

SHAREHOLDER (DIS)EMPOWERMENT THROUGH CROWD-SOURCED EQUITY FUNDING

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The introduction of Crowd-Sourced Equity Funding ('CSEF') into the Australian corporate fundraising landscape sought to give effect to the democratisation and direct participation goals of the Financial Technology ('FinTech') movement. CSEF offers a useful avenue for micro- and small-to-medium enterprises ('MSMEs') to access funds from the 'crowd'. However, this article argues that the current regulatory framework fails to give effect to the core principles underpinning CSEF as part of the FinTech movement. This creates a particularly vulnerable cohort of shareholders who are not given a 'voice' in the corporation, nor do they have the typical 'exit' options associated with public share ownership. The article proposes that corporate governance reforms should aim to enhance the distinctive attraction of CSEF as a corporate fundraising mechanism: the collaborative pursuit of non-financial motivations for investment, and the adoption of engagement mechanisms that advance efforts towards the democratisation of finance and collaboration as a means of social interaction.

I INTRODUCTION

In 2017, Australia introduced a dedicated Crowd-Sourced Equity Funding ('CSEF') regime into its corporate fundraising framework. CSEF allows corporations to raise funds from the 'crowd' through a licensed online portal. The process leverages the internet and social networking technology to facilitate direct participation in finance by retail investors and attempts, in the process, to 'democratise' corporate fundraising as part of the broader Financial Technology

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(‘FinTech’) movement.¹ This means that the support of a social movement, which leverages technological innovation to provide a broader range of members of society with the opportunity to directly participate in the financial system, is at the core of CSEF as a distinctive fundraising mechanism.² Further, CSEF’s use of the crowdfunding concept gives effect to increasing interest in combining financial investments with the pursuit of other social goals that are at the core of debates regarding corporate governance and corporate purpose.

While CSEF aims to harness the potential of the internet to provide distinctive financial opportunities for both business fundraisers and retail investors, the current Australian regulatory framework set out in part 6D.3A of the *Corporations Act 2001* (Cth) (*‘Corporations Act’*) treats CSEF as merely another form of financial investment. This article argues that this results in the creation of a particularly vulnerable cohort of shareholders contrary to the democratisation and direct participation goals that underpin CSEF.

In particular, problems arise as a result of inattention to the implications of Australia’s approach to corporate governance on investors in the CSEF process. While some corporations funded through CSEF may retain their official ‘private’ status, they are largely funded by a new type of corporate actor: a widely dispersed group of shareholders consisting of investors that, while generally treated as unsophisticated in financial terms, are often driven to invest through the combined potential for financial return on investment (however remote) and the desire to contribute towards the pursuit of a shared social preference. This article argues that the current corporate governance framework, with its emphasis on shareholder passivity and on the narrow pursuit of financial gain, is inadequate to meet the goals of CSEF and reforms that are consistent with broader aims of corporate governance would help to overcome these problems.

The remainder of this article proceeds as follows. Part II sets out CSEF in its broader context. This includes critical analysis of both the financial and shared social preference motivations that provide a business case for CSEF as a distinctive corporate fundraising mechanism. Part III explores the current Australian CSEF regulatory framework, dealing with reforms at the fundraising stage, and at the post-fundraising stage. Part IV analyses the limitations of the current regulatory approach in light of the issues that arise from an attempt to fit corporations funded

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- 1 See, eg, Ethan Mollick and Alicia Robb, ‘Democratizing Innovation and Capital Access: The Role of Crowdfunding’ (2016) 58(2) *California Management Review* 72, 73. For a discussion of democratisation in the CSEF context see, eg, Rhiana Whitson, ‘Retail Investors Are Pouring Millions into Equity Crowdfunding, but Is It a Smart Way to Invest?’ *Australian Broadcasting Corporation* (online, 23 November 2021) <<https://www.abc.net.au/news/2021-11-23/crowdfunding-equity-small-business-investment-risk/100628502>>.
 - 2 In an early report following CSEF’s introduction into Australia, the Australian Securities and Investments Commission (‘ASIC’) confirmed the predominance of retail investors in the process. In its survey, ASIC found that 99.4% of investors were classified as retail investors while 0.6% of investors were classified as wholesale investors: Australian Securities and Investments Commission, *Survey of Crowd-Sourced Funding Intermediaries: 2017–18* (Report 616, April 2019) 13. The percentage of retail investors had decreased by the next survey but was still by far larger than the number of wholesale investors in the process: Australian Securities and Investments Commission, *Survey of Crowd-Sourced Funding Intermediaries: 2018–19* (Report 657, April 2020) 6.

through CSEF within the existing corporate governance framework. Part V puts forward a number of corporate governance reforms that aim to give effect to the democratisation, collaboration and direct participation goals of CSEF as well as the combination between financial and non-financial motivations for investment. The aim of these reforms is not to displace the board as the key financial managerial authority within the corporation, but rather seeks to give effect to the innovative aspects of CSEF that make it a distinctive corporate fundraising mechanism. This is vital in light of the extremely high financial risks associated with investment through CSEF and the negligible prospect of financial return on investment. Part VI offers concluding comments and observations, and proposes areas of further inquiry.

II A BRIEF PRIMER ON CSEF

A CSEF in Its Broader Context

CSEF is one example of the broader crowdfunding concept whereby a large number of individuals (the ‘crowd’) each provide a small amount of money through an online platform to support an advertised project or business or to provide a personal loan.³ The process is part of the FinTech movement commonly thought to be ‘disrupting’ finance.⁴ FinTech, a portmanteau of ‘finance’ and ‘technology’, refers to the technology-driven financial innovation that seeks both to provide greater efficiencies in financial markets, as well as to revolutionise markets by encouraging social interactions based on mutuality, cooperation and inclusiveness.⁵ The end goal of FinTech is to democratise finance and to encourage direct participation in financial activity. The approach to social interaction seeks to challenge ongoing reliance on passivity and on large intermediaries as the basis for financial markets.

The crowdfunding concept has been most commonly used as the basis for ‘Community Crowdfunding’ and ‘Financial Return Crowdfunding’.⁶ Community

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- 3 Eleanor Kirby and Shane Worner, ‘Crowd-Funding: An Infant Industry Growing Fast’ (Staff Working Paper No 3, International Organisation of Securities Commissions, 2014) 8. Crowdfunding itself is part of the broader ‘crowdsourcing’ concept first referenced by Jeff Howe in an article he wrote for *Wired*: Jeff Howe, ‘The Rise of Crowdsourcing’, *Wired* (online, 1 June 2006) <<https://www.wired.com/2006/06/crowds/>>. The concept refers to the leveraging of collective intelligence of the online community (the crowd) to achieve organisational goals.
 - 4 Rebel A Cole, Douglas J Cumming and Jon R Taylor, ‘Does FinTech Compete with or Complement Bank Finance?’ (Working Paper, Social Science Research Network, 31 August 2019) <<http://dx.doi.org/10.2139/ssrn.3302975>>.
 - 5 Saule T Omarova, ‘New Tech v New Deal: Fintech as a Systemic Phenomenon’ (2019) 36(2) *Yale Journal on Regulation* 735, 737.
 - 6 Kirby and Worner (n 3) 8–9. Kirby and Worner refer to ‘equity crowdfunding’ but this is only one aspect of securities-based crowdfunding which offers either equity or bonds in return for investment. The classification of different crowdfunding activities varies greatly. For instance, the European Commission divides crowdfunding between ‘crowd sponsoring’ (the equivalent of Community Crowdfunding) and ‘crowd lending’ or ‘crowd investing’ (the equivalent of Financial Return Crowdfunding). See European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Unleashing the Potential of Crowdfunding in the European Union*, Doc No COM(2014) 172, 27 March 2014, 4.

