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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS AMENDMENT (CROWD-SOURCED FUNDING) BILL 2015

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Small Business and Assistant Treasurer, the Hon Kelly O'Dwyer MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
The Act	<i>Corporations Act 2001</i>
AML	Australian Market Licence
ASIC	Australian Securities and Investments Commission
AFSL	Australian Financial Services Licence
Bill	Corporations Amendment (Crowd-sourced Funding) Bill 2015
CAMAC	Corporations and Markets Advisory Committee
CSF	Crowd-sourced funding
IICA	Industry Innovation and Competitiveness Agenda
ICCPR	International Covenant on Civil and Political Rights

General outline and financial impact

Overview

Crowd-sourced funding (CSF) is an emerging form of funding that allows entrepreneurs to raise funds from a large number of investors. It has the potential to provide finance for innovative business ideas and additional investment opportunities for retail investors, while ensuring investors continue to have sufficient information to make informed investment decisions (Chapter 1).

Schedule 1 to the Corporations Amendment (Crowd-sourced Funding) Bill 2015 (the Bill) amends the *Corporations Act 2001* (the Act) to establish a regulatory framework to facilitate CSF by small, unlisted public companies. The CSF regime includes:

- eligibility requirements for a company to fundraise via CSF, including disclosure requirements for CSF offers (Chapter 2);
- obligations of a CSF intermediary in facilitating CSF offers (Chapter 3);
- the process for making CSF offers (Chapter 4);
- rules relating to defective disclosure as part of a CSF offer (Chapter 5); and
- investor protection provisions (Chapter 6).

Schedule 1 to the Bill also makes consequential amendments to the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to include a crowd-funding service, as defined in the Corporations Act, in the range of financial services covered by the ASIC Act

Schedule 2 to this Bill provides new public companies that are eligible to crowd fund with temporary relief from the reporting and corporate governance requirements that would usually apply (Chapter 7). These concessions provide temporary relief to these companies to support the CSF regime by reducing the potential barriers to adopting the required public company structure.

Schedule 3 to this Bill amends the Act to provide greater flexibility in the Australian Market Licence (AML) and clearing and settlement facility licencing regimes. Under the changes, the Minister would be able to provide that certain financial market and clearing and settlement facility operators are exempt from some of the requirements in Chapter 7 of the Act. Providing for this flexibility is necessary to enable secondary trading markets for CSF securities to be licensed once the CSF regime is established. The flexibility would also facilitate the development of other emerging or specialised markets as they would be subjected to a regulatory regime tailored to best address their activities.

Date of effect: The amendments in Schedules 1 and 2 to this Bill will commence on a day to be fixed by Proclamation. If the amendments do not commence within six months from the date of Royal Assent, they will commence on the day after the end of the period of six months after Royal Assent. The amendments in Schedule 3 will commence on the day after Royal Assent.

Proposal announced: The measures were included as part of the 2015-16 Budget.

Financial impact: The measure has the following financial impact:

<i>2015-16</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>
-2.6	-1.8	-1.7	-1.6

Human rights implications: This Bill raises a human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 10, paragraphs 10.1-10.12.

Compliance cost impact: The compliance costs associated with this Bill are \$54.0 million for the CSF model, and a further \$0.6 million for changes to the AML regime. This has been fully offset from within the Treasury portfolio.

Summary of regulation impact statement

Regulation impact on business

Impact: This Bill will remove regulatory barriers to CSF, and will make available a new funding source for businesses. It is expected that the overall ‘per business’ compliance costs for issuers that participate in crowd-sourced funding will decline. However, given the likely growth in the number of businesses raising funds through these arrangements, the aggregate compliance burden over the economy is expected to increase.

Main points:

- This measure recognises that regulatory impediments are the primary barrier to CSF in Australia. This Bill provides a model to reduce these regulatory barriers.
- Three models are discussed in the regulation impact statement – the model proposed by the Corporations and Markets Advisory Committee (CAMAC) 2013 review of crowd-funding in Australia, the model adopted in New Zealand, and a post-consultation model. These are considered against the status quo.
- The model in the Bill is the post-consultation model, which has the greatest net benefit.
- The regulation impact statement details the three stages of consultation undertaken over 2014 and 2015 in considering and refining this model. This included an options paper released in December 2014, a detailed consultation paper with a proposed model released in August 2015, and targeted consultation on the draft legislation in November 2015.
- The framework will be implemented through this Bill and associated regulations. The Government and the Australian Securities and Investments Commission (ASIC) will continue to monitor the regime to ensure the changes to the law are operating as intended.

Chapter 1 Background

Outline of chapter

1.1 This Chapter provides an overview of the Corporations Amendment (Crowd-sourced Funding) Bill 2015.

1.2 Unless otherwise stated, all references in this Chapter relate to the *Corporations Act 2001*.

Context of amendments

Policy background

1.3 Productivity growth is a core driver of economic growth. Fostering innovation is an important way of unlocking productivity, both through innovative products and ways of doing things, and through generating knowledge spill-overs from research and development that add to the general level of knowledge in the economy.

1.4 New funding models that flexibly support emerging firms have the potential to facilitate innovation and contribute to productivity growth. A number of recent reviews have identified the potential of CSF to provide new and innovative businesses with access to the finance they need to develop their product or service and grow.

- The Government's Industry Innovation and Competitiveness Agenda, released in October 2014, called for consultation on a regulatory framework for CSEF.
- The Murray Inquiry into Australia's financial system, released by the Government in December 2014, specifically recommended reducing regulatory impediments to crowdfunding by introducing graduated fundraising regulation. In its response to the Inquiry, released in October 2015, the Government accepted this recommendation.
- The Productivity Commission's Business Set-up, Transfer and Closure draft report, released in May 2015, also supported the introduction of a CSEF framework.

1.5 CSF is an innovative type of fundraising, typically online, that allows a large number of individual investors to make a small financial contribution towards a company.

1.6 CSF will provide an additional funding option for small businesses and start-ups in particular, that may otherwise struggle to obtain affordable finance.

1.7 Existing legislative arrangements can be a barrier to small businesses and start-ups making securities offers:

- For proprietary companies, a limit of 50 non-employee shareholders and prohibitions on making public offers of securities mean such companies are not able to access the large number of small-scale investors that would typically be targeted under an equity CSF campaign.
- Public companies are not subject to these restrictions, but must comply with substantially higher corporate governance and reporting obligations that may be too expensive to be an option for small business. Public companies making equity or debt offers must generally also use a disclosure document, which can be costly and time consuming to prepare.

1.8 While there are currently a small number of operators of online platforms offering investment in Australian start-ups and small businesses, the current legislative arrangements outlined above significantly limit the type of service they can offer, and do not fulfil the 'crowd' element of CSF.

1.9 Facilitating CSF would also provide additional investment opportunities to retail investors, who are generally unable to gain direct access to early-stage financing activities. However, small businesses and start-ups generally present higher risks for investors compared to larger, more established companies. CSF investments may be largely illiquid, reducing the ability of investors to exit their investment.

1.10 In order for CSF to be sustainable, any regulatory framework needs to balance reducing the current barriers to CSF with ensuring that investors continue to have an adequate level of protection from financial and other risks, including fraud, and sufficient information to allow them to make informed decisions.

Summary of new law

1.11 The amendments establish a new CSF regime by:

- inserting a new Part into Chapter 6D, which deals with:
 - eligibility requirements for a company that wants to make an offer under the CSF regime;
 - the process to make a CSF offer, including the role and obligations of the CSF intermediary; and
 - the prohibitions, liabilities and investor protections applying to CSF offers, including rules relating to defective disclosure documents and advertising restrictions.

1.12 The amendments generally disapply Part 6D.2, which contains provisions relating to prospectuses and other existing disclosure documents, and Part 6D.3, which deals with prohibitions, liabilities and remedies relating to offers of securities, by stating they do not apply to CSF offers, unless expressly provided for.

1.13 Part 6D.4, which sets out ASIC's powers in relation to offers of securities, has been amended so that it applies as required to CSF offers.

Chapter 2

Eligibility requirements

Outline of chapter

2.1 This Chapter sets out the eligibility requirements for making a CSF offer.

2.2 Unless otherwise stated, all references in this Chapter are to the *Corporations Act 2001* and the *Corporations Regulations 2001*.

Summary of new law

2.3 The amendments establish that a CSF offer is an offer that is expressly stated to be made under the CSF regime and that is eligible to be made under the regime by meeting all of the relevant requirements.

2.4 The amendments provide that the relevant requirements for making a CSF offer are:

- the offer must be for the issue of securities of the company making the offer;
- the company making the offer must be an ‘eligible CSF company’ at the time of the offer;
- the securities must satisfy the eligibility conditions specified in the regulations;
- the offer must comply with the ‘issuer cap’; and
- the company must not intend the funds sought under the offer to be used by the company or a related party of the company to any extent to invest in securities or interests in other entities or managed investment schemes.

2.5 The amendments also provide a regulation-making power to permit other eligibility requirements for a CSF offer to be prescribed.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A CSF offer is an offer that is expressly stated to be made under the CSF regime and that is eligible to be made under the regime.	An offer requiring disclosure is an offer made under Part 6D.2 that must comply with the requirements in Parts 6D.2 and 6D.3.
<p>An offer will be eligible to be made under the CSF regime where:</p> <ul style="list-style-type: none"> • the offer is for the issue of securities of the company making the offer; • the company making the offer is an ‘eligible CSF company’ at the time of the offer; • the securities satisfy the eligibility conditions specified in the regulations; • the offer complies with the ‘issuer cap’; and • the company does not intend the funds sought under the offer to be used by the company or a related party of the company to any extent to invest in securities or interests in other entities or managed investment schemes. 	An offer requiring disclosure is an offer made under Part 6D.2 that must comply with the requirements in Parts 6D.2 and 6D.3.

Detailed explanation of new law

Establishment of a CSF regime

2.6 The amendments establish the CSF regime: a new disclosure regime that can be used by eligible CSF companies to make certain offers of securities for issue. *[Schedule 1, Part 1, item 14, section 738A]*

2.7 The amendments provide that a company making a CSF offer is also able to offer securities of the same class pursuant to an offer that is exempt from disclosure under section 708. This allows a company to, for example, make a CSF offer of shares via an intermediary to crowd investors but also make an offer of shares to investors for whom disclosure is not required (such as venture capital funds and angel investors). *[Schedule 1, Part 1, item 14, section 738E]*

Offers eligible to be made under the CSF regime

2.8 A CSF offer is an offer that is expressly stated to be made under the CSF regime and that is eligible to be made under the regime by meeting all of the relevant requirements. *[Schedule 1, Part 1, item 14, section 738B]*

2.9 Part 6D.2, which contains the general rules regarding when disclosure is required for offers of securities, does not apply to CSF offers except as expressly provided for. *[Schedule 1, Part 1, items 7, 8, 9 and 10, heading to Part 6D.2, section 703B, section 704, and section 706]*

2.10 Part 6D.3, which contains the prohibitions, liabilities and remedies that usually apply to offers of securities requiring disclosure, does not apply to CSF offers except as expressly provided for *[Schedule 1, Part 1, items 11 and 12, heading to Part 6D.3 and section 725A]*. This is appropriate as the CSF regime establishes the prohibitions, liabilities and remedies relating to CSF offers. There is, however, an express provision that the CSF regime does not otherwise affect any liability that a person has under any other law *[Schedule 1, Part 1, item 14, section 738ZH]*.

Eligibility requirements for a CSF offer

2.11 The relevant eligibility requirements for a CSF offer are set out in detail below.

Offer of securities for issue

2.12 The first criterion is that the offer must be for the issue, not the sale, of securities; that is, a CSF offer can only cover primary issuances. *[Schedule 1, Part 1, item 14, paragraph 738G(1)(a)]*

Eligible CSF company

2.13 The second criterion is that the company making the offer must satisfy the definition of an 'eligible CSF company'. *[Schedule 1, Part 1, item 14, paragraph 738G(1)(b)]*.

2.14 A company will be an eligible CSF company where it satisfies the following conditions:

- the company is a public company limited by shares, with its principal place of business and majority of directors in Australia *[Schedule 1, Part 1, item 14, paragraphs 738H(1)(a), (b) and (c)]*;

- the company satisfies the gross assets and turnover caps [*Schedule 1, Part 1, item 14, paragraph 738H(1)(d)*];
- neither the company, nor any related party, is a listed corporation [*Schedule 1, Part 1, item 14, paragraph 738H(1)(e)*]; and
- neither the company, nor any related party, has a substantial purpose of investing in securities or interests in other entities or managed investment schemes [*Schedule 1, Part 1, item 14, paragraph 738H(1)(f)*].

Public company limited by shares

2.15 A public company limited by shares includes:

- a public company with share capital registered under Chapter 2A; and
- a body corporate that is registered as a public company under Part 5B.1 of the Act.

2.16 A body corporate that is registered as a public company under Part 5B.1 can include an incorporated foreign company. Such a company has, in effect, transferred its incorporation so that it can now effectively be regarded as a public company registered under the Act.

2.17 The following entities are ineligible to access the CSF regime as they will not satisfy the definition of public company limited by shares:

- proprietary companies, as they are explicitly excluded from the definition of ‘public company’ in section 9;
- foreign companies and registrable Australian bodies that are registered under Part 5B.2, as they will not meet the definition of a ‘company’ under section 9; and
- public companies that do not have share capital (for example, public companies limited by guarantee).

Principal place of business and majority of directors located in Australia

2.18 Given one of the policy objectives underpinning the CSF regime is to support Australian businesses’ access to capital, one of the eligibility requirements is that a company seeking to access the CSF regime must have a principal place of business in Australia at the time it is determining its eligibility to crowd fund.

2.19 For similar reasons, another eligibility requirement is that the company must have a majority of directors (not counting alternative directors) that ordinarily reside in Australia.

Complies with consolidated gross assets and turnover caps

2.20 As the CSF regime is intended to assist small-scale businesses, there are restrictions on the size of companies that can access the regime.

2.21 Firstly, the value of the consolidated gross assets of the issuer and any related parties must be less than \$5 million at the time the company is determining its eligibility to crowd fund ('gross assets test'). *[Schedule 1, Part 1, item 14, paragraph 738H(2)(a)]*

2.22 The gross assets cap is based on the value of consolidated gross assets of an issuer and any related parties for integrity reasons to ensure that the cap applies appropriately to related parties of the same group.

2.23 The meaning of 'related party' for the CSF rules is set out in paragraphs 2.44 to 2.47.

2.24 As well as satisfying the assets test, the company and any related parties must also have consolidated annual revenue of less than \$5 million ('turnover test'). *[Schedule 1, Part 1, item 14, paragraph 738H(2)(b)]*

2.25 The amendments are not prescriptive as to what 12-month period must be taken into account for the purposes of determining 'consolidated annual revenue'. This provides flexibility for an issuer as they can take into account the annual revenue for the 12-month period immediately prior to the time when determining eligibility to crowd fund or the 12-month period covered in the last financial statements (which may be particularly beneficial where the company's statements are audited).

Not a listed corporation

2.26 In order to be eligible for the CSF regime, neither the company, nor any related parties, can be a listed corporation *[Schedule 1, Part 1, item 14, paragraph 738H(1)(e)]*. A listed corporation is 'a body corporate that is included in an official list of a prescribed financial market' (section 9). Regulation 1.0.02A lists the following as prescribed financial markets: the Asia Pacific Exchange Limited; ASX Limited; Chi-X Australia Pty Ltd; National Stock Exchange of Australia Limited; and SIM Venture Securities Exchange Limited.

2.27 The rationale for excluding listed corporations is that a company that is listed has demonstrated an ability to bear the costs and compliance requirements associated with listing on a public market. These companies generally have access to other forms of equity raisings because of their listed and continuously disclosing status, such as rights issues and share purchase plans.

2.28 An unlisted company that previously made an offer requiring disclosure under Chapter 6D.2 is not excluded from making a CSF offer. Allowing such companies to access the CSF regime will potentially reduce the fundraising costs of these businesses and provide an alternative to making a traditional offer requiring disclosure.

Not an investment company

2.29 Neither the company, nor its related parties, can have a substantial purpose of investing in securities or interests in other entities or managed investment schemes. *[Schedule 1, Part 1, item 14, paragraph 738H(1)(f)]*

2.30 It would be inappropriate for an investment company, which will itself be investing in other unspecified entities, to undertake such activities in the lower disclosure environment provided by the CSF regime.

Securities prescribed in the regulations

2.31 The securities that are the subject of the CSF offer must be securities of a class prescribed in the regulations. *[Schedule 1, Part 1, item 14, paragraph 738G(1)(c)]*

2.32 Allowing CSF eligible securities to be specified in the regulations will enable the CSF regime to be restricted to a limited range of securities, which is appropriate given crowd-funding is a relatively new development in Australia, but will provide flexibility to permit the expansion of crowd-funding to a broader range of securities in the future.

Offer complies with issuer cap

2.33 Consistent with the policy intent that the CSF regime be used to assist start-ups and innovative small businesses to access capital, and recognising that a CSF offer does not require the same level of disclosure as existing Chapter 6D disclosure documents, there is a cap on the maximum amount of funds that an issuer company (and any related parties) can raise under the CSF regime. *[Schedule 1, Part 1, item 14, paragraph 738G(1)(d)]*

2.34 The amendments set the ‘issuer cap’ at \$5 million in any 12-month period with a regulation-making power to adjust the cap in the future in light of the experience with CSF. *[Schedule 1, Part 1, item 14, subsection 738G(2)]*

2.35 A company seeking to make a CSF offer must satisfy the issuer cap, which is calculated by taking into account:

- the maximum subscription amount sought by the company under the current CSF offer;
- all amounts raised from any other CSF offers made within the past 12 months by the company or its related parties; and
- all amounts raised within the past 12 months from small scale personal offers (subsection 708(1)) and certain offers made via an Australian Financial Services Licence (AFSL) holder (subsection 708(10)) by the company or its related parties.

