



LEGALINK
INTERNATIONAL BUT PERSONAL

EQUITY CROWDFUNDING & PEER-TO-PEER LENDING

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INTRODUCTION

Crowdfunding has already an established and proven recognition worldwide as a powerful alternative financing tool. Three main points should be signaled in this respect. On the one hand, the volume of the crowdfunding market keeps increasing sharply at global level. On the other hand, the crowdfunding market is very dynamic as new crowdfunding platforms have recently started to operate. Finally, the projects to be financed through crowdfunding platforms are more and more diverse.

In this context, at a time when crowdfunding regulation is subject to discussion around the globe (namely in the context of the Proposal for a EU Crowdfunding Regulation), it seems important to assess the legal responses from various relevant jurisdictions, in respect to Equity Crowdfunding and Peer to Peer Lending. Such is the purpose of this publication.

This book is dedicated to the memory of Georg Van Daal, Former Deputy Head of Legalink FinTech Forum. Georg was a brilliant lawyer and a partner at Ekelmans & Meijer from 2014 to 2018. He was key to the structuring and to the development of this project but unfortunately could not live to see its final form. He is dearly missed.

October 2019

Paulo Câmara
Managing Partner of Sérvulo & Associados
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Equity Crowdfunding

For the purposes of the following, 'equity crowdfunding' means raising capital in an offering of shares (or instruments convertible into shares) through an online platform

1. Has your country introduced specific laws or regulations governing equity crowdfunding, or is it regulated under general securities or other laws?

Yes: Equity crowdfunding is regulated under a specific regime (part 6D.3A of the Corporations Act 2001) which prescribes less onerous disclosure requirements for CSF offers than for general securities offers and requires the CSF intermediary (the provider of the online platform by which investors can accept the offer) to perform a gatekeeper function in relation to the eligibility of the issuer to make a CSF offer and the adequacy of disclosure documents.

2. If your country regulates equity crowdfunding, what are the names of the government agencies responsible for regulating it?

Australian Securities and Investments Commission.

3. Are there limits on the amounts that can be raised by crowdfunding companies?

AUD 5 million in total over a 12-month period, which includes:

- (a) maximum amount sought to be raised by the CSF offer;
- (b) all amounts raised through CSF offers in the past 12 months (before the date that the new CSF offer is made) by the company and its related parties; and
- (c) all amounts raised by the company and its related parties in the past 12 months (before the date that the new CSF offer is made) through general securities offers that did not require a disclosure document because they were small-scale offers or made to sophisticated investors through a financial services licensee.

4. Are there restrictions on the types of purchasers to whom shares can be offered?

No, but retail investors cannot obtain more than AUD 10,000 in securities (valued at the offer/subscription price) in the same company via CSF offers in any 12-month period.

5. What information needs to be disclosed to potential purchasers, and are offer documents or marketing materials required to be registered or approved by your country's regulators?

CSF offers must be made under a CSF offer document – a simplified disclosure document prescribed exclusively for CSF offers. A CSF offer document must cover the following matters:

- standard-form risk warnings about the risks inherent in investing in securities via CSF offers;
- information about the offering company, including its directors and senior managers, organisational structure, capital structure, key business risks, key constitutional provisions affecting the rights and liabilities attached to securities being offered, summaries of financial statements of the company and, for proprietary companies, shareholder agreements that may affect the securities in the offering company;

- information about the offer, including a description of the securities being offered, the rights associated with the securities, the minimum and maximum subscription amounts, the period for which the offer is expected to be open and the company's intended use for the funds raised by the CSF offer; and
- information about investor protections, including cooling-off rights, the requirement for the CSF offer platform to contain a discussion board facility on which persons can make posts and have questions answered by the offering company, and the periodic financial reporting obligations of the offering company.

6. Is there any requirement for an equity crowdfunding platform and/or its operator, or a crowdfunding company, to be licensed or registered or to comply with any particular rules?

Operators of equity crowdfunding platforms – CSF intermediaries – must hold an Australian Financial Services Licence (AFSL) authorising them to provide a crowdfunding service. CSF intermediaries are thereby subject to the general AFSL conduct obligations, including to:

- provide financial services efficiently, honestly and fairly;
- manage conflicts of interest to avoid detriment to clients;
- maintain adequate compensation arrangements, including professional indemnity insurance; and
- maintain adequate dispute resolution systems, including membership of the Australian Financial Complaints Authority non-judicial dispute resolution scheme.

In relation to CSF offers, CSF intermediaries serve as a gatekeeper between offerors and investors, providing an additional layer of checks and verification relative to a general securities offer. CSF intermediaries have the following specific obligations:

- to verify the identifying information about the company and its directors, and that the company is eligible to make a CSF offer, prior to publishing a CSF offer document on its crowdfunding platform;
- to perform checks to a reasonable standard to verify that the CSF offer contains the required information and is expressed in a clear, concise and effective manner, prior to publishing a CSF offer document on its crowdfunding platform;
- to notify the offering company if, during the period that the CSF offer is open, it becomes aware that the CSF offer document is defective and close or suspend the CSF offer until the defect is remedied by publication of a supplementary or replacement CSF offer document;
- to present required risk warnings and acknowledgements to investors on its platforms;
- to provide a discussion board facility in relation to each CSF offer in which investors can make posts and ask questions, and the company can respond; and
- to hold application moneys in a separate trust account, pending either payment to the offeror on successful completion of the offer or repayment to applicants if the offer is unsuccessful.