Crowdfunding consists of ‘Reward-Based Crowdfunding’ and ‘Donation-Based Crowdfunding’.⁷ Reward-Based Crowdfunding allows backers of goods or services to invest small amounts of money and receive, in return, some form of reward. Most often the reward is the product or service itself, or some derivative product or service.⁸ Donation-Based Crowdfunding relies on the provision of small donations from a large number of donors, usually for some charitable purpose. The motivation behind Donation-Based Crowdfunding is generally philanthropic with no expectation of reward in return for the donation.⁹

Financial Return Crowdfunding similarly consists of two sub-sets of crowdfunding – ‘Peer-to-Peer Crowdfunding’ and ‘Securities-Based Crowdfunding’. In Peer-to-Peer Crowdfunding, the crowd lends money to a company and in return, the company is legally obligated to repay the loan at an agreed time and interval, in addition to interest payments. In other words, this form of crowdfunding adds a further avenue for corporations to borrow money, where they may be unable, or unwilling, to borrow from a bank or similar financial institution. Securities-Based Crowdfunding involves a corporation issuing either bonds or, most relevant to this article, shares to the public. Where the security is a bond, this operates as a contractual arrangement similar to a loan. Security in the form of a share offers the investor equity ownership in a corporation.

While there are a number of different crowdfunding models, the basic idea started as a way to support community, social, or artistic projects, which did not involve expectation of financial return on investment – in other words, Community Crowdfunding.¹⁰ Financial Return Crowdfunding models, including CSEF, adapted this idea and applied it in an investment context. As with Community

7 Kirby and Worner (n 3) 9.

8 For instance, Zach Braff successfully raised funds through the Kickstarter crowdfunding website for his movie, *Wish I Was Here*: Zach Braff, ‘Wish I Was Here’, *Kickstarter* (Web Page, 24 April 2013) <<https://www.kickstarter.com/projects/1869987317/wish-i-was-here-1>>. Contributors were offered incentives for various contributions ranging from a weekly production diary for a \$10 contribution (Braff notes that this contribution means that ‘[y]ou’re now a part of this movie making club, and I want to show you the process, from start to finish’) to the signed film slate used in the film, which means that ‘[y]ou will own a part of the history of this movie’, or even a small role in the film, for a \$10,000 contribution.

9 Ethan Mollick, ‘The Dynamics of Crowdfunding: An Exploratory Study’ (2014) 29(1) *Journal of Business Venturing* 1, 3 <<https://doi.org/10.1016/j.jbusvent.2013.06.005>>. The Scripps Research Institute fundraising campaign to combat the Ebola virus offers a useful example of this form of crowdfunding. See Scripps Research Institute, ‘Outsmart Ebola Together’, *GoFundMe Charity* (Web Page, 9 October 2014) <<https://web.archive.org/web/20191119193748/https://charity.gofundme.com/CureEbola>>. More recently, a number of Donation-Based Crowdfunding efforts have sought to provide assistance to those in need as a result of the COVID-19 pandemic: Douglas W Arner et al, ‘Digital Finance and the COVID-19 Crisis’ (Research Paper No 2020/017, Faculty of Law, University of Hong Kong, April 2020) 17 <<http://dx.doi.org/10.2139/ssrn.3558889>>. Vaxine, the Australian creators of protein-based Covax-19, sought financing from the crowd to apply to the Therapeutic Goods Administration for approval in Australia: Sharen Petrovsky, ‘Bring Covax-19 Vaccine Back to Australia’, *GoFundMe* (Web Page, October 2021) <<https://web.archive.org/web/20220103015346/https://www.gofundme.com/f/bringing-covax19-back-to-australia>>.

10 See, eg, Alma Pekmezovic and Gordon Walker, ‘The Global Significance of Crowdfunding: Solving the SME Funding Problem and Democratizing Access to Capital’ (2016) 7(2) *William & Mary Business Law Review* 347, 364–6.

Crowdfunding, Financial Return Crowdfunding relies on the interest of the crowd in advertised community, social, or artistic projects to succeed in raising funds. Further, the crowdfunding concept provides the opportunity for members of the crowd to actively participate in a new form of social interaction using innovations in technology that reduce the need for intermediaries in financial markets. As the next section outlines, these elements remain integral to the crowdfunding business case no matter which particular form is adopted in support of a project.

B Do We Need More than Money to Make the World Go Around?

CSEF is most commonly described as a corporate fundraising mechanism directed at helping micro-, small and medium enterprises ('MSMEs') to overcome difficulties in raising funds through traditional financial channels that have contributed towards a 'funding gap'.¹¹ In its review of CSEF in Australia, the Corporations and Markets Advisory Committee ('CAMAC') noted that this funding gap prevented MSMEs in Australia from obtaining finance needed to continue to the next stage of development.¹²

The Australian Government sought to address this funding gap through programs such as the National Innovation and Science Agenda.¹³ The agenda promoted science and innovation as a way to encourage new sources of growth, to facilitate the creation of high-wage jobs and to 'seize the next wave of economic prosperity'.¹⁴ The introduction of a bespoke CSEF regulatory framework is one approach arising out of the agenda that aims to help achieve these goals. The design and aims of Australia's CSEF regulatory framework have understandably been greatly influenced by the desire to enhance fundraising options for MSMEs and, in the process, to encourage economic growth and innovation.¹⁵

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- 11 In the developed world the availability of bank loans and the willingness of banks to lend to MSMEs declined sharply after the financial crisis with banks increasing interest rates and requiring greater collateral from borrowers. See, eg, Oliver Gajda and Nick Mason, *Crowdfunding for Impact in Europe and the USA* (Report, Toniic and the European Crowdfunding Network, 27 December 2013) 11. See also in the Australian context, Reserve Bank of Australia, Submission to Treasury, *Financial System Inquiry* (March 2014) 130; Mihovil Matic, Adam Gorajek and Chris Stewart, 'Small Business Funding in Australia', *Small Business Finance Roundtable* (Reserve Bank of Australia, 22 May 2012) 18.
- 12 Corporations and Markets Advisory Committee, *Crowd Sourced Equity Funding* (Report, May 2014) 6 ('CAMAC CSEF Report'). CAMAC used the term 'capital gap' rather than 'funding gap'. CAMAC found that the primary reasons for the funding gap was a reluctance by these corporations to become public due to greater compliance costs and because they struggled to obtain financing through traditional financial avenues: at 15. See also Amanda Meloni and Tony Chong, 'Crowd-Sourced Funding in Australia' (2018) 45(4) *Brief* 8.
- 13 Department of Prime Minister and Cabinet, 'National Innovation and Science Agenda' (Agenda, 1 November 2015) ('National Innovation and Science Agenda'). For discussion of the various governmental reports exploring the need to support small business by expanding funding opportunities, see Anne Matthew, 'Crowd-Sourced Equity Funding: The Regulatory Challenges of Innovative FinTech and Fundraising' (2017) 36(1) *University of Queensland Law Journal* 41, 43.
- 14 'National Innovation and Science Agenda' (n 13) 1.
- 15 *Ibid* 5.