2.36 The table below summarises which offers count towards the issuer cap.

Table 2.1: Which offers count towards issuer cap

<i>Timing condition</i>	<i>How raised</i>	<i>By issuer</i>	<i>By related party</i>
	Funds sought under current CSF offer	Yes	N/A, as a company and its related parties cannot have more than one CSF offer open at a time
Only if CSF offer <i>made</i> within 12 months of current offer	Funds raised from other CSF offers	Yes	Yes
Only if funds <i>raised</i> within 12 months of current offer	Funds raised from subsection 708(1) and subsection 708(10) offers.	Yes	Yes
	Funds raised from other offers that do not require disclosure, other than subsection 708(1) and subsection 708(10) offers.	No	No

2.37 The issuer cap takes into account the maximum funds *sought to be raised* under the current CSF offer as this is potentially the amount that could be raised by the issuer under the CSF offer.

Which offers within the past 12 months count towards the issuer cap

2.38 With regard to previous offers, the issuer cap disregards amounts raised from offers that are exempt from disclosure, such as offers to sophisticated investors (subsection 708(8)) or professional investors (subsection 708(11)). This reflects the policy intent that the issuer company should continue to have access to funding from wholesale investors (such as angel investors and venture capital funds).

2.39 There are two types of offers that are exempt from disclosure which *do* count towards the issuer cap. These are 708(1) offers (small scale personal offers) and subsection 708(10) offers (offers made via an Australian financial services licensee where the licensee is satisfied on reasonable grounds that the person to whom the offer is made has previous experience in investing that allows them to assess the merits and risks of the current offer).

2.40 The rationale for including the amounts raised under small scale personal offers and subsection 708(10) offers in the issuer cap is that the funds raised under such offers may involve retail investors who are very similar to crowd investors. Not including amounts raised under these offers could mean an issuer company could, in effect, raise funds in excess of the issuer cap, with a lower level of disclosure from crowd investors and other retail investors, who are not sophisticated investors and would otherwise require a disclosure document under Part 6D.2.

Distinction between offers made and funds raised

2.41 In the case of previous offers, there is a difference between how amounts raised under a previous CSF offer and amounts raised under a previous subsection 708(1) or subsection 708(10) offer count towards the issuer cap. In the case of a previous CSF offer, it is necessary to look at when the offer was *made*, not when the amount raised under the offer was *received*. A CSF offer is made when the CSF offer document relating to the offer is first published on the offer platform of an intermediary [*Schedule 1, Part 1, item 14, subsections 738L(6) and 738N(1)*].

2.42 In the case of a subsection 708(1) or subsection 708(10) offer, funds *raised* within 12 months of the current CSF offer contribute towards the issuer cap [*Schedule 1, Part 1, item 14, paragraph 738G(2)(c)*]. Funds from non-CSF offers are included based on when the funds were raised, not when the offer was made, in recognition of the fact there may be some difficulties, in practice, with identifying when the offer was made but there would be less difficulty in identifying when funds relating to the previous offer were received by the company.

Example 2.1 Calculation of issuer cap — previous offers

NewTech Limited is intending to make a CSF offer on 14 October 2019. The minimum and maximum amounts for that offer are \$1 million and \$2.3 million respectively.

NewTech previously made a CSF offer on 10 August 2018, which was completed on 15 November 2018. A total of \$2 million was raised under that offer.

In the period 14 October 2018 to 6 January 2019, NewTech received amounts of \$1.7 million from small scale personal offers made on 23 August 2018.

In calculating the amounts that contribute towards the issuer cap, NewTech will count the maximum amount sought to be raised under the current offer, which is \$2.3 million.

In relation to the previous offers, NewTech will disregard the amounts raised under the CSF offer of 10 August 2018 as that offer was made more than 12 months prior to the current CSF offer. In relation to the previous small scale offer, NewTech will include the amount of \$1.7 million as this was the amount received from small scale offers in the 12 month period prior to the current CSF offer.

The total amount counting towards the issuer cap is \$2.3 million + \$1.7 million = \$4 million. As the total does not breach the issuer cap, the current CSF offer will be an eligible CSF offer (subject to the other eligibility requirements being satisfied).

Certain offers of related parties are included in the issuer cap

2.43 The issuer cap takes into account amounts raised under certain previous offers of the company's related parties.

- 2.44 A related party of a company seeking to make a CSF offer is:
- a ‘related body corporate’ of the company; or
 - an entity controlled by a person who controls the company or an associate of that person. [*Schedule 1, Part 1, item 14, subsection 738G(3)*]

- 2.45 A related body corporate (defined in section 50) of an issuer company would be:
- its holding company;
 - its subsidiary; or
 - a subsidiary of the holding company of the body corporate (a ‘sister’ company).

2.46 An entity controlled by a person who controls the issuer company or an associate of that person will pick up ‘sister’ entities of the company that are not body corporates.

2.47 The definition of ‘related party’ in the CSF regime is based on the approach in subsection 709(4) which applies for companies seeking to raise funds using an offer information statement (which has a cap on total funds raised of \$10 million which applies to the company, its related body corporates and entities controlled by a person who controls the company or associates of such a person).

Anti-avoidance determinations

2.48 The amendments provide ASIC with a power to make a determination that transactions, assets, or revenue of closely related bodies should be aggregated [*Schedule 1, Part 1, items 20 and 21, paragraphs 740(1)(b) and 740(2)(d)*]. A consequence of the determination is that a company may no longer be eligible to make a CSF offer as it will exceed the issuer cap, gross assets or turnover tests.

Funds not to be used for investing in another entity or scheme

2.49 The policy intent is that the CSF regime, given it involves a lower level of disclosure to investors than other types of public offers, cannot be used to raise money for ‘blind pools’.

2.50 This policy intent is achieved by excluding an offer from being a CSF offer where the funds raised are intended to be used to any extent for investing in securities or interests in other entities or schemes *[Schedule 1, Part 1, item 14, paragraph 738G(1)(e)]*. The content requirements of the CSF offer document, which will be specified in the regulations, could require the company to include in the CSF offer document a description of how it intends to use the proceeds from the offer.

Consequences where the offer is not eligible to be a CSF offer

2.51 Where an offer does not satisfy the eligibility criteria to be a CSF offer, it will default to being an offer of securities requiring disclosure under Part 6D.2, unless one of the exemptions from disclosure in section 708 applies.

2.52 Where a person makes an offer of securities requiring disclosure under Part 6D.2 but does not lodge the required disclosure document with ASIC, the person will commit an offence under subsection 727(1), which carries a maximum penalty of 200 penalty units, five years imprisonment or both.

Consequential amendments

2.53 Consequential amendments have been made to section 9 to insert a number of new definitions for concepts relevant to the CSF regime. *[Schedule 1, Part 1, items 1, 2, 3, 4, 5, 6, section 9]*

2.54 A consequential amendment has been made to subsection 1311(1A) to add the new Part 6D.3A (containing the provisions relating to the CSF regime). The effect is that a person will only commit an offence under the CSF regime where a specific penalty has been set out in Schedule 3 to the Act. *[Schedule 1, Part 1, item 33, paragraph 1311(1A)(dba)]*

Chapter 3

The role and obligations of a CSF intermediary

Outline of chapter

3.1 This Chapter sets out the role and obligations of a CSF intermediary in facilitating a CSF offer.

3.2 Unless otherwise stated, all references in this Chapter relate to the *Corporations Act 2001* and the *Corporations Regulations 2001*.

Context of amendments

3.3 The CSF intermediary occupies a central role in the CSF regime. Under the regime, all CSF offers must be made via the ‘platform’ of a CSF intermediary.

Summary of new law

3.4 A person that intends to operate a crowd-funding platform (the intermediary) will be required to hold either an Australian Financial Services Licence (AFSL) and may also be required to obtain an Australian Market Licence (AML).

3.5 For intermediaries required to obtain an AFSL, the Bill creates a new type of financial service, being the crowd-funding service.

3.6 The intermediary has a number of obligations under the CSF regime, including:

- ‘gatekeeper’ obligations (which set out when the intermediary must not publish or continue to publish an issuer’s offer document);
- the obligation to provide a communication facility;

- the obligation to prominently display on the platform the CSF risk warning, information on cooling-off rights, and fees charged to and interests in an issuer company;
- the obligation to ensure retail clients receive the benefit of the relevant investor protections (cooling-off rights, the investor cap, the risk acknowledgement) and that the obligation to comply with the prohibition on providing financial assistance is adhered to; and
- the obligations to close or suspend the offer as required, and handle application monies appropriately.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A person that intends to operate a crowd-funding platform (the intermediary) will be required to hold an Australian Financial Services Licence (AFSL) and may also be required to hold an Australian Market Licence (AML).	No equivalent.
A new financial service has been created: a crowd-funding service.	No equivalent.
<p>A CSF intermediary has a number of obligations under the CSF regime, including:</p> <ul style="list-style-type: none"> • ‘gatekeeper’ obligations; • the obligation to provide a communication facility; • the obligation to prominently display on the platform the CSF risk warning, information on cooling-off rights, and fees charged to and interests in an issuer company; • the obligation to implement systems to ensure retail clients receive certain additional investor protections; and • the obligations to close or suspend the offer as required, and handle application monies appropriately. 	No equivalent.

Detailed explanation of new law

Overview — the role and obligations of an intermediary

3.7 The amendments define the role of the CSF intermediary, the licensing requirements for an intermediary and the various obligations with which the intermediary must comply. The amendments are explained in detail below.

The CSF intermediary must be licensed

3.8 The Bill creates a new type of financial service: a crowd-funding service. A person that intends to provide a crowd-funding service must hold an AFSL that expressly authorises the provision of a crowd-funding service [*Schedule 1, Part 1, items 14 and 25, section 738C and paragraph 766A(1)(ea)*]. Depending on the nature of the activities carried out by the person, they could also be considered to be operating a financial market and therefore be required to hold an Australian Market Licence (AML).

3.9 The policy intent is that the provision of the crowd funding service should be subject to the obligations and protections, particularly as they apply to retail clients, of the AFSL regime (refer to paragraphs 3.17 to 3.18). Therefore, a person that holds an AML would not satisfy the definition of CSF intermediary unless they also held an AFSL that expressly authorised the provision of the crowd-funding service. This means that a person that holds an AML cannot rely on the exemption in paragraph 911A(2)(d) for incidental financial services to provide a crowd-funding service (as they would not satisfy the definition of CSF intermediary). Under the CSF regime, a CSF offer can only be made by publishing a CSF offer document on a platform of a CSF intermediary [*Schedule 1, Part 1, item 14, section 738L*].

3.10 The Minister has a power under section 791C that can be used to exempt operators from the obligation to hold an AML. Schedule 3 to the Bill provides the Minister with additional exemption powers that can be used to exempt certain financial market operators from specified AML obligations, allowing the AML regime to be tailored to particular markets, which could include intermediaries operating crowd-funding services.

Meaning of crowd-funding service

3.11 A person will provide a crowd-funding service if:

- a CSF offer document for a CSF offer of securities of a company is published on a platform operated by the person; and
- applications may be made to the person for the issue, by the company, of securities pursuant to the offer. *[Schedule 1, Part 1, items 22 and 27, section 761A and subsection 766F(1)]*

3.12 A crowd-funding service is also taken to include performing all aspects of the role of CSF intermediary as required under the CSF regime *[Schedule 1, Part 1, item 27, subsection 766F(2)]*. This means, for example, that a CSF intermediary will be taken to provide a crowd-funding service where it performs its gatekeeper obligations, holds application money on trust and operates the communication facility.

3.13 Deeming such activities to be part of the crowd-funding service means that the general obligations in section 912A (such as that the financial service must be provided fairly, efficiently and honestly) will apply to the CSF intermediary in respect of all activities it performs as part of its role of CSF intermediary.

3.14 While there is no explicit carve out from the definition of crowd-funding service applying to agents or employees of a CSF intermediary, agents and employees will not be required to obtain a separate AFSL as they will come within the scope of the exemption in paragraph 911A(2)(a). This paragraph provides that a person who provides a financial service as a representative of an AFSL holder whose licence covers the financial service is exempt from the requirement to hold an AFSL in relation to the financial service. A representative includes: an authorised representative; an employee or director of the licensee; or any other person acting on behalf of the licensee (paragraph 910A(a)).

When and to whom is a crowd-funding service provided

3.15 The Bill makes it clear that the crowd-funding service is provided to both the person seeking to apply for the CSF securities and the company making the CSF offer. *[Schedule 1, Part 1, item 27, subsections 766F(3) and (4)]*

3.16 In the case of a person seeking to apply for CSF securities, the crowd-funding service is provided at the time when the person first uses the application facility to apply for an offer [*Schedule 1, Part 1, item 27, subsection 766F(3)*]. In the case of an issuer company, the crowd-funding service will be provided at the time the company enters into the hosting arrangement for the offer [*Schedule 1, Part 1, item 27, subsection 766F(4)*].

3.17 The intermediary must determine, at the relevant time the crowd-funding service is provided, whether the person to whom the service is provided is a 'retail client'. This is important as certain additional protections and obligations under Chapter 7 are applicable to retail clients.

3.18 A person that is provided a crowd-funding service as a retail client will be entitled to certain additional protections under Chapter 7. The intermediary must ensure that they:

- provide a Financial Services Guide to an applicant or issuer that is a retail client, generally as soon as practicable after it becomes apparent to the intermediary that the financial service is likely to be provided (subsections 941A(1) and 914D(1));
- have a compliant internal dispute resolution scheme and are a member of an external dispute resolution scheme (paragraph 912A(1)(g) and subsection 912A(2)); and
- have arrangements for compensating retail clients for loss or damage suffered because the licensee breached its licensing obligations (section 912B).

3.19 An investor considered to be a retail client under Chapter 7 in relation to the crowd-funding service will also be a retail client for the purpose of the CSF offer, which will entitle them to certain additional investor protections such as cooling-off rights, risk acknowledgments and the investor caps [*Schedule 1, Part 1, item 23, subsection 761G(8)*]. These protections are discussed in further detail in Chapter 6 of the Explanatory Memorandum.

3.20 A person that is not considered to be a retail client will be a wholesale client (and would not, for example, be subject to the investor cap).

When a crowd-funding service is provided to a person as a retail client

3.21 Subsection 761G(7) contains the tests for determining when a person will be a retail client in relation to the crowd-funding service. The person to whom the crowd-funding service is provided will be a retail client unless one or more of the following tests are satisfied:

- the product-value test: the price of the financial product (the securities on offer) or the value of the financial product to which the financial service relates, equals or exceeds \$500,000 (paragraph 761G(7)(a) and Regulations 7.1.18 and 7.1.19); or
- the securities or crowd-funding service is provided for use in a business other than a small business (paragraph 761G(7)(b)). A small business is defined as a business employing less than 20 people, unless the business includes the manufacture of goods, where the business must employ less than 100 people (subsection 761G(12)); or
- where the securities or the crowd-funding service is not provided for use in connection with a business, the person acquiring the securities or crowd-funding service gives the intermediary a certificate prepared by a qualified accountant (defined in section 9) within the preceding two years that states that the person has net assets of \$2.5 million, or gross income in the last 2 financial years of at least \$250,000 (paragraph 761G(7)(c) and Regulation 7.1.28); or
- the person to whom the crowd-funding service is provided is a professional investor as defined in section 9 (paragraph 761G(7)(d)). A professional investor includes an Australian financial services licensee, a listed entity, a bank, or a person that has or controls gross assets of at least \$10 million.

3.22 Subsection 761G(8) provides that, in the case of a prosecution for any offence based on a provision in Chapter 7, if the defendant (in this case the intermediary) alleges that the financial service was provided to the person as a wholesale client, the defendant will be required to raise evidence that the person to whom the crowd-funding service was provided was not a retail client. Imposing the evidential burden on the defendant is appropriate given the policy intent is to ensure that persons that acquire financial products and financial services as retail clients have the benefit of the additional protections in the CSF regime and Chapter 7 more generally.

3.23 In the case of non-criminal proceedings, subsection 761G(9) provides that the presumption is that the financial product or crowd-funding service is provided to a person as a retail client unless the contrary is established.

3.24 The Bill provides that section 761GA, which would otherwise provide a mechanism whereby a financial services licensee could certify that a client has sufficient expertise to be treated as wholesale, does not apply to the provision of a crowd-funding service [*Schedule 1, Part 1, item 24, section 761GA*].

‘Dealing’ does not include providing a crowd-funding service

3.25 Certain activities of a CSF intermediary, which relate to arranging for the issue of securities, would also fall within the definition of the ‘dealing’ financial service in section 766C. To address the overlap, the Bill carves out a crowd-funding service from the dealing financial service [*Schedule 1, Part 1, item 26, subsection 766C(2A)*]. The result is that a CSF intermediary will need only one AFSL authorisation to operate a crowd-funding platform and will only need to consider when and to whom the one crowd-funding service is provided for the purposes of their obligations under the CSF regime and Chapter 7 more generally.

Carve out from the definition of managed investment scheme

3.26 The amendments exclude the provision of a crowd-funding service from the definition of a managed investment scheme (MIS). This is to ensure the CSF intermediary is not subject to obligations under both the CSF regime and the MIS rules. [*Schedule 1, Part 1, item 2, section 9*]

Obligations of a CSF intermediary

3.27 The legislation imposes a number of obligations on the CSF intermediary, referred to as a ‘responsible intermediary’ in relation to a particular CSF offer [*Schedule 1, Part 1, item 14, subsection 738L(5)*]. The intermediary must comply with:

- the ‘gatekeeper’ obligations (which set out when an intermediary must not publish, or continue to publish, the offer document of an issuer company on its platform);
- the obligation to provide a communication facility;
- the obligation to display the CSF risk warning, display cooling-off rights and appropriately disclose fees and interests in an issuer company on the platform;

- the obligation to implement systems and procedures so that retail clients receive the additional investor protections in the CSF regime (cooling-off rights, investor cap, the risk acknowledgement and the prohibition on providing financial assistance); and
- the obligations to close or suspend the offer as required, and handle application money appropriately.