7. Please provide any additional information you feel is important to understanding the regulation of equity crowdfunding in your country.

To be eligible to issue securities by way of CSF offer, a company must satisfy the following criteria:

- it is either an unlisted public company limited by shares or a proprietary company with at least two directors;
- a majority of its directors ordinarily reside in Australia;
- its principal place of business is in Australia;
- it meets the asset and turnover limits described below; and

- it does not have a substantial purpose of investing in securities, managed investment schemes or interests in other entities.

CSF offers may currently only be made by companies with consolidated assets less than AUD25 million and consolidated annual revenue less than AUD 25 million. Consolidated assets and consolidated revenue are determined in accordance with accounting standards and include the assets/revenue of related parties – related bodies corporate and entities controlled by a person who controls the company, and associates of that person.

‘Securities’ for the purposes of part 6D.3A of the Corporations Act include shares, debentures and call options over shares or debentures. The crowd-sourced funding provisions in part 6D.3A apply generally to any class of securities prescribed by the Corporations Regulations 2001. Presently, however, the only prescribed class of securities is fully paid ordinary shares in a company.

A company cannot make a CSF offer if it intends to use any of the funds raised to lend money to a related party, or for a related party to lend money to the company or to another related party.

8. Please identify a point of contact at your firm for equity crowdfunding-related enquiries.

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Peer-to-Peer Lending

For the purposes of the following, 'peer-to-peer lending' means lending by individuals to businesses or other individuals where an online platform is used to match lenders with borrowers.

1. Has your country introduced specific legislation or regulations governing peer-to-peer lending, or is it regulated under generally applicable laws?

No, there is no specific legislation dealing with peer-to-peer lending. However, the investment aspect of a peer-to-peer lending operation will generally be structured as a managed investment scheme and thereby regulated as a financial product under chapter 7 of the Corporations Act 2001, whilst if the lending side involves the provision of consumer credit, it will be regulated under the National Consumer Credit Protection Act 2009 (NCCP Act).

2. If your country regulates peer-to-peer lending, what are the names of the government agencies responsible for regulating it?

Australian Securities and Investments Commission.

3. Are there any limits on the amounts that can be lent?

No.

4. Are there any restrictions on the types of persons who can lend and/or borrow, or restrictions on the rate of interest that can be charged?

There are no restrictions on the types of persons who can borrow.

If the credit being provided is consumer credit, under the NCCP Act the maximum annual cost rate of the credit (an effective interest rate which takes into account non-interest fees) is 48%.

There is no general restriction on the types of persons who can lend under peer-to-peer lending schemes. If a peer-to-peer lending operation is a managed investment scheme, a person's ability to be a lender in that particular scheme depends on whether:

- the person is a retail or wholesale investor; and
- the operator is authorised to provide financial services relating to the peer-to-peer lending managed investment scheme to wholesale and/or retail investors.

5. Is there any requirement for the online platform and/or the lenders to be licensed or registered or to comply with any particular rules?

If a peer-to-peer lending venture is structured as a managed investment scheme, the operator must hold an Australian financial services licence (AFSL) authorising it to deal in interests in a managed investment scheme and to provide general advice in relation to the managed investment scheme. Lenders will be investors in the scheme and so do not require any licence or registration; they will be clients of the operator of the scheme.

If the peer-to-peer lending venture will involve the provision of consumer credit regulated by the NCCP Act (that is, credit provided wholly or predominantly for personal, household or domestic purposes, to purchase, renovate or improve residential property for investment purposes or to refinance credit that was provided wholly or predominantly to purchase, renovate or improve residential property for

investment purposes), the operator of the peer-to-peer lending venture must hold an Australian Credit Licence authorising it to provide consumer credit.

6. Are there any requirements applicable to marketing and promotional documents and activities?

There are no requirements specific to peer-to-peer lending distinct from the general issue of interests in a managed investment scheme or provision of regulated consumer credit.

7. Are there any particular consumer protection provisions that apply?

If the credit provided is consumer credit regulated by the NCCP Act, the NCCP Act and National Credit Code contain consumer protection provisions that require the operator of the peer-to-peer scheme to assess whether the credit is unsuitable for a consumer prior to providing the credit and prescribing procedures that they must follow in enforcing the credit contract in the event of default.

Credit provided for investment purposes (other than in relation to residential property), for business purposes or to non-natural persons is not regulated by the NCCP Act but may be subject to consumer protection provisions in the Australian Securities and Investments Commission Act 2001 if it is provided to a small business.

8. Please provide any additional information you feel is important to understanding the regulation of peer-to-peer lending in your country.

As it is not possible to assign legal title to part of a debt in Australia, peer-to-peer lending operations are invariably structured as unit trust managed investment schemes in which funds are raised from investors and used to lend to consumers. The operator of the scheme is the lender of record on a loan contract and holds the legal title to the loan on trust for investors in the scheme. It is possible to structure the scheme so that each individual loan represents its own class of units in the scheme, so that particular loans can be funded by particular investors as if those investors were directly lending to borrowers, and those investors are exposed to the returns and risks of those particular loans. Alternatively, classes of units can represent pools of loans, so that investors in those units are exposed to the risks and returns of multiple loans.

The issuing of interests in managed investment schemes and the provision of consumer credit are regulated under different legislative schemes, and so it is necessary to consider them separately.

9. Please identify a point of contact at your firm for enquiries related to peer-to-peer lending.

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