However, while economic and financial goals are central to CSEF, the success of the process as a distinctive corporate fundraising mechanism is equally contingent on its Community Crowdfunding and FinTech roots. For instance, in his study on CSEF in New Zealand, Schwartz identifies a number of what he refers to as ‘pro-social’ reasons for investing in CSEF in a context where financial returns are likely to be low or perhaps non-existent.¹⁶ These pro-social motivations, equivalent to the community, social and artistic rewards common in Community Crowdfunding, include political expression, environmental protection, arts patronage, and local community building efforts.¹⁷ When asked to describe the reason for their investment in CSEF, interviewees, therefore, mentioned motivations typically considered social welfare-enhancing, such as environmental protection and improving public health, but also motivations as simple as feelings of pride and prestige associated with ‘owning’ a corporation, altruistic motivations associated with helping entrepreneurs succeed in their projects, and a feeling of being part of, and supporting, their community.¹⁸

CAMAC similarly found that investor expectations of their CSEF investment are likely to differ, and hypothesised that some investors, although, in its view, not a majority of them, could be motivated by the desire to help a ‘socially worthwhile project’.¹⁹ When considering CSEF and social enterprises, CAMAC

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- 16 Andrew A Schwartz, ‘Social Enterprise Crowdfunding in New Zealand’ in Benjamin Means and Joseph W Yockey (eds), *The Cambridge Handbook of Social Enterprise Law* (Cambridge University Press, 2019) 209, 214–15 <<https://doi.org/10.1017/9781316890714.013>> (‘Social Enterprise Crowdfunding in New Zealand’). See also for an outline of the ongoing debate regarding the motivations behind CSEF investment, Andrew A Schwartz, ‘The Nonfinancial Returns of Crowdfunding’ (2015) 34(2) *Review of Banking and Financial Law* 565, 575–80. The framing of these issues as ‘pro-social’ builds on the existing social enterprise movement. This movement provides individuals and small business the opportunity to show that the pursuit of social purposes is good for business. Nina Boeger, ‘Shaping Corporate Reform: Social Enterprise, Cooperatives, and Mission-Led and Employee-Owned Business’ in Benjamin Means and Joseph W Yockey (eds), *The Cambridge Handbook of Social Enterprise Law* (Cambridge University Press, 2019) 123, 127–9 <<https://doi.org/10.1017/9781316890714.008>>. While CSEF could be seen as an extension of this movement, it distinguishes itself from the general social enterprise movement through its reliance on FinTech as a new form of social interaction. Further, the pursuit of shared social preferences does not necessarily have to relate to ‘welfare’ enhancing goals but could simply refer to goals that are not explicitly financial in nature.
- 17 Schwartz, ‘Social Enterprise Crowdfunding in New Zealand’ (n 16) 214–15.
- 18 Ibid 219. For further evidence of the significance of non-financial motivations in CSEF see Akshaya Kamalnath and Nuannuan Lin, ‘Crowd-Sourced Equity Funding in Australia: A Critical Appraisal’ (2019) 47(2) *Federal Law Review* 288, 296–7. A study of CSEF in Finland also suggests there are a multitude of reasons that motivate investment through the process. The authors of this study note that even those investors motivated to invest primarily based on the prospect of financial return also want to be part of the broader phenomenon represented by the corporation as well as helping the corporation itself succeed. Anna Lukkarinen, Jyrki Wallenius and Tomi Seppälä, ‘Investor Motivations and Decision Criteria in Equity Crowdfunding’ (Research Paper, Social Science Research Network, 14 February 2019) 30 <<http://dx.doi.org/10.2139/ssrn.3263434>>.
- 19 CAMAC CSEF Report (n 12) 42. CAMAC did not provide evidence for its view that only a minority of investors would be motivated to participate in CSEF for non-financial reasons. The analysis on motivations to invest through CSEF outlined in this section suggests that Australia would benefit from more research on this point. As discussed below in nn 20–2 and accompanying discursive text, however, there is already considerable evidence to suggest that non-financial motivations are important in CSEF.

noted, however, that while the goals of these enterprises may be commendable, ‘... consumer protection issues still remain, given that CSEF involves an investment-based approach to crowd participation, as opposed to seeking capital through donation-based crowdfunding or rewards-based crowdfunding’.²⁰

CAMAC’s approach rightly acknowledges the need to clearly distinguish CSEF from Community Crowdfunding. However, CAMAC appears to have underestimated the need to also distinguish CSEF from traditional forms of corporate fundraising not based in the Community Crowdfunding concept. Karas usefully outlines this unique value of CSEF as a corporate fundraising mechanism in the following terms:

The revolution comes from figuring out how to let retail investors participate both in the “feel good” aspect and in the financial aspect. One thing that crowdfunding offers that traditional funding does not is that the companies that go through crowdfunding want to reward the people who have supported their businesses and to create a community. There’s the added element of investing in your local coffee shop and investing for more than a return... I think that crowdfunding combines those two aspects: your money is put to work, but you are also investing for returns other than the economics.

...

I do think that crowdfunding is most successful when both the investor and the business are looking for something in addition to economic returns. It’s your corner bookstore. If you really want to have an independent bookstore and you shop there, you are excited to invest in the place that you also support in your community. Or, you really like this artist collective.²¹

The above quote nicely sets out the distinctive attraction of CSEF as a corporate fundraising mechanism for both fundraisers *and* the funding crowd. Importantly, the success of CSEF rests on the perception that it supports collaborative participation in a venture that both the fundraiser and the members of the crowd believe in, while maintaining the prospect for financial gain. The attraction of CSEF rests on its ability to be viewed as more than a form of Community Crowdfunding or a traditional corporate fundraising mechanism: it is a combination of both. Further, the emphasis on collaboration and community-building reflects CSEF’s status as part of the broader FinTech movement, which encourages social interaction based on mutuality, cooperation and inclusiveness. This is consistent with the investment approach of Millennial and Gen Z investors. These investors appear particularly interested in using their financial investments to pursue non-financial goals and who are accustomed to active engagement as a form of social interaction.²²

20 Ibid 27.

21 Valentina Assenova et al, ‘The Present and Future of Crowdfunding’ (2016) 58(2) *California Management Review* 126, 131. Kate Karas was, at the time, Associate General Counsel at Lending Club (a peer-to-peer lending FinTech corporation).

22 For discussion of the social goals of Millennial and Gen Z investors, see Michal Barzuza, Quinn Curtis and David H Webber, ‘The Millennial Corporation: Strong Stakeholders, Weak Managers’ (Research Paper, Social Science Research Network, 6 September 2021) <<https://ssrn.com/abstract=3918443>>. CSEF investors tend to be professionals or semi-professionals between the ages of 25–40 who are likely to be brand advocates of a business, and in many cases, express a degree of passion in the brand they invest in:

The move beyond pure financial motivations in investment has not been lost on leading CSEF industry participants and many fundraisers seeking to use the process. For instance, visitors to the site of one of Australia's leading CSEF platform providers, Birchal, are greeted with the following statement: 'Everyone should have the opportunity to invest in the brands they love'.²³ Prospective investors are then offered the opportunity to invest in corporations that advertise in great detail their objectives as a key motivating factor for investment. There is perhaps no better example of this than the CSEF pitch advertised on Birchal by 'Good Empire'.²⁴ The motivation behind this pitch is the fundraiser's desire to get millions of people and organisations who care about the planet and other people, 'to act'.²⁵ Investors who purchase shares through the CSEF process are promised that they will become part of a corporation that aims to provide the following service and that has the following very explicit mission:

For individuals and organisations who care about people and planet, Good Empire is an app that empowers and gamifies good humaning through challenges, collective action, and missions aligned with the UN Sustainable Development Goals.

...

Our purpose is to gather, unite and empower a global community of good humans to help save the f*cking world.

If not us, then who? If not now, then when?²⁶

Rafael Kimberley-Bowen, 'Crowdfunding in Australia: Everything You Need to Know', *Scale Partners* (Web Page, 14 August 2020) <<https://www.scale.partners/post/crowdfunding-in-australia-everything-you-need-to-know>>. Some overseas studies suggest that the average age of CSEF investor is approximately 40 years old: see, eg, Anna Lukkarinen, 'Equity Crowdfunding: Principles and Investor Behaviour' in Rotem Shneur, Liang Zhao and Bjørn-Tore Flåten (eds), *Advances in Crowdfunding: Research and Practice* (Palgrave Macmillan, 2020) 96 <https://doi.org/10.1007/978-3-030-46309-0_5>; Peter Baeck, Liam Collins and Bryan Zhang, *Understanding Alternative Finance: The UK Alternative Finance Industry Report* (Nesta and University of Cambridge, 2014) 52. More generally, the Australian Securities Exchange ('ASX') notes that there is a new wave of younger Australians entering, and set to enter, the investment market: Australian Securities Exchange, *ASX Australian Investor Study 2020* (Report, 2020) 25 <<https://www2.asx.com.au/blog/australian-investor-study>> ('ASX Investor Study 2020'). These 'next gen' investors are more likely to consider ethical, environmental, social and governance matters when investing than are other investors: at 44. For further discussion of these matters see below n 153 and accompanying discursive text.