Gatekeeper obligations

3.28 An intermediary must comply with certain ‘gatekeeper’ obligations [*Schedule 1, Part 1, item 14, section 738Q*].

Intermediary must conduct prescribed checks

3.29 Prior to publishing an offer document on its platform, an intermediary must conduct certain checks, which will be specified in the regulations (‘prescribed checks’). [*Schedule 1, Part 1, item 14, subsection 738Q(1)*]

3.30 The intermediary must conduct the checks to a ‘reasonable standard’ [*Schedule 1, Part 1, item 14, subsection 738Q(1)*]. The amendments include a regulation-making power that could be used to prescribe what would be considered a reasonable standard for some or all of the checks, thereby providing certainty to intermediaries conducting the checks [*Schedule 1, Part 1, item 14, subsection 738Q(2)*].

3.31 An intermediary that fails to conduct the checks, or fails to conduct the checks to a reasonable standard, will commit a strict liability offence, punishable by a maximum penalty of 50 penalty units [*Schedule 1, Part 1, item 14 and 34, subsection 738Q(3) and item 245E in the table to Schedule 3*].

3.32 Strict liability, and the level of penalty, is appropriate, because:

- the intermediary has a central role in the CSF regime and the obligation to conduct the prescribed checks to a reasonable standard is necessary to maintain the integrity of the CSF regime;
- conducting the checks and the standard to which the checks are conducted is entirely dependent on the conduct of the intermediary who is liable for the offence;

- the proposed penalty for the offence is consistent with the Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which specifies that a strict liability offence should be punishable by a maximum penalty of 60 penalty units with no term of imprisonment.

3.33 Where an intermediary fails to conduct a check, or fails to conduct a check to a reasonable standard, the intermediary is taken to have knowledge of any matter that they would have had knowledge of had they conducted the check to a reasonable standard [*Schedule 1, Part 1, item 14, subsection 738Q(4)*]. This deemed knowledge is relevant in determining whether the intermediary has complied with its obligations to not publish, or not continue to publish, the CSF offer document (discussed below).

3.34 While the regulations will prescribe the checks that must be conducted by an intermediary prior to publishing a CSF offer document, they are not intended to limit the checks or information that may be sought by an intermediary from the issuer company or its officers.

3.35 The amendments make it an offence for an officer or employee of a company to provide information that they know to be false or misleading in a material particular, or that omits a matter or thing which renders the information misleading in a material particular. [*Schedule 1, Part 1, item 32, paragraph 2(1)(c)*]

Intermediary must not publish or continue to publish offer document if not satisfied as to certain matters

3.36 A CSF intermediary must not publish, or continue to publish, an offer document if it:

- is not satisfied as to the identity of the company making the offer or of its directors or other officers;
- has reason to believe that any of the directors or other officers of the company are not of good fame or character;
- has reason to believe that the company or directors or other officers of the company have, in relation to the offer, knowingly engaged in conduct that is misleading or deceptive or likely to mislead or deceive;
- has reason to believe that the particular offer is not eligible to be made as a CSF offer [*Schedule 1, Part 1, item 14, subsection 738Q(5)*].

3.37 The purpose of the gatekeeper obligations is not to require the intermediary to conduct exhaustive due diligence on the company, its directors or other officers, or the company's business. Such an obligation would impose a relatively high burden on an intermediary, with potential flow-on costs for issuers seeking to access the intermediary's platform.

3.38 Rather, the gatekeeper obligations are intended to ensure that an intermediary does not publish, or continue to publish, the offer document in four specific circumstances. The basis for not publishing or continuing to publish the offer document is dependent on the actual knowledge of the intermediary (that is, whether they were satisfied as to certain matters or had reason to believe certain things) and what the intermediary should have become aware of from conducting the prescribed checks to a reasonable standard. Aspects of each situation where an intermediary must not publish or continue to publish an offer document are discussed below.

Not satisfied as to the identity of the company or its directors or other officers

3.39 The first situation where an intermediary must not publish or continue to publish the offer document is where the intermediary is not satisfied as to the identity of the company, its directors or other officers. *[Schedule 1, Part 1, item 14, paragraph 738Q(5)(a)]*

3.40 For the purpose of this requirement, the relevant definition of 'officer' is the definition 'officer of a corporation' (section 9) which is broad enough to also include a person who is not a director of the company but who exerts significant influence over the company or its directors.

Has reason to believe that any of the officers are not of good fame or character

3.41 The second situation where an intermediary must not publish or continue to publish the offer document is where the intermediary has reason to believe that any of the officers of the issuer company are not of good fame or character. *[Schedule 1, Part 1, item 14, paragraph 738Q(5)(b)]*.

3.42 The amendments do not define good fame or character. However, the term is used in the licensing process as one of the preconditions prior to ASIC granting an AFSL. Specifically, subsection 913B(4) states that ASIC must be satisfied that there is no reason to believe: the person applying for the AFSL (where a natural person); or the responsible officers (where the applicant is a body corporate); or any of the partners or trustees (where the applicant is a partnership or trust) are not of good fame or character.

3.43 Subsection 913B(4) provides that ASIC must, in assessing whether there is reason to believe a person is not of good fame or character, have regard to certain matters including certain criminal convictions a person may have had, whether the person held an AFSL that was cancelled or suspended, whether a banning or disqualification order under Division 8 was previously made, or any other matter ASIC considers to be relevant.

Has reason to believe that the company or its officers have, in relation to the CSF offer, knowingly engaged in conduct that is misleading or deceptive or likely to mislead or deceive

3.44 Where an intermediary has reason to believe that an issuer has knowingly engaged in conduct that is misleading or deceptive, or conduct that is likely to mislead or deceive, the intermediary must not publish or continue to publish the offer document [*Schedule 1, Part 1, item 14, paragraph 738Q(5)(e)*]. For example, if an intermediary in considering whether to host an offer of a company has, in its dealings with the directors, reason to believe that the directors' representations in relation to the CSF offer are dishonest, the intermediary must not publish the offer document.

3.45 In the case of an offer that is already open, if the intermediary has reason to believe that the directors have, for example, knowingly provided misleading information in response to a post on the communications facility, the intermediary must not continue to publish the offer document and must close the offer.

3.46 The obligation to close the offer will only arise where the intermediary has reason to believe the issuer *knowingly* engaged in misleading or deceptive conduct. The inclusion of 'knowingly' recognises that there may be cases where an issuer may have, for example, unintentionally provided information that is misleading. In such circumstances, it would be inappropriate if the intermediary's only course of action was to remove the offer document from the platform and close the CSF offer.

3.47 If the intermediary has reason to believe that the issuer company knowingly engaged in conduct that was misleading or deceptive, or that was likely to mislead or deceive, the intermediary must remove the offer document from the platform and close the offer.

Interaction with provisions relating to defective offer documents

3.48 Where the conduct that is misleading or deceptive, or that is likely to mislead or deceive, is in relation to a defective offer document that contains a misleading or deceptive statement, an omission, or where there has been a new circumstance that has arisen since the document was published that would have been required to have been included in the document had it arisen before publication, the specific rules covering defective offer documents will take priority over the gatekeeper obligations. *[Schedule 1, Part 1, item 14, subsection 738Q(6)]*

3.49 The provisions relating to defective offer documents are discussed in Chapter 4 and require an intermediary to either close or suspend an offer when it is aware that the offer document is defective. Where it suspends the offer, the company will have the opportunity to prepare a supplementary or replacement offer document to correct the defect. In effect, the rules regarding defective disclosure documents will take priority over the gatekeeper obligations.

3.50 However, where an offer document is defective, for example, because it contains a misleading statement, but the company also knowingly makes another misleading statement on the communication facility, the intermediary will be required to close the offer as the gatekeeper obligations will apply in relation to the company's conduct relating to the communication facility, even if they do not apply in relation to the offer document.

Has reason to believe that the offer is not eligible to be made as a CSF offer

3.51 An intermediary must not publish or continue to publish an offer document where it has reason to believe that the offer is not eligible to be made as a CSF offer. *[Schedule 1, Part 1, item 14, paragraph 738Q(5)(d)]*

3.52 This obligation is intended to ensure that issuers that purport to be eligible for the CSF regime, but are not in fact eligible, are excluded from making a CSF offer. For example, if the intermediary has reason to believe that the proposed offer does not comply with the issuer cap, the intermediary must not publish the issuer's offer document.

Offences

3.53 An intermediary that fails to comply with its gatekeeper obligations will commit an offence, punishable by a maximum penalty of 60 penalty units, or imprisonment for one year, or both *[Schedule 1, Part 1, item 34, item 245F in the table to Schedule 3]*.

3.54 A related obligation is that an intermediary must have in place ‘adequate arrangements’ to ensure that it complies with its gatekeeper obligations *[Schedule 1, Part 1, item 14, subsection 738Q(7)]*. This means that an intermediary must have in place policies, systems and procedures to ensure that it complies with its gatekeeper obligations, and must ensure that those policies, systems and procedures are adhered to. This must be documented in writing. Failure to do so is an offence, punishable by a maximum penalty of 30 penalty units or imprisonment for 6 months or both *[Schedule 1, Part 1, item 34, item 245G in the table to Schedule 3]*.

Other obligations of CSF intermediaries relating to their platform

3.55 The CSF regime sets out a number of other obligations that a CSF intermediary must comply with. These are that the intermediary:

- must ensure the CSF risk warning appears prominently on the platform at all times while the offer is open or suspended *[Schedule 1, Part 1, item 14, subsection 738ZA(1)]*;
- must provide an application facility, reject any applications made other than via the application facility and not allow an application to be made while an offer is suspended or closed *[Schedule 1, Part 1, item 14, subsections 738ZA(3) and (4)]*;
- must provide a communication facility for each CSF offer *[Schedule 1, Part 1, item 14, subsection 738ZA(5)]*;
- must ensure that information relating to a retail investor’s cooling-off rights appears prominently on the offer platform while an offer is open or suspended *[Schedule 1, Part 1, item 14, subsection 738ZA(8)]*; and
- must disclose fees paid to it by the issuer and any interest that the intermediary has or intends to take in the issuer company prominently on the platform *[Schedule 1, Part 1, item 14, subsection 738ZA(9)]*.

3.56 Failure to comply with any of the obligations set out above will mean the intermediary will commit an offence, punishable by a maximum penalty of 60 penalty units, one year’s imprisonment, or both *[Schedule 1, Part 1, item 34, item 245N in the table to Schedule 3]*. The penalty of 60 penalty units and one year’s imprisonment is in accordance with the fine/imprisonment ratio of 5:1 specified in the Government’s *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (section 3.1.3 of the Guide refers).

Risk warning

3.57 The intermediary must ensure that the CSF risk warning is displayed prominently on the offer platform. The purpose of the risk warning is to alert potential investors, particularly retail investors of the potential risks associated with, and high failure rates of, start-ups and emerging companies, which are most likely to be making CSF offers.

3.58 The required wording of the general CSF risk warning will be specified in the regulations [*Schedule 1, Part 1, item 14, subsection 738ZA(2)*]. The intermediary must ensure that the risk warning appears prominently on its platform at all times, including while an offer is suspended [*Schedule 1, Part 1, item 14, subsection 738ZA(1)*].

3.59 The word ‘prominently’ is not defined and whether the risk warning is prominently displayed will depend on the particular facts and circumstances, including the design of the offer platform.

Applications to only be made via an application facility

3.60 The intermediary must provide a facility — the application facility — on its platform to enable a person to apply for securities that are the subject of a CSF offer. All applications in response to a CSF offer must be made via the intermediary’s application facility.

3.61 Where a person tries to apply for CSF securities other than via the application facility, the intermediary must reject the application and refund any money paid as soon as practicable [*Schedule 1, Part 1, item 14, subsection 738ZA(4) and paragraph 738ZB(4)(b)*]. Requiring all applications in response to the CSF offer to be made via the intermediary is a means of ensuring that applicants is aware of and receives the various investor protections.

3.62 The application facility must only be available while the offer is open — applications must not be able to be made while an offer is closed or suspended. [*Schedule 1, Part 1, item 14, paragraphs 738ZA(3)(a) and (c)*]

3.63 Where a retail client is trying to apply for securities that are the subject of a CSF offer, the intermediary must ensure that the investor completes a risk acknowledgment [*Schedule 1, Part 1, item 14, paragraph 738ZA(3)(b)*]. The requirement that a person ‘complete’ rather than ‘sign’ the risk acknowledgment means it will not be mandatory for an intermediary to require an applicant to digitally sign the risk acknowledgment (although it could choose to require this). The risk acknowledgment must comply with the requirements set out in the regulations [*Schedule 1, Part 1, item 14, paragraph 738ZA(3)(b)*].

Communication facility for each CSF offer

3.64 The intermediary must provide a communication facility in relation to each CSF offer while the offer is open or suspended [*Schedule 1, Part 1, item 14, subsection 738ZA(5)*]. Requiring a communication facility to be provided in relation to each CSF offer is consistent with one of the premises underlying crowd-funding, which is that investors can, in part, rely on the collective wisdom of the ‘crowd’ in making their investment decision.

3.65 The purpose of the communication facility is to allow potential investors, the issuer and intermediary to communicate with each other about a particular CSF offer. Specifically, the communication facility should enable a person who accesses the offer document to make posts relating to the offer, see posts relating to the offer and ask the company making the offer, or the intermediary, questions relating to the offer. It should also enable the company or intermediary to respond to questions and posts. [*Schedule 1, Part 1, item 14, paragraphs 738ZA(5)(a) and (b)*]

3.66 The communication facility does not need to be open to the general public, but must be made accessible to persons that are able to access the CSF offer document. Where a person is unable to access a CSF offer document until they have registered on an intermediary’s platform, the person must be able to make and see posts on the communication facility for the offer on registration.

3.67 While the communication facility will provide an important mechanism for investors to communicate with each other and with the issuer company, persons who are officers, employees or agents of the issuer company, a related party or an associate of the issuer, or of the intermediary, must clearly disclose that fact when making posts on the facility [*Schedule 1, Part 1, item 14, subsection 738ZA(6)*]. Failure to comply with this rule means the person making the post will commit an offence, punishable by a maximum penalty of 60 penalty units, or one year’s imprisonment, or both [*Schedule 1, Part 1, item 34, item 245N in the table to Schedule 3*].

3.68 The amendments include a power to make regulations covering the operation, management or use of the communication facility. For example, regulations could be made covering the removal of material from the communication facility. [*Schedule 1, Part 1, item 14, subsection 738ZA(7)*].

3.69 Statements made on the communications facility that refer to the CSF offer or would reasonably be likely to induce a person to apply for the CSF offer would ordinarily be subject to the advertising restrictions contained in the Bill. The Bill includes a carve out for statements made in good faith on the communication facility. This carve out is discussed in more detail in paragraphs 6.48 to 6.52.

Cooling-off rights must be displayed on the platform

3.70 The intermediary must ensure that the offer platform prominently displays information regarding the cooling-off rights for retail investors (refer to paragraphs 6.18 to 6.22), including the means by which the investor can exercise these rights. This information must be displayed on the platform at all times, including where an offer is open or suspended. *[Schedule 1, Part 1, item 14, subsection 738ZA(8)]*

3.71 Whether the information is prominently displayed is a question of fact and degree and will vary depending on how the intermediary's platform is designed.

Fees and interests must be prominently displayed on the platform

3.72 There are no restrictions, in the CSF regime, on the fee arrangements that may be agreed between an issuer and intermediary. For example, there are no prohibitions on an intermediary's fees being calculated based on funds raised under the offer or an intermediary being remunerated in the form of securities in an issuer company in lieu of cash. However, it is appropriate that the fee arrangements between the issuer and intermediary be disclosed to investors and, therefore, there is a requirement that this information be prominently displayed on the platform while the offer is open or suspended. *[Schedule 1, Part 1, item 14, paragraph 738ZA(9)(a)].*

3.73 Similarly, while there are no restrictions on an intermediary having or taking a direct or indirect pecuniary interest in the company whose securities it is offering on its platform, it is appropriate that this information is disclosed to investors. Therefore, there is likewise a requirement that this information be prominently displayed on the offer platform at all times while the offer is open or suspended *[Schedule 1, Part 1, item 14, paragraph 738ZA(9)(b)].*

Intermediary must deal with application money appropriately

3.74 The client money provisions contained in Division 2 of Part 7.8 will apply to the intermediary as they are an AFSL holder. Broadly, these provisions require an intermediary to hold application money in a qualifying account (the requirements for the account are set out in section 981B). Regulations made under the Division specify matters such as when money may be withdrawn from the account, and how interest earned on the account is dealt with.

3.75 The Bill confirms that the intermediary must deal with application money in accordance with the client money provisions but also contains specific provisions (discussed below) regarding when an intermediary must either pay money to the issuer or refund money to applicants. [*Schedule 1, Part 1, item 14, subsection 738ZB(1)*]

When money must be paid to the issuer or refunded to the applicants

3.76 The intermediary must pay application money to an issuer, net of any fees due to the intermediary, as soon as practicable after an offer is ‘complete’ (that is, the minimum subscription condition has been met and all withdrawal rights have expired, refer to paragraphs 4.50 to 4.53) and the company has issued the shares to the applicants [*Schedule 1, Part 1, item 14, subsections 738L(8) and 738ZB(2)*].

3.77 The intermediary must refund money to applicants as soon as practicable in the following situations:

- the offer was closed because it was withdrawn by the company (paragraphs 4.47) or because the intermediary was required to close the offer pursuant to its ‘gate keeper obligations’ (paragraph 4.48);
- the offer was closed for another reason (because the maximum offer period was reached (paragraphs 4.37 to 4.43) or the intermediary considered the offer to be fully subscribed (paragraphs 4.44 to 4.46) but not complete; or
- an applicant exercised their withdrawal rights — these could be statutory or non-statutory cooling-off rights, or the right to withdraw an offer within one month of receiving a supplementary or replacement offer document relating to a defective offer document (paragraph 5.31) [*Schedule 1, Part 1, item 14, subsections 738ZB(3) and (4)*].

3.78 An intermediary that does not comply with the above rules will commit a strict liability offence, punishable by a maximum of 50 penalty units [*Schedule 1, Part 1, item 14, subsection 738ZB(5) and item 34, item 245P in the table to Schedule 3*].

