as, or converts to, a public company after the commencement of the CSF regime will be eligible for the corporate governance and reporting concessions which apply for a maximum of 5 years, which include:
- a. Exemption from needing to hold an Annual General Meeting (AGM) under the usual rules;

- b. The option to only provide financial reports to shareholders online;
  - c. The company not being required to appoint an auditor or have audited financial reports until more than \$1 million has been raised from CSF offers or other fundraising offers requiring disclosure.
- 9.2. As noted earlier in this submission, ASSOB insists the Issuer companies convert to public companies prior to listing on the ASSOB platform in any event, as we consider that companies need to learn to be compliant and accountable to investors from the start. We do not consider that the exemptions to public company compliance proposed by the legislation are necessary, or alternatively would support a shorter exemption time (ie perhaps 2 years rather than 5).

We thank you for taking the time to consider our submission.

Yours faithfully,

Will Leitch  
Chief Executive Officer