23 *Birchal* (Web Page, 15 November 2016) <<https://www.birchal.com/>>.

24 Good Empire, 'Level Up Your Impact for People and Planet', *Birchal* (Web Page, 7 October 2021) <<https://www.birchal.com/company/goodempire>>.

25 This quote was included on the Good Empire CSEF campaign webpage (see *ibid*). The campaign has ended and at the time of publication, the webpage has replaced the campaign content with post-campaign messaging on the goals of Good Empire. The call 'to act' remains a feature of the Good Empire messaging, as reflected on the post-campaign content as well as on the company's home webpage at: *Good Empire* (Web Page) <<https://www.goodempire.org/>>.

26 This quote was also included on the Good Empire CSEF campaign webpage (see above n 24). The company has retained the essence of this messaging, including the second portion of the extracted quote verbatim: at *Good Empire* (Web Page) <<https://www.goodempire.org/>>. While this is a clear example of a fundraiser with a clear social welfare goal (see above nn 20–2 and accompanying discursive text) the shared social preference could be something less obviously connected to social welfare, such as investors wanting to help local businesses succeed, or to simply invest in a new form of investment opportunity that encourages direct participation in finance.

Consistent with the views expressed by Karas, the appeal for investment based on the desire not only to make profit, but also to achieve a goal that both the fundraiser and the funding crowd share could not be clearer. The founder of Good Empire wants to use the corporate form to undertake a venture that will help save the world, and prospective investors are enlisted through their shareholding to be active members of the community that seeks to achieve a specific goal. In other words, this is not promoted as an opportunity for investors to passively sit by while corporate managers try to attain a profit on their behalf, but rather, as an opportunity to be part of a social movement through their investment.

Indeed, active shareholder engagement regarding the pursuit of a shared social preference may be a potential asset to the corporation rather than an obstacle or a burden as commonly represented in governance models that advocate shareholder passivity. Several fundraisers have identified the clear benefits associated with democratisation and direct participation as an approach to financial investment in a context where the potential for return on investment is limited.²⁷ For instance, the founders of Black Hops, a small Queensland craft brewery, which raised funds through the Birchal crowdfunding portal, highlight the importance of ongoing engagement with their shareholders (which they called the ‘Alpha Team’) in the following terms: ‘We love engaging our audience in what we do and keeping them involved in the business. It’s also a healthy and transparent way to raise money’.²⁸

As with any form of investment, while the CSEF process does not compel each and every fundraiser or each member of the crowd to buy into any specific motivation, it is important that regulation of the process acknowledges and takes into account the potential motivations for investment. The analysis above illustrates that Australia’s approach to regulating CSEF should take into account the desire to pursue shared social preferences and the democratisation and direct participation elements that are integral to CSEF. Parts III and IV suggest that the current approach to regulating CSEF overlooks these elements and in the process creates a particularly vulnerable cohort of shareholders that is contrary to the key aims of CSEF.

27 Alan Crabbe, ‘Buying Shares & Investing in Companies through Equity Crowdfunding: Investment Timeframe, Return of Investment and Things to Consider’, *Birchal* (Web Page) <<https://web.archive.org/web/20210513092155/https://help.birchal.com/en/articles/2572191-an-introduction-on-equity-crowdfunding>>. These limitations are discussed further in Part IV(C), below.

28 Birchal, *Funded: Crowd-Sourced Funding (CSF) in Australia* (Annual Report, 27 July 2021) 19. Similarly, the CEO of DIT AgTech, a corporation that provides innovative ways to supplement livestock, including reducing the environmental impact of farming and enhancing animal welfare, noted the benefit of bringing investors – what he refers to as the corporation’s ‘brand ambassadors’ – along the journey through personal engagement: at 21–2. Interestingly, one DIT AgTech CSEF investor noted that the primary reason for their investment was that their grandparents had been sheep and cattle farmers and they wanted, through their support of DIT AgTech, to help more farmers be profitable, particularly in times of drought: at 22. This is consistent with the broad interpretation of shared social preference adopted in this article.

III JUST ANOTHER FUNDRAISING OPTION?

Australia's CSEF regulatory regime was introduced in 2017 through part 6D.3A of the *Corporations Act*. Before the introduction of a bespoke regulatory framework for CSEF, the *Corporations Act* required that corporations wishing to make an offer of shares to the public comply with onerous and costly prospectus (or offer information statement) requirements set out in part 6D.²⁹ Private corporations were further limited in their public fundraising efforts to 50 non-employee shareholders.³⁰ Where a private corporation wanted to make an offer of shares to the public beyond this limitation, they had to either become public or else rely on limited exemptions to public offer rules for small-scale offerings or offers targeted to sophisticated and professional investors.³¹ Indeed, CSEF was initially offered in Australia through these exemptions. However, Australia's corporations regulator, the Australian Securities and Investments Commission ('ASIC') expressed concern that some crowdfunding activities, which relied on these exemptions, constituted public offers, or involved advertising a financial product, providing a financial service or fundraising through offers of securities, that would require compliance with the disclosure obligations set out in part 6D of the *Corporations Act*.³²

The introduction of a bespoke regulatory framework for CSEF sought to overcome these concerns. It now provides a general exclusion from the disclosure obligations set out in part 6D where a qualifying corporation raises funds through the CSEF process. The CSEF regulatory framework came into effect on 28 September 2017 with the enactment of the *Corporations Amendment (Crowd-Sourced Funding) Act 2017* (Cth).³³ The framework initially restricted CSEF to corporations that were either public, or if they were private, corporations that committed to becoming public after a five year grace period.³⁴ The framework, therefore, offered a new way for public corporations, or those corporations that committed to becoming public, to raise funds from the public.

Amendments introduced through the *Corporations Amendment (Crowd-Sourced Funding for Proprietary Companies) Act 2018* (Cth) expanded the regulatory framework and provided that CSEF would also be available to private corporations without the need to become public. This development, in particular, reflects a fundamental re-framing of the corporate landscape in Australia, with

29 In its review of CSEF, CAMAC identified the onerous cost of compliance with existing disclosure obligations as a major barrier to the promotion of CSEF in Australia: *CAMAC CSEF Report* (n 12) 14–15.

30 *Corporations Act 2001* (Cth) s 113 ('*Corporations Act*'). Further obligations apply in relation to financial reporting depending on whether a private corporation is classified as small or large: at ss 45A, 113.

31 These exemptions apply where no more than \$2 million is raised through offers made to no more than 20 investors in any rolling 12-month period: *ibid* ss 708(1)–(8).

32 Australian Securities and Investments Commission, 'ASIC Guidance on Crowdfunding' (Media Release 12-196MR, 13 August 2012) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2012-releases/12-196mr-asic-guidance-on-crowd-funding>>.

33 For an overview of the process leading up to the creation of the current Australian CSEF regime, see, eg, Steve Kourabas and Ian Ramsay, *Facilitating Equity Crowdfunding in the ASEAN Region* (Report, Association of Southeast Asian Nations, August 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126652>.

34 For an explanation of these arrangements see *ibid* 74–5.

private corporations presumptively permitted to raise funds from the public so long as they adhere to the less onerous public fundraising obligations set out in part 6D.3A of the *Corporations Act*. For the purposes of this article, the provisions of part 6D.3A can be categorised as those applying to the fundraising stage of a campaign and those applying to the post-fundraising stage.