3.79 Strict liability, and the level of penalty, is considered appropriate because:

- the requirement to deal appropriately with application money is a key element of the CSF regime;
- an intermediary that fails to comply with the rules (for example, by not refunding money when cooling-off rights are exercised, or by paying money to an issuer before the securities are issued), compromises the investor protection and other elements that are central to the CSF regime;
- exposure to the penalty is entirely dependent on the conduct of the intermediary who is liable for the offence; and
- the penalty for the offence complies with the requirements of the Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (that is, the maximum penalty is no more than 60 penalty units and does not include a term of imprisonment).

Regulations may be made regarding how intermediaries are to deal with applications

3.80 The amendments provide for a regulation making power that can permit regulations to be made regarding how CSF intermediaries are to deal with applications pursuant to CSF offers, including in relation to:

- the order in which applications are to be dealt with;
- the circumstances in which applications must or may be rejected; and
- when applications are to be counted towards the maximum or minimum subscription amounts. [*Schedule 1, Part 1, item 14, section 738ZJ*].

Consequential amendments

3.81 Consequential changes have been made to the ASIC Act to include a crowd-funding service, as defined in the Corporations Act, in the range of financial services covered by the ASIC Act *[Schedule 1, Part 2, items 35 and 36, subsection 5(1) and subsections 12BAB(1C) and 12BAB(1D) of the ASIC Act]*.

3.82 Consequential amendments have been made to extend two current exceptions to the takeover laws.

3.83 The first exception to the takeover laws is relates to an acquisition that results from an issue of securities in a company to a promoter under a Chapter 6D disclosure document and where certain required disclosures have been made. The amendments extend the existing exception to cover acquisitions that arise pursuant to a CSF offer document where the required disclosures have been made. *[Schedule 1, Part 1, item 6, item 12 in the table in section 611]*.

3.84 The second exception to the takeover laws relates to an acquisition that results from an issue of securities in a company to an underwriter or sub-underwriter under a Chapter 6D disclosure document so long as the disclosure document disclosed the effect the issue would have on the underwriter's or sub-underwriter's voting power in the company. The amendments will extend the exception to cover issues of securities pursuant to a CSF offer in a company to an underwriter or sub-underwriter as long as the relevant disclosures have been made in the CSF offer document. *[Schedule 1, Part 1, item 6, item 13 in the table in section 611]*.

3.85 As a CSF intermediary can be established as a partnership or a trust, consequential amendments have been made to ensure the rules in Chapter 7 that treat partnerships and trusts as legal persons generally apply to CSF intermediaries except where the rule is expressed to relate only to specific parts of Chapter 7. *[Schedule 1, Part 1, item 14, paragraphs 738F(1)(a) and (b), subsection 738F(2)]*

3.86 Consequential amendments have been made to extend the application of the rules in Chapter 7 that provide that a person is generally responsible for the conduct of their directors, employees, agents to the CSF regime. *[Schedule 1, Part 1, item 14, paragraph 738F(1)(c)]*

3.87 A regulation making power has been included to permit regulations to be made to modify how the above rules apply. *[Schedule 1, Part 1, item 14, subsection 738F(3)]*

Chapter 4

Process for making a CSF offer

Outline of chapter

- 4.1 This Chapter sets out the process of making CSF offers.
- 4.2 Unless otherwise stated, all references in this Chapter relate to the *Corporations Act 2001*.

Summary of new law

- 4.3 The amendments establish:
- that the process for making a CSF offer involves a CSF eligible company publishing a CSF offer document on a single CSF intermediary's platform;
 - that a new document — a 'CSF offer document' — must be prepared for CSF offers;
 - that the company must obtain certain consents of persons associated with the offer document prior to its publication;
 - that a company making a CSF offer and its related parties cannot have more than one CSF offer open at a time when another CSF offer previously made by the company is open or suspended; and
 - rules for determining 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'.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
CSF offer must be made in accordance with the CSF regime.	An offer requiring disclosure must be made in accordance with Part 6D.2.
A CSF offer document must be prepared for a CSF offer	A disclosure document must be prepared for an offer requiring disclosure.
A CSF offer is made by publishing the CSF offer document on the platform of a single CSF intermediary.	No equivalent
A CSF offer is made when the offer document is published on the platform of a CSF intermediary.	No equivalent.
A CSF offer is open from the time when the offer is made until the offer is suspended or closed by the intermediary.	No equivalent.
A CSF offer is closed from the time when a CSF intermediary gives written notice on the offer platform that the offer is closed.	No equivalent.
A company making a CSF offer and its related parties cannot have more than one CSF offer open at a time.	No equivalent.

Detailed explanation of new law

A CSF offer must be made in accordance with the CSF regime

4.4 The amendments establish the CSF regime: a new disclosure regime that can be used by eligible CSF companies to make certain offers of securities for issue. *[Schedule 1, Part 1, item 14, section 738A]*

4.5 An offer that is subject to the CSF regime is not subject to Part 6D.2, which contains the general rules regarding when disclosure is required for offers of securities, except as expressly provided for. *[Schedule 1, Part 1, items 7, 8, 9 and 10, heading to Part 6D.2, section 703B, section 704, section 706]*

4.6 An offer that is subject to the CSF regime is also not subject to Part 6D.3, which contains the prohibitions, liabilities and remedies that apply to offers of securities requiring disclosure, except as expressly provided for. *[Schedule 1, Part 1, items 11 and 12, heading to Part 6D.3 and section 725A]*

A CSF offer document must be prepared for each CSF offer

4.7 Under the CSF regime, a CSF offer document must be prepared in relation to each CSF offer. *[Schedule 1, Part 1, item 14, subsection 738J(1)]*

4.8 The CSF offer document must contain all the information specified in the regulations *[Schedule 1, Part 1, item 14, subsection 738J(2)]*. The CSF offer document can also contain the CSF offer *[Schedule 1, Part 1, item 14, subsection 738J(1)]*.

4.9 The above approach has been drafted in recognition of the fact that it is possible for a CSF offer document to satisfy the content requirements specified in the regulations (for example, by including information about the company and its business, the securities on offer, how the proceeds from the CSF offer will be used) but not contain the actual CSF offer (the offer by the company of securities for consideration). In practice, however, it is expected that a CSF offer document would contain the CSF offer as well as the information required to be included by the regulations.

4.10 The information contained in the offer document must be worded and presented in a clear, concise and effective manner and comply with any other requirements specified in the regulations. *[Schedule 1, Part 1, item 14, section 738K]*

4.11 Where the information in a CSF offer document does not comply with the above requirements, ASIC has stop order powers *[Schedule 1, Part 1, item 15, paragraph 739(1)(e)]* which will enable it to order that no issues of the securities be made while the order is in force *[Schedule 1, Part 1, item 16, paragraph 739(1A)(a)]*. This is similar to the position in relation to existing Chapter 6D disclosure documents where ASIC has stop order powers where the disclosure document is not worded in a clear, concise and effective manner. Unlike other disclosure documents, however, the CSF offer document will not need to be lodged with ASIC.

How to make a CSF offer

4.12 The amendments provide that the CSF offer must be made by a CSF eligible company publishing a CSF offer document on the platform of a single CSF intermediary. [*Schedule 1, Part 1, item 14, subsection 738L(1)*]

4.13 The requirement that the CSF offer be made via the platform of an intermediary is a key element of the CSF regime. An offer of eligible securities by a CSF eligible company, where expressed to be made under the CSF regime, would qualify as a CSF offer (as the requirements in Division 2 of Part 1 to the Bill would be satisfied). However, it is not appropriate that companies be permitted to make CSF offers otherwise than through the platform of a licenced CSF intermediary, given the intermediary's central role in administering a number of aspects of the regime (refer Chapter 3).

4.14 The amendments require the offer document to be published on the platform of a *single intermediary*. Limiting the issuer to using one offer platform for each CSF offer is appropriate as it supports compliance with other rules in the CSF regime (for example, the issuer cap and investor cap).

Offer must be contained in, or be published together with, the offer document

4.15 As noted above (paragraphs 4.8 and 4.9) it is possible for the CSF offer not to be contained in the offer document. However, if the CSF offer is not contained in the CSF offer document, the CSF offer must be published on the intermediary's platform. [*Schedule 1, Part 1, item 14, subsection 738L(1)*]

Applications and application money must be handled via intermediary

4.16 All applications in response to the CSF offer must be made via the intermediary's offer platform. This ensures that investors, particularly retail clients, are provided with the various protections in the CSF regime (such as the communication facility, risk warning and cooling-off rights). It is also intended that all application money in respect of applications to the CSF offer be handled by the intermediary. This ensures that application money is handled appropriately, as the intermediary, being an AFSL holder, will be subject to the client money provisions (as well as obligations in the CSF rules for when money must be paid to the issuer company and refunded to the applicants) (refer to paragraphs 3.74 to 3.79).

4.17 The obligation to ensure that applications and application money are handled via the intermediary is given effect by the provision requiring the agreement between the issuer and intermediary for the publication of the offer document (referred to in the Bill as the ‘hosting arrangement’) to require all applications relating to the CSF offer to be made via the intermediary’s platform and all application monies to be paid to or dealt with by the intermediary. *[Schedule 1, Part 1, item 14, subsection 738L(2)]*

Failure to comply will be an offence

4.18 If the company does not make the CSF offer as required (by publication of the CSF offer and a complying CSF offer document on the platform of a single intermediary) or the hosting agreement does not require all applications and application money to be handled via the intermediary, the company will commit an offence. *[Schedule 1, Part 1, item 14, subsection 738L(3) and item 34, item 245A in the table to Schedule 3].*

4.19 The offence carries a maximum penalty of 300 penalty units, five years imprisonment or both.

4.20 The five year term of imprisonment is consistent with the penalty that currently applies to a person offering securities where the offer requires disclosure under Chapter 6D.2. The penalty units for the offence have been calculated in accordance with the fine/imprisonment ratio of 5:1 specified in the Government’s *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (section 3.1.3 of the Guide refers).

Only one offer may be published at a time

4.21 An issuer company cannot have more than one CSF offer open at a time when another CSF offer previously made by the company is open or suspended. *[Schedule 1, Part 1, item 14, subsection 738R(1)]*

4.22 In addition, a company cannot make a CSF offer at the same time as a related party of the company makes a CSF offer. The purpose of this prohibition is predominantly to support the enforceability of the issuer cap, which applies to funds raised by the issuer and its related parties. Allowing the issuer and its related parties to make simultaneous CSF offers would make it difficult to enforce the issuer cap. *[Schedule 1, Part 1, item 14, subsection 738R(2)]*

4.23 Failure to comply with the prohibitions against making more than one offer at a time is an offence carrying a maximum penalty of 300 penalty units, five years imprisonment, or both *[Schedule 1, Part 1, item 34, item 245H in the table to Schedule 3].*

Consents required prior to publication

4.24 Consistent with the arrangements applying under Chapter 6D.2 to other disclosure documents, a company must not arrange for publication of the CSF offer document until they obtain the necessary consents.

4.25 Firstly, the company must obtain the consent in writing of each person named in the offer document as a director or proposed director prior to publication. *[Schedule 1, Part 1, item 14, subsection 738M(1)]*

4.26 Where the CSF offer document includes a statement by a person, or includes a statement that is indicated in the offer document to be based on a statement by a person, the company must not arrange for publication of the offer document unless:

- that person has consented in writing to the statement being included in the offer document in the form and context in which it is included;
- the offer document states the person has given their consent; and
- the person has not withdrawn their consent prior to publication. *[Schedule 1, Part 1, item 14, subsection 738M(2)]*

4.27 The consents must be retained by the company for a period of seven years. *[Schedule 1, Part 1, item 14, subsection 738M(3)]*

4.28 The requirement to obtain and retain written consents is important as the consents may be relevant to any criminal proceedings or cause of action that an investor may wish to commence in the event that the CSF offer document is defective (Chapter 5).

4.29 Failure to obtain or retain written consents is a strict liability offence, carrying a maximum penalty of five penalty units. The penalty is consistent with the existing penalty applying to the comparable offence in Chapter 6D. *[Schedule 1, Part 1, items 14 and 34, subsection 738M(4) and item 245B in the table to Schedule 3]*

4.30 Strict liability, and the level of penalty for the new offence, is appropriate, for a number of reasons:

- a person named in the offer document as a director or proposed director, or a person said to have made a statement included in the offer document are potentially criminally liable or are exposed to an action for recovery of loss or damage by investors in the event the offer document is defective. Requiring the company to obtain written consent of these persons prior to publication is therefore a crucial step as it provides an opportunity for the person to try to amend the contents of the offer document, or not provide consent, to minimise their potential liability;
- the requirement to obtain written consent and retain the consent for seven years is clear and easy to understand, and the offence depends entirely on the action or non-action of the company which is liable for the offence.

4.31 Consistent with the Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the maximum penalty for the offence is below the maximum penalty amount in the Guide of 60 penalty units and the penalty does not include a term of imprisonment.

Timing rules related to a CSF offer

When a CSF offer is open, closed and complete

4.32 A CSF offer is open from the time when it is first published on the platform of the responsible intermediary [*Schedule 1, Part 1, item 14, subsection 738N(2)*].

4.33 A CSF offer can only be closed by an intermediary giving written notice on the offer platform that the offer is closed.

4.34 An intermediary has the power to close a CSF offer at any time, although the hosting arrangement between the intermediary and the issuer can place limits on when the intermediary can close the offer except where the intermediary is required, under these amendments, to close an offer. [*Schedule 1, Part 1, item 14, subsections 738N(3) and (5)*].

4.35 When an intermediary gives notice on the platform that an offer is closed, the offer will be closed from the time when notice is first given [*Schedule 1, Part 1, item 14, subsection 738N(3)*]. It is not necessary for the notice to continue to appear on the platform for the offer to be closed.

When an intermediary must close an offer

4.36 The Bill sets out five circumstances, discussed in detail below, where an intermediary must close a CSF offer (paragraphs 4.37 to 4.48). Where an intermediary fails to close the offer as required, the intermediary will commit an offence, punishable by a maximum penalty of 30 penalty units, six months imprisonment, or both [*Schedule 1, Part 1, item 34, item 245C in the table to Schedule 3J*]. The offer must be closed at the earliest of the following times:

- three months after the CSF offer is made;
- if the offer document states a date by which the offer will close, that date;
- when the intermediary considers the offer to be fully subscribed;
- when the company withdraws the offer; or
- when the company's 'gatekeeper' obligations require the intermediary to remove the offer document from its platform.

Offer must be closed after three months

4.37 A CSF offer can be open for a maximum of three months [*Schedule 1, Part 1, item 14, paragraph 738N(4)(a)*]. It is appropriate that there be a capped maximum offer period to ensure information contained in the CSF offer document (which is a limited disclosure document) remains current. A three month time limit is also consistent with the notion of CSF as a simpler, faster way of raising funds with streamlined disclosure.

4.38 The three month time limit cannot be extended for any reason. This means, for example, if the company became aware that the offer document was defective two months into the offer period, the intermediary would still be required to close the offer at the end of three months after the CSF offer was initially made, even if the company prepared a supplementary or replacement offer document. The company would not be precluded, however, from making a new CSF offer.

4.39 Assuming the CSF offer is closed at three months, the intermediary must determine, after the expiry of all withdrawal rights, whether:

- the offer is ‘complete’: that is, the minimum subscription condition is met disregarding withdrawn applications. The intermediary will be required to pay application money to the issuer following the issue of the securities [*Schedule 1, Part 1, item 14, subsection 738N (7) and subsection 738ZB(2)*]; or
- the offer is unsuccessful as the minimum subscription amount was not raised. This means the intermediary must refund application money to applicants [*Schedule 1, Part 1, item 14, subsection 738ZB(3)*]

4.40 An intermediary that closes the offer because the three month time limit is reached may, but is not required to, remove the offer document from its platform [*Schedule 1, Part 1, item 14, subsection 738P(2)*]. The intermediary will, therefore, have the option of maintaining the offer document on the platform after the offer is closed as an archive of the previous offers it has hosted.

Offer must be closed by the date specified in the offer document

4.41 The issuer company is not required to specify an offer close date in the offer document. However, if the issuer does specify a date (or period) by which the offer will close, the intermediary must close the offer at that time (or upon expiry of that period) [*Schedule 1, Part 1, item 14, paragraph 738N(4)(b)*].

4.42 Neither the intermediary nor the issuer are able to extend the closing date beyond what was specified in the offer document, including if the offer document was found to be defective and the issuer prepared a replacement or supplementary offer document.

4.43 An intermediary that closes the offer because the offer closure date specified in the offer document is reached may, but is not required to, remove the offer document from its platform. [*Schedule 1, Part 1, item 14, subsection 738P(2)*]

Offer must be closed when intermediary considers the offer fully subscribed

4.44 An intermediary has the power to close an offer when it considers the offer to be fully subscribed to the maximum subscription amount [Schedule 1, Part 1, item 14, subsection 738L(7) and paragraph 738N(4)(c)]. This is consistent with the policy intent that an issuer not be able to raise more than the maximum subscription amount specified in the offer document as disclosures regarding the purpose to which funds would be put would be premised on the basis that no more than the maximum subscription amount would be raised.

4.45 Allowing an intermediary to close an offer where they ‘consider’ the offer to be fully subscribed provides some flexibility. For example, an intermediary may allow the application facility to receive applications that exceed the maximum subscription amount if, from experience, it expects a certain proportion of applicants will withdraw their acceptances (pursuant to cooling-off rights). If the offer does result in applications worth more than the maximum subscription amount being received, even after taking into account withdrawals of acceptances, the intermediary should reject applications to ensure that no more than the maximum amount is collected and transferred to the issuer. Application money relating to rejected applications must be returned to the investor [Schedule 1, Part 1, item 14, paragraph 738ZB(4)(b)].