A Protecting the Financial Interests of ‘Vulnerable’ Retail Investors while Promoting Innovation and Economic Growth

The CSEF regulatory framework addresses each of the core actors in the fundraising process: licensed CSEF platform operators who provide an internet platform for the sale and purchase of shares; issuers (predominantly MSMEs) who seek relatively small amounts of funds in exchange for the issue of ordinary shares; and a large number of mainly retail investors who invest small amounts of funds in return for shares.

As previously noted, public and private corporations may make an offer for the issue of ordinary shares through the CSEF process.³⁵ Any corporation wishing to raise funds through the CSEF process must meet an assets and turnover test. This test requires that the value of gross consolidated assets, and the value of consolidated annual revenue is each less than \$25 million.³⁶ Corporations wishing to raise funds through the CSEF process cannot be listed and they cannot have a substantial purpose of investing securities or other interests in other entities or schemes.³⁷

While issuers that are eligible to raise funds through CSEF are exempt from complying with disclosure obligations ordinarily required of a public offer of shares, they must comply with more limited disclosure obligations generally satisfied through the completion of an offer document.³⁸ The offer document must be worded and presented in a clear, concise and effective manner, must only be published on a single CSEF platform,³⁹ and must contain information prescribed by the regulations.⁴⁰ At the time of writing, the regulations provide that the offer document must contain information such as a prescribed risk warning, information about the issuer, information about the offer, and information about investor rights.⁴¹ Issuers must also ensure that they do not make misleading or deceptive statements,

35 *Corporations Act* (n 30) section 738G sets out offer eligibility requirements and sub-section (1)(c) requires that securities are of a class specified in the regulations. The regulations provide that the relevant class is fully-paid ordinary shares: *Corporations Regulations 2001* (Cth) r 6D.3A.01 (*‘Corporations Regulations’*). The investors’ reward when they obtain shares through CSEF is a ‘share of future profits’: see Paul Belleflamme, Thomas Lambert and Armin Schwiendacher, ‘Individual Crowdfunding Practices’ (2013) 15(4) *Venture Capital* 313, 315 <<https://doi.org/10.1080/13691066.2013.785151>>.

36 *Corporations Act* (n 30) s 738H(2).

37 *Ibid* s 738H(1)(f).

38 *Ibid* s 738J(1).

39 *Ibid* ss 738K–738L. The key task of CSEF platform operators in the process is to ensure the adequacy of offer documents, although they must also make certain disclosures relating to their services, such as applicable charges: s 738ZA(9).

40 *Ibid* ss 738J(2), 738K.

41 *Corporations Regulations* (n 35) rr 6D.3A.02–6D.3A.06.

or leave out required information from their offer documents.⁴² Finally, issuers must ensure that they comply with the issuer cap, which limits CSEF fundraising to \$5 million every 12 months.⁴³

Issuers must place their offer of shares on an online platform offered by a licensed CSEF platform operator. These CSEF platform operators act as gatekeepers of the fundraising process. This includes the requirement to screen users so as to ensure compliance with CSEF regulations.⁴⁴ To perform this function, a prospective CSEF platform operator must obtain a licence from ASIC. To obtain the license, they must illustrate to ASIC that they have, for instance, adequate conflicts processes, adequate financial and human and technological resources, risk management processes, compensation arrangements, and organisational competence.⁴⁵ They must also show that they will efficiently, honestly and fairly comply with any conditions imposed on their license as well as comply with relevant laws.⁴⁶

Once licensed, CSEF platform operators are considered financial services licensees who are permitted to operate a CSEF platform.⁴⁷ As licensees, they must comply with the CSEF-specific regime set out in part 6D.3A of the *Corporations Act* and relevant aspects of part 7 of the *Corporations Act*, which set out the obligations of financial services licensees more broadly.⁴⁸ Ongoing obligations include the requirement to not publish an offer document, or to stop the publication of an offer document, when they are not satisfied of the identity or good character of an issuer, or where the issuer has previously been found to have acted in a misleading or deceptive manner.⁴⁹

42 *Corporations Act* (n 30) s 738U. ASIC has provided comprehensive guidance for companies wishing to issue shares through CSEF as well as a template offer document. See Australian Securities and Investments Commission, 'Crowd-Sourced Funding: Guide for Companies' (Regulatory Guide 261, June 2020) <<https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-261-crowd-sourced-funding-guide-for-companies/>> ('ASIC Guide for Companies').

43 See Kourabas and Ramsay (n 33) 73. The *Corporations Act* (n 30) sets out the requirements for an offer to be eligible, including that the offer comply with the issuer cap set out in section 738G(2): s 738G(1). The figures for the issuer cap and the assets and turnover test may be altered through the regulations. The issuer cap also includes funds raised through sections 708(1) or 708(10) of the *Corporations Act* (n 30), which provides for fundraising activities that do not require disclosure: s 738G(2).

44 Schwartz provides a detailed analysis of the role of gatekeepers through a review of CSEF in New Zealand and the United States of America ('USA'). He finds that CSEF platform operators in New Zealand screen prospective offers more than their peers in the USA. According to Schwartz, this indicates a greater focus in New Zealand on efficiency in the process, whereas in the USA, there is a greater focus on inclusivity. Ultimately, Schwartz finds that the New Zealand approach is more effective. See generally Andrew A Schwartz, 'The Gatekeepers of Crowdfunding' (2018) 75(2) *Washington and Lee Law Review* 885.

45 These requirements are set out in Australian Securities and Investments Commission, 'Crowd-Sourced Funding: Guide for Intermediaries' (Regulatory Guide 262, October 2018) <<https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-262-crowd-sourced-funding-guide-for-intermediaries/>> ('ASIC Guide for Intermediaries').

46 These obligations are set out in *Corporations Act* (n 30) sections 912A–912B. The role of CSEF platform operators in protecting the interests of retail investors is further reflected in regulation that requires them to provide notification of the five-day cooling-off period and ensure that investors receive the benefit of this cooling-off period: s 738ZD.

47 *Corporations Act* (n 30) s 738C.

48 These obligations are set out in the 'ASIC Guide for Intermediaries' (n 45).

49 *Corporations Act* (n 30) s 738Q(5).

CSEF platform operators must also include a prescribed risk warning regarding the CSEF process on their website. This risk warning highlights the risky, speculative nature of CSEF investment, the potential for investors to lose their entire investment, the heightened prospect in CSEF investment that share value will be diluted where a corporation does succeed, the illiquid nature of CSEF shares, and the limited prospect in recovering funds in the case of corporate misconduct on the part of the issuer.⁵⁰

In recognition of the important democratisation and direct participation goals of the CSEF process, CSEF platform operators must also provide communication facilities on their platforms.⁵¹ This allows prospective investors the opportunity to communicate with each other and with the issuer.⁵² While the government clearly sought to address the importance of mandatory communication facilities at the fundraising stage of the process to ensure that issuers did not mislead prospective investors,⁵³ communication facilities also acknowledge the benefits of fundraising using technological innovations that underpin CSEF. Communication facilities offer potential investors, issuers, and CSEF platform operators the opportunity to communicate with each other about an offer, and provide prospective investors the opportunity to read offer documents and make posts that are available to others regarding the offer.⁵⁴ Therefore, the CSEF regulatory framework places a premium on active engagement between issuers and the crowd, and provides a useful way for interaction that leverages the benefits of the internet.