4.46 An intermediary that closes a CSF offer because it considers the offer to be fully subscribed may, but is not required to, remove the offer document from its platform. [Schedule 1, Part 1, item 14, subsection 738P(2)]

Offer must be closed if the company withdraws the offer or gatekeeper obligations apply

4.47 A company has the power to withdraw a CSF offer at any time before the offer is complete [Schedule 1, Part 1, item 14, section 738S]. To do so, the company must notify the intermediary that the offer is withdrawn. Once an intermediary receives such a notification it must, as soon as practicable, close the offer and remove the offer document from its platform. [Schedule 1, Part 1, item 14, paragraph 738N(4)(d) and subsection 738P(1)]

4.48 The intermediary must close an offer if it is required to remove the offer document pursuant to its gatekeeper obligations (discussed in paragraphs 3.28 to 3.54) and must remove the offer document from its platform. Failure to comply is an offence, punishable by a maximum penalty of 30 penalty units, six months imprisonment or both [Schedule 1, Part 1, items 14 and 34, paragraph 738N(4)(e), subsection 738P(1), item 245D in the table to Schedule 3]

Dealing with application money once an offer is closed

4.49 Once an offer is closed, the next step is for the intermediary to determine if the offer is ‘complete’ and, if so, handle application money appropriately.

4.50 There are three conditions that must be satisfied before an offer can be ‘complete’.

4.51 Firstly, the offer must have closed because: the three month maximum duration of a CSF offer expired; the offer close date specified in the offer document was reached; or the intermediary considered the offer to be fully subscribed [*Schedule 1, Part 1, item 14, paragraph 738N(7)(a)*]. If an offer is closed for another reason (for example, because it was withdrawn by the issuer, or the intermediary had to close the offer pursuant to its ‘gatekeeper’ obligations), it can never be ‘complete’.

4.52 The second condition is that all possible withdrawal rights — whether statutory or provided for by the intermediary — which permit an applicant to withdraw their application must have expired [*Schedule 1, Part 1, item 14, paragraph 738N(7)(b)*]. This means that an intermediary must wait for the expiry of the five business day cooling-off rights for retail clients (refer to paragraphs 6.18 to 6.22), the one month right to withdraw an application (which applies to all investors where an issuer publishes a supplementary or replacement offer document in relation to a defective offer document, refer to paragraph 5.31) and any other non-statutory withdrawal rights that the intermediary provides.

4.53 The final condition is that the value of the applications received, disregarding any applications that have been withdrawn or rejected by the intermediary, must exceed the minimum subscription amount set out in the offer document [*Schedule 1, Part 1, item 14, paragraph 738N(7)(c)*].

4.54 An offer that is closed but not complete, because it was withdrawn by the issuer or the intermediary was required to close the offer pursuant to its ‘gatekeeper’ obligations, will result in the intermediary refunding application money held to the applicants (paragraph 3.77).

Chapter 5

Defective CSF offer documents

Outline of chapter

5.1 This Chapter sets out the rules concerning defective CSF offer documents.

5.2 Unless otherwise stated, all references in this Chapter relate to the *Corporations Act 2001*.

Summary of new law

5.3 The amendments define when a CSF offer document is deemed to be ‘defective’. The definition is aligned with the existing provisions in Chapter 6D applying to prospectuses and other offer documents.

5.4 The amendments set out notification obligations applying to certain classes of persons if they become aware that an offer document is defective. A number of further obligations and possible actions applying to the intermediary and company making the offer are defined in circumstances where an offer document is defective.

5.5 Liabilities arising from a defective disclosure document are set out in the amendments. These include criminal liability as well as exposure to action for recovery of loss or damage where the statement, omission or new circumstance which led to the document being defective is *materially adverse* from the point of view of an investor.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A company must not make a CSF offer under a defective offer document.	A company must not make an offer of securities requiring disclosure under a defective disclosure document.
A CSF intermediary must not publish or continue to publish a CSF offer document if the document is defective and the intermediary knows the offer document is defective.	No equivalent.

<i>New law</i>	<i>Current law</i>
Persons that are liable on the CSF offer document must notify the company and the CSF intermediary if they become aware that the offer document is defective.	Persons liable on the disclosure document must inform the person making the offer if they become aware of deficiencies in the disclosure document.
A CSF intermediary must suspend a CSF offer if it becomes aware that the CSF offer document is defective.	No equivalent.
A company can prepare a supplementary or replacement CSF offer document where the original CSF offer document is defective or does not satisfy the requirements of a CSF offer document.	A company can prepare a supplementary or replacement disclosure document to correct a deficiency in the original disclosure document or to change the terms of the offer.
An intermediary that publishes a supplementary or replacement CSF offer document must notify applicants that made applications pursuant to the original CSF offer document that they have one month from the date of the notice in which to withdraw their application.	If the original disclosure document is defective, the company could either: repay application money to applicants; give applicants a supplementary or replacement disclosure document and one month to withdraw their application; or issue the securities to the applicants and provide them with one month to return the securities and be repaid.
A company that offers securities under a CSF offer document that is defective commits an offence if the defect is materially adverse from the point of view of an investor.	A company that offers securities under a defective disclosure document commits an offence if the defect is materially adverse from the point of view of an investor.
An intermediary that publishes a CSF offer document that it knows to be defective commits an offence if the defect is materially adverse from the point of view of an investor.	No equivalent.
An investor that suffers loss or damage because of a defective CSF offer document is able to recover the amount of the loss or damage from persons liable on the offer document.	An investor that suffers loss or damage because of a defective disclosure document is able to recover the amount of the loss or damage from persons liable on the disclosure document.
ASIC may make a stop order in relation to a defective CSF offer document.	ASIC may make stop orders in relation to defective disclosure documents.

Detailed explanation of new law

Prohibition on making offers under a defective CSF offer document

5.6 The amendments provide that a company must not offer securities under a CSF offer document if the document is defective [*Schedule 1, Part 1, item 14, subsection 738Y(1)*]. A company will be taken to offer securities under a CSF offer document, at all times, before the offer is closed, while the document is published on a platform of the intermediary [*Schedule 1, Part 1, item 14, subsection 738Y(2)*].

5.7 The amendments provide that an intermediary must not publish or continue to publish a CSF offer document if the document is defective and the intermediary *knows* the document is defective [*Schedule 1, Part 1, item 14, subsection 738Y(3)*]. For the purposes of determining whether the intermediary knew the offer document was defective, the intermediary is taken to have knowledge of any matter that they would have had knowledge of had they conducted the prescribed checks to a reasonable standard [*Schedule 1, Part 1, item 14, subsection 738Q(4)*].

When an offer document will be ‘defective’

5.8 A CSF offer document will be defective where:

- the document contains a misleading or deceptive statement; or
- there is an omission from the document of information required to be included in the document; or
- since the document was published, a new circumstance has arisen that would have been required to have been included in the document had it arisen prior to the document being published. [*Schedule 1, Part 1, item 14, subsection 738U(1)*]

5.9 The amendments provide that a misleading statement includes a statement about a future matter where the person making the statement does not have reasonable grounds for making the statement [*Schedule 1, Part 1, item 14, subsection 738U(2)*].

Notification obligations where the offer document is defective

5.10 The amendments place obligations on certain persons associated with the offer document to provide written notification to the company and intermediary if they become aware, while the CSF offer is open, that the offer document is defective:

- if the issuer company becomes aware that the document is defective, it must notify the responsible intermediary as soon as practicable [*Schedule 1, Part 1, item 14, subsection 738V(1)*];
- if the intermediary becomes aware that the offer document is defective, the intermediary must notify the company as soon as practicable [*Schedule 1, Part 1, item 14, subsection 738V(2)*]; and
- if another person who is liable on the offer document (refer paragraph 5.42) becomes aware that the offer document is defective, that person must notify the company and the intermediary as soon as practicable [*Schedule 1, Part 1, item 14, subsection 738V(3)*].

5.11 The notification obligation only arises where the person required to notify *becomes aware* that the offer document is defective. If the person does not know that the document is defective, then no obligation to notify will arise.

5.12 In the case of an intermediary, it is relevant to note that an intermediary is taken to have knowledge of any matter that they would have known of had they conducted the prescribed checks to a reasonable standard [*Schedule 1, Part 1, item 14, subsection 738Q(4)*].

5.13 Notification that an offer document is defective is critical because:

- it will trigger the intermediary's obligation to remove the offer document from the platform and will prevent further applications from being received under a defective offer document; and
- for applicants that have already applied for securities under the defective offer document, they will either be provided with a supplementary or replacement offer document that corrects the defect and be given one month to withdraw their acceptance, or the offer will close but not complete, which will mean applicants will not be issued with securities and will be refunded any application money paid.

5.14 In light of the above and to ensure that investors are basing their investment decisions on a compliant offer document, it is necessary to ensure that persons who are aware that an offer document is defective provide the relevant written notifications. This is achieved by providing that a person that fails to comply with their notification obligations commits a strict liability offence, punishable by a maximum penalty of 50 penalty units. *[Schedule 1, Part 1, items 14 and 34, subsection 738V(4) and item 245J in the table to Schedule 3]*

Intermediary's obligation to suspend offer

5.15 Once an intermediary becomes aware that the offer document is defective, the intermediary must remove the offer document from its platform and either close the offer or suspend the offer, by giving notice on the offer platform that the offer is suspended *[Schedule 1, Part 1, item 14, subsections 738N(6), 738X(1) and (2)]*.

5.16 The offer will continue to be suspended until: the company provides a replacement or supplementary offer document that the intermediary publishes, in which case the offer will be 'open'; or the intermediary closes the offer (either pursuant to their general power to close an offer or because they are required to do so pursuant to their gatekeeper obligations).

5.17 The notice advising of the suspension must continue to appear on the offer platform for the entire time the offer is suspended and no applications may be received while the offer is suspended. *[Schedule 1, Part 1, item 14, subsection 738X(3)]*

5.18 If the intermediary does not comply with their obligations to remove the offer document and either close or suspend the offer, or (where the offer is suspended) the notice that the offer is suspended does not appear on the offer platform at all times until the suspension ends, the intermediary will commit a strict liability offence, punishable by a maximum penalty of 50 penalty units. *[Schedule 1, Part 1, items 14 and 34, subsection 738X(4) and item 245K in the table to Schedule 3]*

5.19 Imposing an obligation on the intermediary to remove the defective offer document and either close or suspend the offer is necessary to ensure that no further applications can be received in respect of a defective offer document. For a person that has already applied for the offer, the intermediary, by closing or suspending the offer, ensures that the applicant will not be issued with securities under the CSF offer unless the person receives a replacement or supplementary offer document that corrects the defect and is given one month within which to withdraw their application.

5.20 In light of the above, the fact that the penalty for the offence complies with the Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the fact that exposure to the offence is entirely dependent on the conduct of the intermediary, the strict liability offence is considered to be appropriate.

When a company may prepare a supplementary or replacement offer document

5.21 The company can prepare a supplementary or replacement offer document in relation to an original CSF offer document in the following circumstances:

- where the original offer document is defective, to correct a defect in the original offer document;
- where the original offer document does not comply with the requirement that information contained therein be clear, concise and effective, and comply with any regulations, to correct the non-compliance; and
- in any other circumstances permitted by the regulations.
[Schedule 1, Part 1, item 14, subsection 738W(1)].

5.22 A supplementary or replacement offer document cannot be provided in any other circumstance.

5.23 If the supplementary or replacement offer document is provided to correct a defective or otherwise non-compliant offer document, it must not incorporate any changes other than to correct the defect or non-compliance, unless this is permitted by the regulations. Where the regulations do permit other changes to be incorporated, the supplementary or replacement offer document must comply with any conditions imposed by the regulations. *[Schedule 1, Part 1, item 14, subsection 738W(2)]*

5.24 The amendments set out certain requirements that replacement or supplementary offer documents must adhere to:

- at the beginning of the supplementary offer document there must be a statement that it is a supplementary offer document, an identification of the affected offer document it supplements and a statement that the supplementary and affected offer document are to be read together;

- at the beginning of the replacement offer document there must be a statement that it is a replacement offer document and a statement identifying the document it replaces.
[Schedule 1, Part 1, item 14, subsections 738W(3) and (4)]

5.25 The company will need to ensure that it obtains the relevant consents in relation to the replacement or supplementary offer document *[Schedule 1, Part 1, item 14, paragraph 738W(6)(a)]*. ‘Fresh’ consents will be required for persons that are liable on the CSF offer document as a whole (such as directors and persons named as proposed directors). However, if a person had consented to a statement in the original offer document and the supplementary or replacement offer document does not make a material change to the form or context of that statement, the company will not need to obtain a ‘fresh’ consent from that person *[Schedule 1, Part 1, item 14, subsection 738W(7)]*.

5.26 Failure to obtain the relevant consents in relation to the supplementary or replacement offer document will mean the company will have committed the offence of failing to obtain the required consents prior to publication, which carries a maximum penalty of five penalty units. *[Schedule 1, Part 1, item 34, item 245B in the table to Schedule 3]*

5.27 An intermediary that is provided with a supplementary or replacement offer document by the company is not obliged to publish the offer document. Non-publication could be due to the intermediary’s ‘gatekeeper’ obligations which will apply to a supplementary or replacement offer document in the same way as they applied to the original offer document. *[Schedule 1, Part 1, item 14, paragraph 738W(6)(b)]*.

5.28 If the document provided is a supplementary offer document that the intermediary decides to publish, it must publish the supplementary offer alongside the original offer document *[Schedule 1, Part 1, item 14, paragraph 738W(5)(a)]*. Once the intermediary does so, the supplementary and original offer documents are taken to be the CSF offer document for anything that happens after the publication *[Schedule 1, Part 1, item 14, subsection 738W(8)]*.

5.29 If the document provided to the intermediary is a replacement offer document that it decides to publish, the intermediary must only publish the replacement offer document *[Schedule 1, Part 1, item 14, paragraph 738W(5)(b)]*. Once the intermediary does so, the replacement offer document (and not the original offer document) is taken to be the CSF offer document for anything that happens after its publication *[Schedule 1, Part 1, item 14, subsection 738W(9)]*.

5.30 Once the intermediary publishes the supplementary or replacement offer document on its platform, the offer will be open again, which means that new applications can be received via the application facility.

Intermediary's obligation to notify existing applicants of withdrawal rights when the supplementary or replacement offer document is published

5.31 Once the supplementary or replacement offer document is published, the period of suspension ends and the intermediary must give written notice to 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 [Schedule 1, Part 1, item 14, subsections 738X(5), 738X(6) and 738X(7)]. Failure to provide the required notice will mean the intermediary will commit a strict liability offence, punishable by a maximum penalty of 30 penalty units [Schedule 1, Part 1, item 34, item 245L in the table to Schedule 3].

5.32 Strict liability, and the level of penalty, is appropriate, because:

- persons that have applied for the offer have based their investment decision on a defective disclosure document and it is therefore important that they be notified of their right to withdraw from the offer;
- the notifications are entirely dependent on the conduct of the intermediary who is liable for the offence;
- the proposed penalty for the offence is consistent with the Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which specifies that a strict liability offence should be punishable by a maximum penalty of 60 penalty units with no term of imprisonment.

5.33 An applicant that wants to withdraw their acceptance must do so in writing within one month of receiving the notice from the intermediary [Schedule 1, Part 1, item 14, subsection 738X(9)]. The intermediary must refund the application money of anyone who exercises their withdrawal rights as soon as practicable [Schedule 1, Part 1, item 14, paragraph 738T(1)(a) and subsection 738ZB(4)].

5.34 Once the suspension ends and the CSF offer is open, the usual rules covering when an offer is 'closed' and when it is 'complete' apply (refer Chapter 4 of the Explanatory Memorandum). If there is a further defect in the offer document, the offer may be suspended once more.

Intermediary's obligations if the company does nothing

5.35 When the company becomes aware that the offer document is defective, there is no obligation on the company to do anything other than notify the intermediary that the offer document is defective. The amendments do not require the company to, for example, withdraw the offer or prepare a replacement or supplementary offer document. Therefore, a company may do nothing once the offer is suspended.

5.36 However, even if the company does nothing once the offer is suspended, an intermediary may choose to close the offer (so long as this is in accordance with the hosting arrangement) [*Schedule 1, Part 1, item 14, subsection 738N(3)*]. Even if it does not choose to close the offer, there will come a point in time (no later than three months after the offer was first made) where the intermediary will be required to close the offer [*Schedule 1, Part 1, item 14, paragraphs 738N(4)(a) and (b)*]. As the offer will be closed but not 'complete', the intermediary will be required to refund application money to applicants as soon as practicable after the offer is closed [*Schedule 1, Part 1, item 14, paragraph 738N(4)(b)*].

Liabilities relating to defective documents that are materially adverse from the perspective of an investor

5.37 Consistent with the approach applying to prospectuses and other existing disclosure documents, persons associated with the offer may be criminally liable or be exposed to action for recovery of loss or damage where the offer document is defective and the statement, omission or new circumstance which led to the document being defective is *materially adverse* from the point of view of an investor.

Criminal liability

5.38 A company that offers securities under a CSF offer document that is defective commits an offence if the statement, omission or new circumstance that caused the document to be defective is materially adverse from the point of view of an investor. [*Schedule 1, Part 1, item 14, subsection 738Y(4)*].

5.39 Likewise, an intermediary that publishes an offer document that it *knows* to be defective commits an offence if the statement, omission or new circumstance that caused the document to be defective is materially adverse from the point of view of an investor [*Schedule 1, Part 1, item 14, subsection 738Y(4)*]. This means an intermediary will not commit an offence where the defect in the offer document is materially defective if the intermediary did not know the offer document was defective. For the purpose of determining what an intermediary knows, an intermediary is taken to know all matters that they would have known had they conducted the prescribed checks to a reasonable standard [*Schedule 1, Part 1, item 14, subsections 738Q(4) and 738Y(3)*].

5.40 The penalty for a person that commits the offence is a maximum penalty of 300 penalty units, five years imprisonment, or both [*Schedule 1, Part 1, item 34, item 245M in the table to Schedule 3*].

5.41 There are a number of defences that are available to a person who would otherwise be criminally liable. These are discussed at paragraphs 5.45 to 5.53.

Investor's right to recover for loss or damage

5.42 An investor that suffers loss or damage because of a defective document is able to recover the amount of the loss or damage from certain persons associated with the offer, including:

- the issuer and its directors, to the extent the loss or damage was caused by any part of the offer document;
- persons named, with their consent, in the offer document as proposed directors, to the extent of loss or damage caused by any part of the offer document;
- a person named in the offer document with their consent as having made a statement that is included in the CSF offer document or on which a statement made in the CSF offer document is based, to the extent of loss or damage caused by the inclusion of the statement in the CSF offer document;
- a person whose conduct resulted in, or was involved in, the offer document being defective, to the extent of loss or damage caused by that conduct;

- the intermediary that published the offer document to the extent the intermediary knew that the offer document was defective, to the extent of the loss or damage caused by any part of the offer document. *[Schedule 1, Part 1, item 14, subsection 738Y(5)]*

5.43 For the purpose of determining what an intermediary knew about the offer document, the intermediary is taken to have known of anything that they would have known had they conducted the prescribed checks to a reasonable standard. *[Schedule 1, Part 1, item 14, subsection 738Q(4)]*

5.44 An investor has six years from the day the cause of action arose in which to commence recovery proceedings. *[Schedule 1, Part 1, item 14, subsection 738Y(6)]*

Defences against criminal liability and action for recovery of loss

5.45 The amendments set out the defences available to a person who would otherwise commit an offence or be liable for loss or damage in relation to a defective offer document. The defences are similar to those that are available in relation to certain existing disclosure documents.

5.46 The first defence applies where a person did not know the offer document was defective ('lack of knowledge' defence). This defence is currently available in respect of offer information statements (but not in respect of prospectuses, which have a higher 'due diligence' threshold).

5.47 A company will not commit an offence where they did not know the offer document was defective *[Schedule 1, Part 1, item 14, paragraph 738Z(1)(a)]*. The company bears the evidential burden of establishing that it did not know that the offer document was defective. This is appropriate as the company is best placed to raise evidence that they did not know the offer document was defective.

5.48 A person, other than an intermediary, who would otherwise be liable in respect of an action for recovery of loss or damage in relation to a defective offer document will not be liable if they did not know that the offer document was defective. *[Schedule 1, Part 1, item 14, paragraph 738Z(1)(b) and subsection 738Z(2)]*

5.49 The 'lack of knowledge' defence is not available to the intermediary as the intermediary would anyway only be liable where it knew that the offer document was defective but continued to publish it *[Schedule 1, Part 1, item 14, subsections 738Y(3) and 738Z(2)]*.

5.50 A second defence is available where the person placed ‘reasonable reliance’ on information given by another person, other than if that information was given by an employee, agent or (in the case of a company) a director [*Schedule 1, Part 1, item 14, subsection 738Z(3)*]. Consistent with the position in relation to existing disclosure documents, a person that performs a particular professional or advisory function will not be taken to be an agent of the body or individual [*Schedule 1, Part 1, item 14, subsections 738Y(3) and 738Z(5)*].

5.51 As is the case with the lack of knowledge defence, the ‘reasonable reliance’ defence is not available to the intermediary given the intermediary would only be liable where they *knew* the offer document was defective. [*Schedule 1, Part 1, item 14, subsection 738Z(4)*].

Withdrawal of consent — statements and omissions

5.52 A person who is named in a CSF offer document as being a proposed director or underwriter, or as making a statement included in the document, or making a statement on the basis of which a statement is included in the offer document, is not liable for loss or damage and does not commit an offence if they publicly withdrew their consent to being named in the document. [*Schedule 1, Part 1, item 14, subsection 738Z(6)*]

5.53 This defence is available in relation to existing Chapter 6D disclosure documents.

ASIC stop order powers

5.54 ASIC’s stop order powers have been extended so that they apply where a company offers securities under a defective CSF offer document [*Schedule 1, Part 1, item 15, paragraph 739(1)(d)*]. ASIC may order that no offers, issues, sales or transfers of the securities are to take place while the order is in force [*Schedule 1, Part 1, item 16, paragraph 739(1A)(a)*].

Consequential amendments

5.55 Consequential amendments have been made to provide that the general rules prohibiting misleading and deceptive conduct in the Corporations Act do not apply in relation to a CSF offer document [*Schedule 1, Part 1, item 30, subparagraph 1041H(3)(a)(ia)*]. This amendment means that defective CSF offers will be treated in the same way as existing Chapter 6D disclosure documents.

5.56 Corresponding consequential amendments have been made to provisions in the ASIC Act: section 12DA (prohibition on misleading or deceptive conduct) and section 12DB (prohibition on making false or misleading representations) to exclude these provisions from applying to CSF offer documents [*Schedule 1, Part 2, item 37, subparagraphs 12DA(1A)(a)(iii) and 12DB(2)(a)(iii) of the ASIC Act*]. The carve out from these provisions in the ASIC Act is limited to CSF offer documents, the provisions will continue to apply to other misleading or deceptive conduct or false representations made by the issuer company or the intermediary.

5.57 Amendments have also been made to exclude the State Fair Trading Act of any State or Territory from applying to CSF offers made under a defective CSF offer document [*Schedule 1, Part 1, item 31, subparagraph 1041K(1)(a)(ia)*]. This amendment means that CSF offer documents will be treated in the same way as existing Chapter 6D disclosure documents.

Chapter 6

Investor Protections

Outline of chapter

6.1 This Chapter sets out the investor protection provisions that are part of the CSF regime.

6.2 All legislative references within this Chapter are to the *Corporations Act 2001* unless specified otherwise.

Summary of new law

6.3 The amendments establish certain protections for all investors, with some additional protections applying to retail clients. These protections ensure that investors can make informed decisions and reduce the extent to which they may be subjected to excessive levels of risk under the new CSF regime.

6.4 The additional protections that apply to retail clients are:

- an investor cap of \$10,000 per issuer via a particular intermediary within a 12-month period;
- unconditional cooling-off rights;
- a prohibition on providing financial assistance to enable investments in CSF offers; and
- the requirement to obtain a risk acknowledgment prior to accepting a CSF application.

6.5 The amendments restrict the advertising of CSF offers or intended CSF offers.

6.6 The existing prohibition on securities hawking may apply to certain offers of securities that are also the subject of a CSF offer.

6.7 The amendments make it an offence for a person to make an offer that is expressed as a CSF offer but that relates to a company that has not yet been formed or does not exist.

Comparison of key features of the new law and current law

<i>New law</i>	<i>Current law</i>
A CSF intermediary must reject an application from a retail investor that breaches the retail investor cap of \$10,000 per issuer company via the intermediary's platform within a 12-month period.	No equivalent.
A CSF intermediary must reject an application from a retail investor where the investor has not completed the risk acknowledgment.	No equivalent.
A retail investor has an unconditional right to withdraw from a CSF offer within 5 business days of making the application.	No equivalent.
The company making the CSF offer and its related parties, and the CSF intermediary that hosts or intends to host a CSF offer and its associates, cannot financially assist or arrange financial assistance for a retail investor to acquire securities under a CSF offer.	No equivalent.
A person can advertise or publish a statement in relation to a CSF offer or intended CSF offer so long as the advertisement or statement complies with the advertising rules.	A person can advertise or publish a statement in relation to an offer of securities or intended offer requiring disclosure so long as the advertisement or statement complies with the advertising rules.
A person must not make an offer expressed as a CSF offer in relation to a company that has not been formed or does not exist.	A person must not make an offer of securities that needs disclosure under Part 6D.2 in relation to a company that has not been formed or does not exist.

Detailed explanation of new law

6.8 The CSF regime contains certain investor protections that apply only to an investor treated as a retail client in relation to the CSF offer.

Protections for retail clients

6.9 For the purposes of the CSF regime, a retail client for the purpose of a CSF offer is defined in the same way as a retail client for the purpose of a crowd-funding service [*Schedule 1, Part 1, item 14, section 738D*]. Paragraphs 3.21 to 3.24 explain when a person will be treated as a retail client in relation to a crowd-funding service.

Investor caps

6.10 The Bill establishes a \$10,000 cap as the maximum amount a retail client can invest in relation to CSF offers by a particular issuer via the same intermediary within a 12-month period to limit a retail investor's exposure to a single company. The amount of the cap can be adjusted by regulations. [*Schedule 1, Part 1, item 14, subsection 738ZC(1)*]

6.11 The investment cap is applied as an obligation on a CSF intermediary to reject an application from a retail client where it would otherwise breach the cap. When assessing whether the cap would be breached, the intermediary should only take account of investments made on its offer platform and not investments made in the issuer company via other platforms.

6.12 It is expected that CSF intermediaries will have the necessary systems to ensure that amounts invested by retail investors are appropriately tracked so that an application from a retail client that would exceed the cap is rejected. Where an application is rejected because it would otherwise breach the cap, the intermediary must refund application money to the investor as soon as practicable [*Schedule 1, Part 1, item 14, paragraph 738ZB(4)(b)*].

Example 6.1: Treatment of joint applications

On 2 January of the current year, Donna makes an application to invest \$9,000 in a CSF offer by New Tech Ltd via Value Add Pty Ltd, a licensed CSF intermediary.

New Tech's CSF offer is successful and the company decides to make a second CSF offer 6 months later using the Value Add platform again. Donna was very happy with her investment in New Tech and decides to participate in their second offer.

On 5 July Donna attempts to make an investment of \$5,000 in New Tech but is unable to complete the application on the Value Add platform. This is because the \$5,000 allocation would take her total investment in New Tech via the Value Add platform beyond the \$10,000 cap within 12 months.

6.13 The Bill provides rules relating to the investor cap if two or more people make a joint application for securities. Where there are joint applicants, each of the applicants is taken to have made an individual application for the purposes of calculating the amounts contributing to each applicant's investor cap. The amount each of the applicants is considered to have invested is determined by dividing the total amount invested under the joint application by the total number of applicants. *[Schedule 1, Part 1, item 14, subsection 738ZC(2)]*

6.14 If the amount being attributed to each applicant under a joint application would result in any one of the individual applicants exceeding their investor cap, the CSF intermediary must reject the joint application and refund the application money. There is a regulation-making power to allow the default rules relating to joint applications to be amended by regulation. *[Schedule 1, Part 1, item 14, subsection 738ZC(2)]*

6.15 An intermediary that does not reject an application by a retail client, which leads to a breach of the investor cap, commits an offence punishable by a maximum penalty of 30 penalty units. *[Schedule 1, Part 1, item 14, subsection 738ZC(1) and item 34, item 245Q in the table to Schedule 3]*

6.16 In the case of a prosecution related to this offence, the defendant would bear an evidential burden for establishing that the investor was not a retail client in relation to the CSF offer *[Schedule 1, Part 1, item 23, subsection 761G(8)]*. Imposing the evidential burden on the defendant is necessary and appropriate to ensure investors that are retail clients are provided with the additional investor protections, such as the investor cap, provided to retail clients under the CSF regime.

6.17 There are no penalties for a retail client that makes, or purports to make, an application that exceeds the investor cap.

Cooling-off rights

6.18 The Bill provides all retail clients who make an application in relation to a CSF offer with an unconditional right to withdraw their application within 5 business days of it being made *[Schedule 1, Part 1, item 14, subsection 738ZD(1)]*

6.19 The cooling-off rights provide retail clients with time to reconsider their decision to invest and allow the investor to withdraw their application in the event they no longer wish to proceed with the investment.

6.20 The investor must exercise their cooling-off rights in accordance with the method specified by the intermediary on their offer platform. *[Schedule 1, Part 1, item 14, subsection 738ZD(2)]*

6.21 The intermediary is required to display information regarding the retail investors' statutory cooling-off rights prominently on the offer platform including the means by which an investor can exercise those rights [*Schedule 1, Part 1, item 14, subsection 738ZA(8)*]. These requirements are discussed in paragraphs 3.70 to 3.71.

6.22 Where an investor exercises their cooling-off rights, the intermediary must refund their application money as soon as practicable. [*Schedule 1, Part 1, item 14, paragraph 738ZB(4)(a)*]

Example 6.2: Exercise of cooling-off rights

Eric applies to invest \$7,000 in a CSF offer by AlphaBeta Ltd via the Value Add Pty Ltd CSF platform on 10 March. He thinks about the decision to invest and on 13 March decides that he has changed his mind and wants to withdraw his application.

Eric can withdraw as he is within the 5 business day withdrawal period but he must indicate his withdrawal to Value Add in accordance with the instructions they have provided on their platform.

Prohibition on the provision of financial assistance

6.23 The Bill prohibits the following persons from providing financial assistance or arranging to provide financial assistance to a person that is a retail investor:

- a company making the CSF offer or intended offer (an offer that is yet to be made);
- related parties of the company;
- a CSF intermediary that is hosting or intending to host the CSF offer; and
- any associates of the CSF intermediary. [*Schedule 1, Part 1, item 14, subsections 738ZE(1) and (2)*].

6.24 The amendments define who is taken to be a related party of the company (refer to paragraphs 2.44 to 2.47). An 'associate' of an intermediary is determined in accordance with sections 10 to 17.

6.25 The Bill confirms that the prohibition applies whether the financial assistance was provided before or after the acquisition of securities under the offer and also covers financial assistance provided in the form of a dividend [*Schedule 1, Part 1, item 14, subsection 738ZE(3)*]. The Bill provides that the terms ‘financially assist’ and ‘financial assistance’ have the same meanings as they do for section 260A of the Act [*Schedule 1, Part 1, item 14, subsection 738ZE(4)*].

6.26 Contravention of the prohibition is an offence, punishable by a maximum penalty of 300 penalty units, five years imprisonment, or both. The term of imprisonment is consistent with the penalty applicable under section 260A. The penalty of 300 penalty units has been calculated based on the fine/imprisonment ratio of 5:1 specified in the Government’s *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (section 3.1.3 of the Guide refers). [*Schedule 1, Part 1, item 34, item 245R in the table to Schedule 3*]

Protections applying to all investors

Advertising restrictions

6.27 The Bill permits issuers and intermediaries to advertise CSF offers as long as the advertisement or publication complies with the rules set out in the Bill.

6.28 The purpose of the advertising rules is to protect investors by ensuring they make informed decisions regarding the merits of a CSF offer based on the information contained in the CSF offer document rather than advertisements.

Scope of the advertising prohibitions

6.29 The advertising restrictions apply to advertisements of CSF offers and intended CSF offers (offers that are yet to be made). [*Schedule 1, Part 1, item 14, paragraph 738ZG(1)(a)*]

6.30 The advertising restrictions also apply to statements that refer to CSF offers or intended offers (whether directly or indirectly) or statements that are reasonably likely to induce people to apply for securities under a CSF offer or intended offer. [*Schedule 1, Part 1, item 14, paragraph 738ZG(1)(b)*]

When a statement will be taken to indirectly refer to a CSF offer or to reasonably induce investors to apply

6.31 In determining whether a statement indirectly refers to a CSF offer or intended offer, or is reasonably likely to induce investors to apply for securities offered under a CSF offer or intended offer, the Bill provides that regard must be had to three factors:

- whether the statement is part of normal advertising directed at maintaining or attracting customers [*Schedule 1, Part 1, item 14, paragraph 738ZG(3)(c)*];
- whether the statement contains information that deals with the affairs of the body publishing the statement [*Schedule 1, Part 1, item 14, paragraph 738ZG(3)(d)*]; and
- whether an investor would likely be encouraged to invest in the securities on the basis of the statement rather than the CSF offer document [*Schedule 1, Part 1, item 14, paragraph 738ZG(3)(e)*].

Not within scope of the advertising restrictions

6.32 The advertising restrictions do not apply to the publication of a CSF offer, CSF offer document, or any other information relating to a CSF offer that is on the platform of the intermediary [*Schedule 1, Part 1, item 14, subsection 738L(4) and paragraph 738ZG(2)(a)*]. In the absence of this carve out, the intermediary would be required to include a statement that a person should, in deciding whether to make an application under the offer, consider the CSF offer document and general CSF risk warning (refer to paragraphs 6.37 to 6.40). However, it would be unnecessary to include a statement directing a person's attention to the offer document and the general CSF risk warning given, in order to read the statement, the person would already have to be viewing the offer platform which would itself already display the CSF offer document and general CSF risk warning.

6.33 However, the Bill provides that statements made on a communication facility, even where the communication facility is part of the offer platform, will remain subject to the advertising restrictions [*Schedule 1, Part 1, item 14, subsection 738ZG(2)*]. There is a separate exception to the advertising rules that applies for statements made in good faith on the communication facility, discussed at paragraphs 6.48 to 6.52.

6.34 The advertising restrictions do not apply to advertisements or publications that do not refer to particular CSF offers or intended offers and that do either or both of the following:

- identify a person as a CSF intermediary;
- provide general information about the intermediary's CSF services. *[Schedule 1, Part 1, item 14, paragraph 738ZG(2)(b)]*

6.35 This exclusion from the advertising restrictions is to permit the intermediary to advertise its intermediation services.

Exceptions to the advertising restrictions

6.36 The Bill sets out some exceptions to the advertising restrictions. *[Schedule 1, Part 1, item 14, section 738ZG(4)]*

Advertisement includes a statement that a person must, in deciding whether to invest in the CSF offer, consider the CSF offer document and risk warning

6.37 An advertisement or publication will not contravene the advertising restrictions where the advertisement or publication includes a statement that a person should, in deciding whether to make an application under the offer, consider the CSF offer document and general CSF risk warning. *[Schedule 1, Part 1, item 14, subsection 738ZG(6)]*

6.38 The same requirements apply whether the advertisement is in relation to an open CSF offer (one where the CSF offer document has been published) or an intended offer. This is different to how advertisements relating to offers of an unlisted company are treated: an advertisement made before the disclosure document has been lodged with ASIC is subject to stricter controls regarding what can be included in the advertisement than an advertisement made after the disclosure document has been lodged (paragraph 734(5)(b) compared with subsection 734(6)).

6.39 The rationale for relaxing some of the advertising restrictions applying to intended offers is that the CSF regime builds in certain investor protections, for example, that applications can only be made via the platform of an intermediary that is required to prominently display important information for investors (such as the CSF offer document and risk warning). The regime also provides additional protections for retail investors (such as the unconditional cooling-off rights).