The regime also imposes a number of caps on investment that CSEF platform operators must ensure investors and issuers comply with.⁵⁵ A CSEF platform operator must reject prospective investments from a retail investor if that investment would result in the retail investors spending over \$10,000 in CSEF shares issued by the same issuer over that CSEF platform.⁵⁶ While this means that retail investors may invest \$10,000 in multiple fundraising campaigns, it does encourage diversification of investment portfolios and in the process limits the potential for retail investors to be significantly impacted financially through the failure of any one corporation funded through CSEF.⁵⁷

50 *Corporations Regulations* (n 35) r 6D.3A.10. An example of this risk warning is provided on the Equitise website: 'Warning Statement', *Equitise* (Web Page, 2021) <<https://equitise.com/warning-statement-au>> ('Equitise Web Page'). Before they can invest through the CSEF process, CSEF platform operators must ensure that investors have completed an acknowledgment regarding these financial risks.

51 *Corporations Act* (n 30) s 738ZA.

52 *Ibid* s 738ZA(5)(a)–(b).

53 Explanatory Memorandum, *Corporations Amendment (Crowd-Sourced Funding) Bill 2016* (Cth) 33 [3.45].

54 *Ibid* 37 [3.65].

55 *Corporations Act* (n 30) s 738ZC.

56 *Ibid* s 738ZC(1). CSEF platform operators determine whether a prospective investor is a retail client by reference to the test set out in section 761G(7) of the *Corporations Act* (n 30).

57 CSEF platform operators encourage prospective investors to diversify their investment portfolio. See, eg, *Equitise Web Page* (n 50).

B Post-Fundraising Reforms to the Corporations Regime

The reforms set out in Part III(A) deal specifically with the fundraising stage of CSEF. The provisions are typical of those you would expect of a regulatory framework that attempts to attract MSMEs to the process by reducing the regulatory burden associated with public offers of shares while simultaneously including a number of protections generally aimed at protecting the financial interests of so-called ‘vulnerable’ retail investors. However, unlike most other forms of crowdfunding, the relationship between fundraiser and funder continues after the funds have been raised.⁵⁸ A number of provisions have, therefore, been included in the CSEF corporate governance regulatory framework to deal with this ongoing relationship, particularly as it relates to private corporations. Private corporations that have one or more CSEF shareholders must comply with the following list of requirements that are not otherwise applicable to private corporations:⁵⁹

- record details about CSEF shares on their share register and notify ASIC of certain information regarding CSEF shares;⁶⁰
- have a minimum of two directors rather than the usual one director required for private corporations (with a majority of those directors ordinarily residing in Australia);⁶¹
- prepare annual financial and director reports and, where a private corporation is a large private corporation or a small private corporation that has CSEF shareholders and has raised more than \$3 million from all CSEF offers, appoint an auditor and have their annual financial reports audited;⁶² and
- comply with related party transaction provisions set out in chapter 2E of the *Corporations Act*.⁶³

The CSEF regulatory framework also acknowledges that unlike the shares of public corporations, shares purchased by the public through CSEF are illiquid (whether in a public or private corporation). Corporations with CSEF shares are, therefore, excluded from the application of section 606 of the *Corporations Act*, which offers protection for shareholders from takeovers. This exclusion aims to reduce commercial costs and increases flexibility for potential buyers of a corporation (enhancing the exit options available to shareholders). At the same time, CSEF shareholders, who would likely be minority shareholders, will not

58 While Community Crowdfunding may not create a formal ongoing relationship between funder and fundraiser, commercial and legal obligations may nonetheless be relevant to post-fundraising campaigns. See Julie S Hui, Michael D Greenberg and Elizabeth M Gerber, ‘Understanding the Role of Community in Crowdfunding Work’ (Conference Paper, Association for Computing Machinery Conference on Computer Supported Cooperative Work & Social Computing, February 2014) 62–74 <<http://dx.doi.org/10.1145/2531602.2531715>>.

59 ASIC provides a useful guide on the operation of these provisions: ‘ASIC Guide for Companies’ (n 42) s G.

60 *Corporations Act* (n 30) s 169(6AA).

61 *Ibid* ss 201A, 738H(1)(a)(i).

62 *Ibid* ss 292(1)(c), 292(2)(c), 296(1A)(c), 298(3), 319(2), 301, 325.

63 *Ibid* s 738ZK.

have the rights and protections afforded under the takeover rules, which may, as a result, affect their ability to receive a premium on the sale of their shares.⁶⁴

The takeover exemption recognises the limited financial prospects of investment through CSEF and seeks, as a result, to increase the opportunity for shareholders in CSEF corporations to exit the corporation. The exemption, however, acts as an illustration of the problems that arise when important aims of CSEF are overlooked and the process is instead treated as merely another means by which corporations can raise funds. The justification for the exemption recognises that these minority shareholders are unlikely to receive a premium on the sale of their shares. The interests of these shareholders are ignored when the fundraiser has the potential to receive a cash injection from a larger investor and the perceived need for the crowd dissipates. This not only neglects the financial interests of these investors, but also neglects the Community Crowdfunding and FinTech origins of CSEF, which emphasise active participation in the pursuit of a shared social preference and the attempt to create a community, through appeal to the crowd, to pursue these preferences. Part IV explores the current corporate governance framework and how this negatively effects shareholders in corporations funded through CSEF.

IV THE CHALLENGES OF REGULATING CSEF CORPORATIONS UNDER THE EXISTING CORPORATE GOVERNANCE FRAMEWORK

One of the unique aspects of CSEF is that it formally introduces into the Australian corporate landscape a new class of corporate actor with governance implications. Members of the crowd who invest through CSEF maintain an ongoing relationship with the company. They form a widely dispersed group of shareholders generally treated as relatively unsophisticated in financial terms, but who are driven to invest through the combined potential for financial return on investment (however remote) and the desire to be active participants in the pursuit of a shared social preference.⁶⁵ These shareholders represent a new type of investment

64 ‘ASIC Guide for Companies’ (n 42) RG 261.315–RG 261.316. On illiquidity of CSEF shares, see Financial Conduct Authority (UK), ‘Loan-Based (“Peer-to-Peer”) and Investment-Based Crowdfunding Platforms: Feedback on Our Post-Implementation Review and Proposed Changes to the Regulatory Framework’ (Consultation Paper CP18/20, July 2018). The illiquidity of these shares is widely acknowledged and is a reason that CSEF platform operators like Equitise warn prospective investors to not expect a financial return on their investment: Equitise Web Page (n 50); Georgia Parletta, ‘Crowd-Sourced Equity Funding in Australia: Getting It Right’ (2019) 36(8) *Company and Securities Journal* 628, 654.

65 The information in Part IV is derived, in part, from the description of corporate governance set out in Steve Kourabas, ‘Corporate Governance Implications of Equity Crowdfunding’ in Andrew Godwin, Pey Woan Lee and Rosemary Teele Langford (eds), *Technology and Corporate Law: How Innovation Shapes Corporate Activity* (Edward Elgar Publishing, 2021) 227 <<https://doi.org/10.4337/9781800377165.00019>>. For a comprehensive discussion of the many motivations driving investment through CSEF, see the discussion in Part II(B). The Australian CSEF regime has been constructed on the understanding that many investors in CSEF will be *financially* unsophisticated retail investors. Studies from overseas suggest

brought about as a result of technological innovation that offer opportunities for direct and active participation. Further, CSEF also targets prospective fundraisers who recognise, and want to be part of, this new form of corporate fundraising where investors are considered potential collaborators rather than merely a source of funds. However, these shareholders find themselves subject to a corporate governance framework that does not take into account any of these matters.