6.40 Where the advertisement or publication does not include the required statement (and no other exceptions apply), the person advertising or publishing the statement will commit an offence (refer to paragraphs 6.57 to 6.59).

Exception for publishers

6.41 Media businesses that publish an advertisement in the ordinary course of their business are not subject to the advertising restrictions. The exception only applies if the media business does not know and does not suspect that the publication would breach the advertising restrictions. *[Schedule 1, Part 1, item 14, subsection 738ZG(7)]*

6.42 The exception only applies in relation to media businesses that are newspapers, magazines, radio and television broadcasters, and their electronic equivalents. *[Schedule 1, Part 1, item 14, subsection 738ZG(10)]*

6.43 The exception also extends to news reports or other genuine comment in the media that refer to a CSF offer document that is published on an intermediary's platform, information in such an offer document and information that is contained in certain other permitted reports. *[Schedule 1, Part 1, item 14, paragraph 738ZG(9)(c)]*

6.44 Reports about securities of the company making the CSF offer or intended offer that are published by an *independent* third party are also an exception to the advertising restrictions. *[Schedule 1, Part 1, item 14, paragraph 738ZG(9)(d)]*

6.45 An entity will be considered an independent third party if it is: not the company making the CSF offer; not acting for that company; not a director of the company; not the CSF intermediary hosting the offer; and not anyone else who has an interest in the success of the issue of the securities. *[Schedule 1, Part 1, item 14, paragraph 738ZG(9)(d)]*

6.46 An entity will not be considered independent if they receive consideration or any other benefit for the publication that contravenes the advertising restrictions. *[Schedule 1, Part 1, item 14, paragraph 738ZG(9)(d)]*

6.47 An advertisement or publication not covered by this exception will contravene the advertising restrictions (unless another exception applies) and the person advertising or publishing the statement will commit an offence (refer to paragraphs 6.57 to 6.59).

Statements made in good faith on the communication facility

6.48 This exception to the advertising restrictions is to enable statements to be made on the communication facility for a CSF offer as long as the statement is made in good faith. *[Schedule 1, Part 1, item 14, subsection 738ZG(8)]*

6.49 In the absence of this exception, any person (including a prospective investor) making a statement on the communication facility would be required to include, in addition to their statement, a statement that a person, in deciding whether to make an application pursuant to the CSF offer, should consider the CSF offer document and general CSF risk warning. If the person failed to include the required statement, they would breach the advertising restrictions and commit a strict liability offence, punishable by a maximum penalty of 30 penalty units.

6.50 As it would be impracticable to require every person using the communication facility to include the required statement every time they made a statement on the facility, the amendments create an exception for statements made in good faith on the communication facility, by any person (including the issuer company or intermediary). *[Schedule 1, Part 1, item 14, subsections 738ZG(1) and (8)]*

6.51 A statement not made in good faith would not be covered by this exception. The evidential burden of demonstrating that the statement was made in 'good faith' falls on the person making the statement. This is appropriate as the person making the statement is best placed to raise evidence as to why the statement was made in good faith, given it could at least in part involve some inquiry as to the person's state of mind and knowledge.

6.52 Where the person is unable to show the statement was made in good faith, the person will commit an offence (refer to paragraphs 6.57 to 6.59).

Exceptions for certain reports and notices

6.53 This exception is to enable the publication of certain notices and reports relating to a company making a CSF offer.

6.54 The exception enables the publication of a notice or report of a general meeting of a company making a CSF offer. *[Schedule 1, Part 1, item 14, paragraph 738ZG(9)(a)]*

6.55 The exception also covers reports about the company that are published as long as the reports do not contain material information about the company that is not included in the CSF offer document or annual report and do not actually refer to the CSF offer. *[Schedule 1, Part 1, item 14, paragraph 738ZG(9)(b)]*

6.56 An advertisement or publication not covered by this exception will contravene the advertising restrictions (unless another exception applies) and the person advertising or publishing the statement will commit an offence (refer to paragraphs 6.57 to 6.59).

Consequences of contravening the advertising restrictions

6.57 A person that advertises or publishes a statement in contravention of the advertising restrictions commits a strict liability offence, punishable by a maximum penalty of 30 penalty units *[Schedule 1, Part 1, item 14, subsection 738ZG(5) and item 34, item 245T in the table to Schedule 3]*.

6.58 Strict liability is appropriate because of the importance of ensuring that investors applying for CSF offers do so after forming a view of the merits of the CSF offer, based on the information contained in the CSF offer document and having regard to the general CSF risk warning. This is particularly important given CSF investments will be high risk (given the relatively high failure rate of start-ups and small businesses).

6.59 The penalty of 30 penalty units complies with the Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* as it is below the recommended maximum penalty of 60 penalty units and does not include a term of imprisonment.

Prohibition on hawking securities

6.60 Section 736 prohibits a person from offering securities for issue (or sale) in the course of, or because of, an unsolicited meeting or telephone call. The prohibition on securities hawking in Part 6D.3 is an important safeguard against a person being pressured into acquiring securities without potentially having all of the information to make an informed decision or the benefits of the protections offered under the CSF regime.

6.61 The prohibition has not been specifically amended to apply to CSF offers because CSF offers can only be made via an intermediary's platform. Nevertheless, it is possible for the securities hawking prohibition to apply to securities under a CSF offer where the offer actually made in the course of the unsolicited meeting or telephone call is *not* expressed to be made as a CSF offer. In such cases, the offer will not be a CSF offer and *will*, therefore, be covered by the securities hawking prohibition in section 736.

6.62 Where the person offering the securities does so in a way that the offer is expressed as a CSF offer (and the offer is eligible to be made as a CSF offer), the prohibition on securities hawking will not apply (refer to paragraph 2.10). However, as the CSF offer would have been made otherwise than on the platform of an intermediary, the rules regarding how a CSF offer must be made (refer Chapter 4 of the Explanatory Memorandum) will have been contravened, which is an offence.

Offering securities of a company that does not exist

6.63 The amendments prohibit a person from making an offer expressed as a CSF offer in relation to a company that has not been formed or that does not exist [*Schedule 1, Part 1, item 14, section 738ZF*]. This is comparable to the rule in section 726, which makes it an offence for a person to offer securities in a body that has not been formed or that does not exist where the offer requires disclosure under Part 6D.2. Section 726 does not apply to a CSF offer as a CSF offer is not an offer requiring disclosure under Part 6D.2, which is why these amendments create a new offence.

6.64 The offence carries a maximum penalty of 300 penalty units, five years imprisonment, or both [*Schedule 1, Part 1, item 34, item 245S in the table to Schedule 3*].

ASIC stop order powers

Defective advertising of CSF offers

6.65 ASIC's stop order powers have been extended so that they apply where an advertisement or publication for a CSF offer or intended offer is defective because there is a misleading or deceptive statement in the advertisement, or the advertisement does not include the required statement advising that a person should, in considering whether to apply for the offer, consider the CSF offer document and general CSF risk warning [*Schedule 1, Part 1, items 15, 18 and 19, paragraph 739(1)(f), subsection 739(6) and paragraph 739(6)(c)*].

6.66 Where the advertisement is defective, ASIC may order that the relevant conduct specified in the stop order must not be engaged in. *[Schedule 1, Part 1, item 17, paragraph 739(1A)(b)]*

Offers expressed as, but not eligible to be, CSF offers

6.67 The amendments extend ASIC's stop order powers so that they apply to offers expressed to be made as CSF offers but that are not eligible to be made as CSF offers *[Schedule 1, Part 1, item 15, paragraph 739(1)(g)]*.

6.68 ASIC may order that no offers, issues, sales or transfers of the securities are to take place while the order is in force *[Schedule 1, Part 1, item 16, paragraph 739(1A)(a)]*.

Consequential amendments

6.69 A consequential amendment has been made to one of the exceptions to the existing advertising restrictions in Part 6D.3 to add CSF offer documents. The consequential amendment is intended to cover the situation where a company has made both a CSF offer and an offer requiring disclosure under Chapter 6D. A reference to both offers in a report of the company could breach both the advertising restrictions in the CSF regime as well as the existing restrictions applying to advertising of disclosure documents. The effect of the consequential amendment is that a report about a company that does not contain material information about the company that has not previously been included in a Chapter 6D disclosure document *or a CSF offer document* and that does not refer to the offers will not contravene the existing advertising restrictions in Part 6D.3. *[Schedule 1, Part 1, item 13, subparagraph 734(7)(c)(i)]*

6.70 Consequential amendments have been made to subsection 1018A(4). The subsection sets out the general exceptions to advertising restrictions applying to financial products. An existing exception for reports by the issuer where information was previously made available in a disclosure document lodged with ASIC has been extended to include CSF offer documents. An exception for news reports, or genuine comment, in the media relating to information contained in a disclosure document lodged with ASIC has been extended to include CSF offer documents. *[Schedule 1, Part 1, items 28 and 29, subparagraphs 1018A(4)(c)(i) and 1018A(4)(d)(i)]*

Chapter 7

Corporate Governance Concessions

Outline of chapter

7.1 This Chapter sets out the temporary concessions from certain public company corporate governance and reporting requirements available to a new public company that is eligible to crowd fund and has completed or intends to complete a CSF offer within the required time.

7.2 Unless otherwise stated, all references in this Chapter relate to the *Corporations Act 2001*.

Context of amendments

7.3 As the CSF regime is only available to public companies, it will exclude start-ups and other small-scale enterprises that do not adopt a public company structure. Restricting the CSF regime in this way could potentially reduce the number of companies using the CSF regime and consequently substantially reduce the effectiveness of the regime.

7.4 To address this, the Bill creates temporary concessions from certain public company corporate governance and reporting requirements for new public companies that satisfy the CSF eligibility criteria at the time of registration as a new public company and at the end of the relevant financial year, and that complete a CSF offer within the required timeframe. The purpose of the concessions is to reduce the barriers to adopting a public company structure.

7.5 The corporate governance concessions are only available to companies that register as, or convert to, a public company *after* the commencement of the CSF regime. This is to ensure that public companies currently subject to the public company requirements do not reduce their reporting or governance standards.

Summary of new law

7.6 A company that is registered as, or that converts to, a public company after the commencement of the CSF regime will be eligible for the corporate governance and reporting concessions.

7.7 The concessions are only available to companies that are eligible and intend to crowd fund at the time they are registered and that successfully complete a CSF offer within 12 months of registration.

7.8 The corporate governance and reporting concessions apply for a maximum of five years from the date of registration as, or conversion to, a public company. The concessions are:

- an exemption from needing to hold an Annual General Meeting (AGM) under the usual rules;
- the option to only provide financial reports to shareholders online; and
- 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.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A company that is registered as, or converts to, a public company after the commencement of the CSF regime and that satisfies the eligibility criteria is eligible for certain corporate governance and reporting concessions for up to five years.	No equivalent.
A company that is eligible for the corporate governance and reporting concessions is not required to hold an AGM under section 250N.	Under section 250N, a public company must hold an AGM each year.
A company that is eligible for the corporate governance and reporting concessions is only required to provide financial reports to shareholders online.	A public company may provide financial reports to shareholders: by hard copy or email (where the shareholder has made an election to receive the reports in this way); by making the report readily accessible on a website; or by directly notifying, in writing, all persons that did not make an election as to how to receive the report, the website at which the reports may be accessed.

<i>New law</i>	<i>Current law</i>
A company that is eligible for the corporate governance and reporting concessions is not required to appoint an auditor or have audited financial reports until more than \$1 million has been raised from CSF offer or other offers requiring disclosure.	A public company must appoint an auditor within one month of registration and its financial reports must be audited each year.

Detailed explanation of new law

7.9 The concessions are only available to a company that registers as a public company, or converts to a public company, after the commencement of the CSF regime. In order to be eligible to claim the concessions, the company must satisfy certain eligibility criteria on registration and at the end of the financial year in which it is claiming the concession.

Must be eligible on registration

7.10 In order to be eligible for the concessions, the company must indicate, on its application for registration, that it will satisfy the requirements to be an eligible CSF company (Chapter 2 of the Explanatory Memorandum) on registration and that it intends to make a CSF offer after registration [*Schedule 2, item 1, paragraph 117(2)(mc)*].

7.11 A company that does not indicate the above in its application for registration will be ineligible for the concessions.

Must be eligible at end of financial year

7.12 The company must determine its eligibility to claim the concessions at each financial year end.

7.13 A company is eligible for the concessions for a particular year where it satisfies the following criteria:

- it is an eligible CSF company at the end of the financial year;
- it has, in its application for registration, indicated that it will be an eligible CSF company on registration and that it intends to make a CSF offer;
- the current financial year ends within five years of the date of the company's registration;

- where the current financial year ends more than 12 months since registration, the company has successfully completed a CSF offer; and
- either it is the company's first financial year, or where it is not the company's first financial year, the company has been eligible for the concessions in relation to every earlier financial year. *[Schedule 1, Part 1, item 14, section 738ZI]*

Must complete a CSF offer within 12 months of registration

7.14 The requirement that the company complete a CSF offer within 12 months of registration as, or conversion to, a public company is intended to ensure the concessions are targeted to companies that use the CSF regime.

7.15 Recognising that it will take some time for a newly formed company to complete a CSF offer, the company has a period of 12 months from registration as, or conversion to, a public company within which to successfully complete a CSF offer.

7.16 The offer must be complete within the 12-month period. A company that makes a CSF offer that is open at the end of the 12 month period will not be eligible for the CSF corporate governance concessions even if the offer subsequently successfully completes.

7.17 Likewise, if the company makes a CSF offer that closes but does not 'complete' (for example, because the minimum subscription condition is not met), the company will be ineligible to claim the concessions.

7.18 While the companies described in paragraphs 7.16 and 7.17 will not be eligible for the public company corporate governance and reporting concessions outlined in paragraphs 7.19 to 7.29, they may still be eligible to make a CSF offer, subject to satisfying the relevant eligibility criteria (refer to Chapter 2 of the Explanatory Memorandum).

Concession 1: Relief from holding an AGM

7.19 If the financial year end for the company is within 18 months of the date of registration, the company does not need to hold an AGM if it satisfies the requirements to claim the public company concessions (paragraph 7.13) at the end of the financial year *[Schedule 2, item 2, subsection 250N(5)]*.

7.20 For all subsequent financial years, the company does not need to hold an AGM if it satisfies the requirements to claim the public company concessions (paragraph 7.13) at the end of that financial year [*Schedule 2, item 2, subsection 250N(6)*].

7.21 The policy rationale for providing relief from having to hold an AGM is that, while AGMs serve a purpose in the general engagement process between companies and their shareholders and are a mechanism for accountability of those in control of the company, holding an AGM poses practical difficulties and costs for start-ups and other small-scale enterprises. The concession, therefore, is intended to reduce the burdens associated with holding an AGM for a limited period. Notwithstanding the company will not be required to hold an AGM under section 250N, the directors may still be required to call a general meeting under other circumstances (for example, pursuant to subsection 249D(1), on the request of members with at least 5 per cent of the votes that may be cast at the general meeting).

Concession 2: Relief from preparing audited annual financial reports

7.22 Public companies must have their financial reports audited (sections 295 to 297). However, recognising the compliance burden that can arise for a newly formed public company (particularly where it has converted from a proprietary company where audited financial reports are not required), a company can elect not to have audited financial reports where:

- they satisfy the general eligibility criteria to claim the concessions (paragraph 7.13); and
- as at the end of the current financial year, the company has raised less than \$1 million from all CSF offers and other offers requiring disclosure under Chapter 6D.2 that it has made at any time [*Schedule 2, item 5, subsection 301(5)*].

7.23 Recognising that the obligation to have audited financial reports provides an important safeguard for investors, the exemption from having audited financial reports ceases at the earlier of: five years from the date of registration as, or conversion to, a public company; or when the company raised more than \$1 million from CSF offers or other offers requiring disclosure made at any time. The cap is based on offers made at any time — the \$1 million cap does not reset every year.

Relief from appointing an auditor

7.24 As the Bill provides an exemption from the requirement to prepare audited financial reports, the Bill exempts the directors of a company from needing to appoint an auditor within one month of registration where the following requirements are satisfied:

- on registration, the company satisfied the general eligibility criteria to claim the concessions (paragraph 7.13); and
- the application for registration stated that the company would be eligible for the concessions on registration and that the company intends to make a CSF offer after registration.
[Schedule 2, item 9, subsection 327A(4)]

Concession 3: Annual financial reports only to be provided online

7.25 Public companies must provide a financial report, directors' report and auditor's report to shareholders each year. The company must, on at least one occasion, directly notify each shareholder in writing that they may elect to receive the reports in either hard or electronic copy free of charge and, if they do not so elect, they may access the reports on a specified website.

7.26 The requirement to notify shareholders of the options to receive the annual reports and to provide the reports in the format elected by the shareholder may impose significant costs on a start-up or small-scale enterprise.

7.27 The Bill provides that a company that satisfies the general eligibility criteria to claim the concessions (paragraph 7.13) at the end of the financial year only needs to provide its annual reports via a website and does not need to notify shareholders of alternative ways of receiving the reports. *[Schedule 2, items 6 and 7, subsections 314(1) and 314(1AF)]*

7.28 A similar amendment has also been made to enable a company that qualifies for the concessions to provide its concise financial report to shareholders by making the report available on a website *[Schedule 2, item 8, subsection 314(2A)]*.

7.29 Consequential amendments have been made to the content requirements of the annual directors' report. The amendments provide that a company that claims the audit concessions (refer to paragraphs 7.22 to 7.23) is not required to include a copy of the auditor's declaration in its directors' report *[Schedule 2, items 3 and 4, subsections 298(1AA) and 298(1AC)]*.

Chapter 8

Exemptions from regulatory requirements relating to Australian Market Licences and Clearing and Settlement Facility Licences

Outline of chapter

8.1 This Chapter sets out the new exemption powers that can be used to provide for a more tailored regulatory regime to facilitate specialised and emerging financial market and clearing and settlement facility operators, including in relation to CSF securities.