A Australia's Current Approach to Corporate Governance

At its most basic, corporate governance refers to the legal and non-legal rules that provide a corporation's 'operating system'.⁶⁶ These rules provide incentives and constraints that guide conduct within, and by, a corporation.⁶⁷ In Australia, the Royal Commission into the collapse of insurer HIH Australia defined corporate governance as the 'framework of rules, relationships, systems and processes within and by which authority is exercised and controlled within corporations'.⁶⁸ It encompasses the mechanisms by which companies, and those in control, are held to account. The Organisation for Economic Co-operation and Development ('OECD') adds further context to this basic definition by noting that corporate governance involves a range of relationships between management, the board, shareholders and other stakeholders as well as the mechanisms by which the objectives of the corporation are devised, achieved, and monitored.⁶⁹

Taken together, these definitions outline a number of important aspects in corporate governance. First, corporate governance is concerned with managing the exercise of authority within a corporation and its implications outside of the corporation. Second, following on from the first point, corporate governance is concerned with

that the majority of investors in CSEF do not have prior financial investment experience. In the United Kingdom ('UK') approximately 62% of investors in CSEF had no previous investment experience: see Baeck, Collins and Zhang (n 22) 53. Further studies need to be undertaken regarding the demographics of investors in Australia, however, inexperience in financial matters does not necessarily mean that these shareholders have nothing to contribute as collaborators in the pursuit of shared social preference.

- 66 See, eg, Ronald J Gilson, 'From Corporate Law to Corporate Governance' in Jeffrey N Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press, 2018) 8. The Organisation for Economic Co-operation and Development ('OECD') has similarly noted that corporate governance refers to the 'internal means by which corporations are operated and controlled': Organisation for Economic Co-operation and Development, *OECD Principles of Corporate Governance* (Report, Meeting of the OECD Council at Ministerial Level, 1999) 5, 9 ('*OECD Principles 1999*').
- 67 Tom Baker and Sean J Griffith, 'Predicting Corporate Governance Risk: Evidence from the Directors' and Officers' Liability Insurance Market' (2007) 74(2) *University of Chicago Law Review* 487, 516. The need for corporate governance has been with us from the time that the adoption of the corporate form created a potential conflict between managers and investors. See Harwell Wells, 'The Birth of Corporate Governance' (2010) 33(4) *Seattle University Law Review* 1247, 1251.
- 68 Neville Owen, *Royal Commission into the Failure of HIH Insurance: A Corporate Collapse and its Lessons* (Final Report, 4 April 2003) vol 1, xxxiii. This definition has been adopted by the ASX: Australian Securities Exchange Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Report, 4th ed, February 2019) ('ASX Corporate Governance Principles and Recommendations') 1.
- 69 Organisation for Economic Co-operation and Development, *G20/OECD Principles of Corporate Governance* (OECD Publishing, 2015) 9 <<https://doi.org/10.1787/9789264236882-en>> ('*OECD Principles 2015*').

establishing mechanisms of accountability for those who control the corporation. Third, traditionally, the main actors that are subject to corporate governance rules have been management, boards, shareholders, but also, increasingly ‘other stakeholders’. Fourth, all of these preceding factors are important in determining, and helping to achieve, certain corporate purposes although these purposes are not necessarily pre-determined through the regulatory framework.

The Australian corporate governance framework generally operates on the understanding that corporations consist of a primary contractual relationship between shareholders, treated as the equity ‘owners’ of the corporation, and the board of directors, acting as the agents of shareholders with broad discretionary decision-making authority. While this central relationship can be categorised as contractual in nature, suggesting that the parties are free to negotiate the balance of power and authority, the Australian corporate governance framework has increasingly shifted towards a ‘managerialist’ approach to corporate governance that establishes the board of directors as the primary decision-making authority with broad discretion in the conduct of its duties.⁷⁰ For instance, replaceable rule section 198A of the *Corporations Act* provides as follows:

- (1) The business of a company is to be managed by or under the direction of the directors.
- (2) The directors may exercise all the powers of the company except any powers that this Act or the company’s constitution (if any) requires the company to exercise in general meeting.

Although this rule is ‘replaceable’, Australian courts have for some time reinforced the strict division of authority between the board and the general meeting and the supremacy of the board when it comes to decision-making. For instance, in *National Roads & Motorists’ Association v Parker*, the Supreme Court of New South Wales held that:

it is no part of the function of the members of a company in general meeting by resolution, ie as a formal act of the company, to express an opinion as to how a power vested by the constitution of the company in some other body or person ought to be exercised by that other body or person.⁷¹

70 The contractual approach can be contrasted with the statutory approach in jurisdictions such as the USA, which provide in their legislative framework for the ultimate decision-making authority of the board of directors. See, eg, Stephen M Bainbridge, ‘Director versus Shareholder Primacy: New Zealand and USA Compared’ (2014) 4 *New Zealand Law Review* 551, 561. The Australian framework appears to offer a middle approach between the purely statutory and contractual approaches, with the inclusion of a replaceable rule in the statutory framework operating as a default power allocation regime while leaving open the option for the negotiation a more extensive role for shareholders. For a useful analysis of these different approaches to corporate governance, see Pearlie Koh, ‘Shareholder Empowerment in the Digital Age’ in Andrew Godwin, Pey Woan Lee and Rosemary Teele Langford (eds), *Technology and Corporate Law: How Innovation Shapes Corporate Activity* (Edward Elgar Publishing, 2021) 152–77 <<https://doi.org/10.4337/9781800377165.00016>>. The board generally carries out its managerial obligations through directions, or supervision, of corporate managers: Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (Report, December 2006) 82 (‘CAMAC Social Responsibilities Report’).

71 (1986) 6 NSWLR 517, 522 (McLelland J).

In *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia*, the Federal Court confirmed that there was no right for the general meeting to express opinions on matters reserved for management through resolution while holding that the board of directors was entitled to give its opinion on proposed resolutions at a general meeting.⁷² As discussed in Part V(B), below, this means, in effect, that the key engagement mechanism for minority shareholders is the opportunity to ask questions at formal, periodic, infrequently held, and predominantly in-person general meetings. This is a hallmark of the passive shareholder investment model that has driven Australia's corporate governance framework for decades.

Having established the board of directors as the managerial authority with broad discretion, the Australian corporate governance framework then provides a number of accountability mechanisms that seek to provide authority to shareholders, in limited circumstances, to protect against abuse of their financial interests and to promote sound financial management practices.⁷³ So, for instance, shareholders can (at least in theory) express displeasure with managerial performance by removing and appointing directors;⁷⁴ by altering the corporate constitution and approving certain share transactions;⁷⁵ and by approving or rejecting director remuneration.⁷⁶ Further, mechanisms such as audit and disclosure requirements seek to empower shareholders through the dissemination of financial information,⁷⁷ while mechanisms such as takeover restrictions discussed in Part III(B), above, empower shareholders when it comes to the ongoing financial management of the corporation.

A strict distinction between public and private corporations remains relevant.⁷⁸ In the case of public corporations, the unfettered right to sell shares (an 'exit' option) provides the ultimate market mechanism by which to hold the board to account, to encourage 'good' financial management, and to protect the financial

72 (2015) 325 ALR 736, 749–50 [39]–[43] (Davies J). The Privy Council has similarly noted that 'directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed ... the majority of shareholders cannot control them in the exercise of these powers while they remain in office': *Howard Smith Ltd v Ampol Petroleum Ltd* (1974) 1 NSWLR 68, 79 (Lord Wilberforce for the Court). The ability to call a general meeting is even more limited for shareholders in corporations funded through CSEF as they are unlikely to hold the 5% of the votes that may be cast at the meeting required to ask directors to hold the meeting: *Corporations Act* (n 30) s 249D(1).

73 The approach is consistent with the conception of the corporation that predominated the early-to-mid 20th century and concerns regarding the risk of managerial abuse relative to shareholders. See Wells (n 67) 1249.

74 For removal of directors, see *Corporations Act* (n 30) ss 203C ('Private Corporations'), 203D ('Public Corporations'). Appointment of directors by resolution is outlined in *Corporations Act* (n 30) s 201G.

75 *Ibid* ss 257B, 256C, 260A, 246B.