8.2 All legislative references within this Chapter are to the *Corporations Act 2001* unless specified otherwise.

Context of amendments

8.3 Currently, under Part 7.2 of the Act, any person that falls within the definition of operating a financial market is required to obtain an Australian Market Licence (AML) or seek an exemption from the Minister. The Minister has the power to exempt a market from the operation of Part 7.2 in full, but does not have the power to provide a partial exemption from particular requirements under the regime.

8.4 The AML regime was designed to address the risks associated with large public exchanges (such as the Australian Securities Exchange) and imposes obligations commensurate with the nature and risks of those financial markets. The full suite of obligations may not be as appropriate for operators of emerging or specialised financial markets such as crowd-sourced funding (CSF) intermediaries.

8.5 Generally, requiring these types of market operators to obtain an appropriately modified AML may ensure that they have adequate arrangements to meet their obligations and to provide the market environment expected by persons participating in the market.

8.6 Amending the AML framework to provide the Minister with the power to exempt certain market operators from specified obligations would ensure that the AML regime could be tailored to particular markets. The exemption power could be used to facilitate the development of emerging and specialised markets, including CSF intermediaries.

8.7 To be able to effectively tailor the regulatory obligations to suit emerging or specialised financial markets, similar partial exemption powers are required in relation to Parts 7.2A, 7.3 and 7.5 of the Act.

8.8 Part 7.2A provides for Australian Securities and Investment Commission (ASIC) supervision of financial markets. Some or all of these requirements may not be suitable for all emerging and specialised financial markets. Similarly, Part 7.5 requires AML holders to maintain compensation arrangements designed for public exchanges but that may not be appropriate for other types of financial markets.

8.9 Part 7.3 provides for the licencing of clearing and settlement facilities. The definition of clearing and settlement is wide and could apply to emerging or specialised financial markets owing to some incidental activities they perform as part of operating a financial market. These include transferring money between the trading accounts of investors. Like Part 7.2, some of the requirements imposed by Part 7.3 may not be appropriate for such incidental activities.

8.10 As such, providing the Minister with enhanced powers to exempt some emerging and specialised financial markets – such as intermediaries operating facilities for secondary trading in CSF interests – from some or all of the requirements in parts 7.2, 7.2A, 7.3 and 7.5 would provide for a more effective, efficient and flexible regulatory regime.

8.11 The ability to offer more tailored regulation of financial markets and clearing and settlement facilities would provide a more agile framework that would facilitate innovation in and the development of new types of funding mechanisms, including CSF.

Summary of new law

8.12 The Bill provides the Minister with additional exemption powers to provide financial markets and clearing and settlement facilities with exemptions from specified parts of the AML and clearing and settlement facility licencing regimes.

8.13 The Bill amends the existing exemption power under Part 7.2 of the Act to provide the Minister with the power to exempt a financial market or class of financial markets from some of the AML regulatory requirements under Part 7.2 of the Act. The existing exemption power only allows for a full exemption from holding an AML.

8.14 An identical exemption power is also being introduced into Part 7.2A of the Act so that the Minister can exempt a financial market or class of financial markets from some or all of the obligations relating to ASIC supervision under Part 7.2A of the Act. This is a new exemption power that exactly mirrors the amended exemption power being introduced into Part 7.2 of the Act.

8.15 The existing exemption power in Part 7.3 of the Act is being amended to provide the Minister with the power to exempt a clearing and settlement facility or class of clearing and settlement facilities from some of the clearing and settlement facility licensing requirements under Part 7.3 of the Act. The current exemption power only allows for a full exemption from needing a licence for operating a clearing and settlement facility.

8.16 An identical exemption power is also being introduced into Part 7.5 of the Act so that the Minister can exempt a financial market or class of financial markets from some or all of the compensation arrangement requirements under Part 7.5 of the Act. This is a new exemption power that exactly mirrors the amended exemption power being introduced into Part 7.2 of the Act.

8.17 The introduction of these four identical exemption powers creates a streamlined approach to granting some emerging or specialised financial markets and clearing and settlement facilities with exemptions from some of the regulatory requirements in Parts 7.2, 7.2A, 7.3 and 7.5 of the Act to provide for a more tailored regulatory approach.

Summary of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Minister may exempt a financial market or class of financial market from some of the AML requirements.	The Minister may exempt a financial market or class of financial market from all of the AML requirements.
The Minister can exempt a financial market or class of financial markets from some or all of the obligations relating to ASIC supervision.	No equivalent.

<i>New law</i>	<i>Current law</i>
The Minister may exempt a clearance and settlement facility or class of clearing and settlement facility from some of the clearing and settlement facility licensing requirements	The Minister may exempt a clearance and settlement facility or class of clearing and settlement facility from all the clearing and settlement facility licensing requirements
The Minister can exempt a financial market or class of financial markets from some or all of the compensation arrangement requirements.	No equivalent.

Detailed explanation of new law

8.18 The Bill provides for changes in the exemption powers in Parts 7.2, 7.2A, 7.3 and 7.5 of the Act. The changes provide a more flexible and appropriate regulatory regime for emerging and specialised financial markets.

Exemptions from AML obligations

8.19 The Bill repeals the exemption power in existing section 791C of the Act and replaces it with an amended exemption power. *[Schedule 3, item 1, section 791C]*

8.20 The new amended exemption power largely replicates the existing power being replaced but provides greater flexibility in allowing the Minister to provide an exemption from specified obligations under Part 7.2 of the Act (as opposed to only being able to provide a complete exemption from the AML regime). *[Schedule 3, item 1, subsection 791C(1)]*

8.21 The exemption can be applied in relation to a particular market or a particular class of markets. Where an exemption is made in relation to a class of financial markets, then the exemption is a legislative instrument and is subject to disallowance and sunseting, consistent with the existing exemption power. *[Schedule 3, item 1, subsection 791C(4)]*

8.22 Where an exemption applies in relation to a particular market, an exemption is not a legislative instrument and the Minister is required to publish a notice of the exemption in the Gazette *[Schedule 3, item 1, subsection 791C(5)]*. This is the same approach as is currently provided for in the existing exemption power.

8.23 The new exemption also replicates the Minister's powers to vary or revoke an exemption after providing notice and providing affected market operators with the opportunity to make submissions. The only change to these requirements is that notice of a change to an exemption relating to a class of financial markets must be published on the ASIC website instead of a newspaper. *[Schedule 3, item 1, subsections 791C(2) and (3)]*

8.24 The new amended exemption power has also been rewritten to reflect modern drafting requirements.

8.25 As the existing exemption is being repealed to be replaced with the amended exemption, a savings provision has been introduced to ensure that all exemptions made prior to the change continue to operate. *[Schedule 3, item 2]*

Exemptions from ASIC supervision

8.26 The Bill provides the Minister with a new power to exempt a particular financial market or a class of financial markets from ASIC supervision under Part 7.2 of the Act. *[Schedule 3, item 3, section 798M]*

8.27 This new exemption power operates identically to the amended exemption power being introduced into Part 7.2 of the Act (refer to paragraphs 8.19 to 8.23 for a detailed description of how the power operates).

8.28 There is already a broad regulation making power under section 798L of the Act to exempt financial markets or types of financial markets from ASIC supervision under Part 7.2A of the Act.

8.29 The new exemption power is being introduced despite the existence of the regulation making power so that a consistent approach can be taken in providing a more tailored regulatory regime for emerging and specialised financial markets. Under this approach, where relevant, the Minister can exempt a financial market or class of financial markets from obligations relating to ASIC supervision in the same way that these markets can be given an exemption from the AML requirements in Part 7.2 of the Act.

Exemptions from clearing and settlement licensing obligations

8.30 The Bill repeals the exemption power in existing section 820C of the Act and replaces it with an amended exemption power. *[Schedule 3, item 4, section 820C]*

8.31 The change to the exemption power is identical to the change being made to the exemption power in Part 7.2 of the Act (see paragraphs 8.19 to 8.23 for a detailed description of how the power operates).

8.32 The main change to the provision is, therefore, to give the Minister the power to exempt a clearing and settlement facility or class of clearing and settlement facilities from part of the clearing and settlement licensing regime [*Schedule 3, item 4, subsection 820C(1)*]. The new exemption also replicates the Minister's powers to vary or revoke an exemption, with the required notice now able to be provided on the ASIC website rather than in a newspaper [*Schedule 3, item 4, subsections 820C(2) and (3)*]. The new amended exemption power has also been rewritten to reflect modern drafting requirements.

8.33 As the existing exemption is being repealed to be replaced with the amended exemption, a savings provision has been introduced to ensure that all exemptions made prior to the change continue to operate. [*Schedule 3, item 5*]

Exemptions from compensation regime requirements

8.34 The Bill provides the Minister with a new power to exempt a particular financial market or a class of financial markets from the compensation arrangement requirements under Part 7.5 of the Act. [*Schedule 3, item 6, section 893B*]

8.35 This new exemption power operates identically to the amended exemption power being introduced into Part 7.2 of the Act (see paragraphs 8.19 to 8.23 for a detailed description of how the power operates).

8.36 There is already a broad regulation making power under section 893A of the Act to exempt financial markets or types of financial markets from the compensation arrangements requirements under Part 7.5 of the Act.

8.37 The new exemption power is being introduced despite the existence of the regulation making power so that a consistent approach can be taken in providing a more tailored regulatory regime for emerging and specialised financial markets. Under this approach, where relevant, the Minister can exempt a financial market or class of financial markets from some of the compensation arrangement requirements in Part 7.5 of the Act in the same way that these markets can be given an exemption from the AML requirements in Part 7.2 of the Act.

Application and transitional provisions

8.38 These amendments will take effect from the day after the Bill receives Royal Assent. This is before the CSF regime commences because the changes will have application to other emerging or specialised market operators in addition to CSF intermediaries.

Chapter 9

Regulation impact statement

Policy objective

9.1 The primary policy objective of this Bill is to facilitate the development of the CSF market in Australia, through the removal of regulatory impediments to this type of fundraising. These impediments include governance and reporting requirements for companies, equity fundraising rules and requirements for financial intermediaries.

9.2 While these arrangements exist to protect and promote the interests of market participants, each has the effect of increasing the regulatory burden and cost of equity fundraising. This makes the overall cost of equity fundraising prohibitively expensive for small businesses, particularly start-ups, as the amount of funds they may seek to raise through CSF is typically small. Current regulatory settings are therefore constraining development of the CSF market in Australia.

9.3 This Bill provides a framework that addresses the regulatory barriers that are not easily able to be addressed by potential CSF participants. It also facilitates investment in these products by retail investors, who have previously been unable to participate in CSF offerings.

Implementation options

9.4 Four policy options are considered in the regulation impact statement. Three options were considered in the initial consultation process over December 2014 and January 2015. Option 4 was developed based upon stakeholder feedback from that initial process and incorporates elements of Options 1 and 2.

9.5 Option 1 is the model recommended by a CAMAC review in 2013. This model creates a new category of company – the ‘exempt public company’ – which would be relieved of some of the compliance requirements for public companies for a period of three to five years. These include continuous disclosure, annual general meeting, audited financial reports and half-yearly reporting requirements. Issuers would be able to raise up to \$2 million through CSF in any 12-month period, and investors would be limited to a \$2,500 investment per 12-month period in any particular CSF issuer, and \$10,000 in aggregate per 12-month period.

9.6 Intermediaries would be required to hold an AFSL, undertake due diligence requirements and provide risk warnings to investors.

9.7 Option 2 is the model adopted in New Zealand. It provides a cap of \$2 million on the amount that can be raised through CSF in any 12-month period, is not specifically limited to small enterprises but does not offer CSF-specific exemptions from compliance costs such as financial reporting and audit. Investors must sign a risk acknowledgment statement, but any investor caps are voluntary. Intermediaries must meet similar obligations to those provided in Option 1, and are permitted to invest in issuers using their platform.

9.8 Option 3 is retention of the status quo.

9.9 Option 4 allows CSF fundraising of up to \$5 million per annum for unlisted public companies with less than \$5 million in assets and annual turnover, with exemptions from certain public company obligations as recommended by Option 1. Investors would be limited to up to \$10,000 per issuer per 12-month period and required to complete a risk acknowledgment statement, but will not be limited in how much they can invest per 12-month period. Intermediaries will be required to hold an AFSL, undertake due diligence requirements and provide generic risk warnings to investors.

Assessment of impacts

9.10 The compliance costs are estimated by modelling the cost for issuers, intermediaries and investors of key relevant elements of the current regulatory framework for small businesses that currently use online platforms to raise equity, and comparing these status quo costs of Option 3 to the expected costs under each of the options. This approach makes assumptions about the number of CSF issuers, intermediaries and investors over the next 10 years under each option.

9.11 For each of Options 1, 2 and 4, the 'per business' compliance costs are expected to decline. However, given the likely growth in the number of businesses raising funds through CSF, the aggregate compliance burden across the economy over the next 10 years is expected to increase.

Impact group identification

9.12 There are three groups primarily impacted under this regulation impact statement.

9.13 Companies seeking to raise funds and which stand to benefit from a CSF framework. This is particularly the case for innovative firms and start-ups, which typically have more difficulty obtaining bank debt finance than established firms, but for whom existing equity fundraising is prohibitively expensive. These companies would be *issuers* of CSF offerings.

9.14 Individuals seeking new opportunities to invest stand to benefit from the increased range of financial products that CSF would present. These individuals would be able to diversify the range of products they invest in, and would be *investors* in CSF offerings.

9.15 A number of organisations are seeking to establish and operate a platform that allows issuers to list their CSF offerings, bringing together issuers and potential investors. These organisations would operate as *intermediaries* in the CSF market.

Analysis of costs/benefits

9.16 Under Option 1, costs per issuer are expected to fall in net terms by \$7,950 per year, driven primarily by temporary exemptions from audit, annual general meeting and disclosure requirements. Intermediary costs are expected to increase by \$1,550 per fundraising campaign. Costs per investor are expected to increase by \$75 per year as a result of risk disclosure statements and monitoring their compliance with investment caps.

9.17 In aggregate, the regulatory compliance cost of Option 1 is \$58.9 million.

9.18 Under Option 2, costs per issuer are expected to fall in net terms by only \$1,750 per year, as there are no CSF-specific exemptions from public company compliance requirements. Intermediary costs are expected to increase by \$1,680 per fundraising campaign. Costs per investor are expected to increase by \$17 per year as a result of risk disclosure statements.

9.19 In aggregate, the regulatory compliance cost of Option 2 is \$73.4 million.

9.20 Under Option 4, costs per issuer are expected to fall in net terms by \$9,950 per year, driven primarily by temporary exemptions from audit, annual general meeting and disclosure requirements. Intermediary requirements are the same as for Option 1 and are expected to increase by \$1,550 per fundraising campaign. Costs per investor are expected to increase by \$75 per year as a result of risk disclosure statements and monitoring their compliance with investment caps.

9.21 In aggregate, the regulatory compliance cost of Option 4 is \$54.6 million.

Consultation

9.22 The design of Option 4 was driven by stakeholder feedback from consultation undertaken in the first half of 2015. A subsequent discussion paper was released in August 2015, outlining the key features of Option 4. Feedback provided at this stage informed the design of the final model.

9.23 The draft Bill was shared with key industry stakeholders, including a number of firms seeking to set up as intermediaries in Australia, and corporate law experts for comment in early November 2015. Stakeholders were overall supportive of the draft legislation. Issues raised related to the obligations of intermediaries, and eligibility criteria for using CSF. Some of these have been addressed through revisions to the Bill. Others are expected to be clarified in time through regulations and ASIC guidance.

Conclusion and recommended option

9.24 The Government has elected to implement Option 4. This model is considered to provide the most appropriate balance between reducing the barriers to and compliance costs of CSF for public companies, while maintaining adequate investor protection. This model is also likely to have the highest net benefit of the options considered, and has a lower estimated aggregate regulatory cost than the other two options.

Chapter 10

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Corporations Amendment (Crowd-sourced Funding) Bill 2015

10.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

10.2 The Bill establishes the regulatory framework to facilitate CSF offers by small unlisted public companies, provides new public companies that are eligible to crowd fund with temporary relief from reporting and corporate governance requirements that would normally apply and creates new exemption powers to provide emerging financial markets with a more tailored regulatory and licencing framework.

Human rights implications

10.3 The Bill engages the right of freedom of expression under Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR).

10.4 New section 738ZG under item 1 in Schedule 1, Part 1 of the Bill restricts the advertisement of CSF offers except in prescribed circumstances.

10.5 The restriction on advertising is part of the investor protection provisions included in the Bill. Restricting the advertisement of CSF offers except as prescribed is intended to ensure that investors make decisions to invest in CSF interests based on full and accurate information.

10.6 To balance the need to protect investors with the need to enable the flow of information, there are a number of exemptions from the advertising restrictions. The first is to allow advertisements relating to CSF offers as long as the advertisement includes a statement that the investor should, in considering whether to invest in the offer, consider the CSF offer document and risk warning.

10.7 The provision provides for advertisements that direct potential investors to the CSF offer document and risk warning on the intermediary's platform to obtain further information about the offer that will enable them to make an informed decision on whether to invest.

10.8 There is also an exemption from the advertising restrictions to permit media businesses reporting on CSF offers in the ordinary course of their business to refer to CSF offers as long as they are not aware that they are breaching the advertising restrictions.

10.9 The CSF regime also provides for a specific communications facility that intermediaries are required to maintain while an offer is open so that investors can obtain information about an offer.

10.10 The advertising restrictions put constraints on the freedom of expression under the ICCPR but do so to protect investors. The provision balances the need to allow full freedom of expression with the need to protect investors participating in CSF offers. The provisions strike an effective balance by enabling the dissemination of information while also ensuring investors are directed to an appropriate source to obtain further information about the offer.

Conclusion

10.11 The Bill is compatible with human rights as it seeks to protect retail clients from advertisements that could induce them to make investment decisions without having all the necessary information.

10.12 To the extent that the Bill restricts the freedom of expression, this is justified because it is a reasonable, necessary and proportionate consequence of protecting investors by ensuring they can access sufficient information about the CSF offer.

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