76 *Ibid* s 202A. For an explanation of these director remuneration rules see Jennifer G Hill, 'Images of the Shareholder: Shareholder Power and Shareholder Powerlessness' in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar Publishing, 2015) 66–8 <<https://doi.org/10.4337/9781782546856.00010>>.

77 These provisions are outlined in *Corporations Act* (n 30) ch 2M.

78 The distinction has long been recognised as a reflection of the fact that management and ownership of private corporations is much more concentrated than it is in public corporations. See, eg, John C Coates, 'The Future of Corporate Governance Part I: The Problem of Twelve' (Working Paper No. 19-07, Harvard Law School, 20 September 2018) 4 <<http://dx.doi.org/10.2139/ssrn.3247337>>. As discussed in this article, this distinction is no longer as relevant for corporations funded through CSEF.

interests of shareholders displeased with management. The ability to sell shares is much more limited for the shareholders of private corporations. The corporate constitution may restrict the transfer of shares and, even if there is a liberal transfer regime in place for a particular corporation, the shares of private corporations are generally considered illiquid.⁷⁹

These limitations as they apply to private corporations have been accounted for through the establishment of members' remedies. While not restricted to private corporations, the Australian corporate governance framework includes remedies that are particularly suited to the minority members of these corporations, such as the right to institute statutory derivative actions on behalf of the corporation where the board is not exercising its managerial authority in an appropriate manner (ie, where a board does not institute proceedings for breach of directors' duties),⁸⁰ and the right to seek a remedy for oppressive conduct.⁸¹ Statutory derivative actions and the oppression remedy work together to establish a corporate governance framework that ensures the equitable treatment of all shareholders and in the process promotes accountability through deterrence.⁸²

In summary, the current Australian approach to corporate governance provides considerable broad managerial discretion to the board of directors, while shareholders are provided with limited accountability mechanisms in recognition of their 'ownership' claim in the corporation. The section that follows outlines some of the particularly negative implications of this approach to corporate governance on shareholders in CSEF corporations.

B Creating a Vulnerable Cohort of Shareholders

Part IV(A) sets out a vision of corporate governance in Australia that generally emphasises the financial goals of corporations and, in particular, the importance of directorial discretion in achieving those goals. The approach is often considered well-suited to promoting the short-term financial interests of shareholders as owners

79 For further discussion of illiquidity see above n 64 and below n 95 and accompanying discursive text.

80 *Corporations Act* (n 30) s 236(1). In order to succeed in their application, the court must be satisfied that the corporation would not bring the action in its own name; the application is made in good faith; it is in the best interests of the corporation that the applicant be granted leave; that, where the application is to bring legal proceedings, there is a serious question to be tried; and that appropriate notice provisions have been met: *Corporations Act* (n 30) s 237(2). See Ian M Ramsay and Benjamin B Saunders, 'Litigation by Shareholders and Directors: An Empirical Study of the Australian Statutory Derivative Action' (2006) 6(2) *Journal of Corporate Law Studies* 397, 420.

81 Remedies for oppressive conduct have most commonly been sought by minority shareholders in small private corporations: James McConvill, 'Ensuring Balance in Corporate Governance: Parts 2F.1 and 2F.1A of the Corporations Law' (2001) 12(3) *Australian Journal of Corporate Law* 293:1–13, 5–6; Ian M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27(1) *Australian Business Law Review* 23, 23–5. Section 233 of the *Corporations Act* provides that where a court finds oppressive conduct it may offer a shareholder relief, including: that the corporation be wound up; that the constitution be modified or repealed; that the future conduct of the corporation be subject to regulation; the requirement that the corporation purchase shares in certain circumstances; that the corporation or other persons institute, prosecute, defend or discontinue proceedings; that a receiver be appointed; and that certain conduct certain conduct be restrained or a person do a specified act.

82 McConvill (n 81) 1.

of the corporation.⁸³ The adoption of corporate governance mechanisms that give effect to this limited conception of the corporation empowers a small group of directors with clearly defined authority to make financial decisions on behalf of the corporation. Justification for the approach is based on the complex and fast-paced nature of business, which cannot be effectively and efficiently conducted through shareholder resolutions at general meeting.⁸⁴ As such, shareholder passivity is a key hallmark of the framework,⁸⁵ although there is recognition in the framework of the need to provide accountability mechanisms both to encourage effective financial management of the corporation and to protect vulnerable shareholders.

Australia's current approach to CSEF treats investment and shareholding as an extension of this system. However, when applied to CSEF, the approach results in the creation of hybrid public-private corporations where even the limited accountability mechanisms available do not operate as originally intended. The outcome is that, not only does the current corporate governance framework overlook the FinTech origins of CSEF, but shareholders in corporations funded through CSEF are some of the most financially vulnerable in Australia. The following analysis outlines some of these vulnerabilities and the limitations of attempts to overcome them without comprehensive reform to the corporate governance framework as it applies to CSEF.

To begin with, the lack of a secondary market for CSEF shares means they are unlikely to be transferred easily and, even where this is possible, the private nature of the shares means that it is difficult to obtain an accurate share valuation – in other words, they are illiquid.⁸⁶ Further, as previously noted, the CSEF framework excludes corporations from the operation of the takeover provisions in an attempt to reduce the costs of takeovers and, as a result, to increase flexibility and attractiveness of these shares to large investors.⁸⁷ However, this also means that shareholders have limited capacity to promote their interests and receive a premium on their investment.⁸⁸

83 See generally Dorothy S Lund and Elizabeth Pollman, 'The Corporate Governance Machine' (Working Paper No 564/2021, European Corporate Governance Institute, February 2022) <<http://dx.doi.org/10.2139/ssrn.3775846>>.

84 Corporations and Markets Advisory Committee, 'The AGM and Shareholder Engagement' (Discussion Paper, September 2012) 8 ('CAMAC Shareholder Engagement Discussion Paper'); *OECD Principles 2015* (n 69) 18.

85 Wells (n 67) 1248–9; Coates (n 78) 2. This conception of the corporation was famously put forward by Berle and Means in the USA: Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Commerce Clearing House, 1932). The Berle and Means corporation highlighted agency problems associated with the separation of ownership and control between shareholders and the board of directors respectively, and the limited potential for shareholders as a widely dispersed, generally disinterested cohort, to influence corporate decision-making. For a description of different 'visions' of shareholders, see Jennifer Hill, 'Visions and Revisions of the Shareholder' (2000) 48(1) *American Journal of Comparative Law* 39, 64–7; Ramsay (n 81) 27.

86 For further discussion of illiquidity see above n 64 and below n 95 and accompanying discursive text.

87 See above n 64 and accompanying discursive text.

88 *Ibid.*

The sale of Hop Stuff Brewery Ltd in the UK serves as a useful example of the financial vulnerability of CSEF shareholders during a proposed buy-out. Hop Stuff raised £800,000 through the equivalent CSEF process in the UK in 2018 to expand its network of brewery taprooms.⁸⁹ By 2019 it had gone into administration and was bought out by the Molson Coors Brewing Company.⁹⁰ In a blog post alerting CSEF shareholders of the sale, Hop Stuff noted that a full sale of the shareholding was commercially unviable and so investors would not receive a return on their investment.⁹¹ Shareholders in Australian corporations funded through CSEF would similarly have little input in a takeover situation given their exclusion from the relevant takeover provisions.

Regulation that encourages the creation of secondary markets may lessen the impact of such provisions by enhancing liquidity. One of Australia's leading platform operators, Birchal, has received ASIC approval to operate a low volume financial market, called Birchal Trading.⁹² This allows Birchal to assist corporations raising funds through CSEF to operate a low-volume secondary market for up to 100 completed transactions valued at \$1.5 million and below within a 12-month period without the need to obtain an Australian Market Licence under part 7.2 of the *Corporations Act*.⁹³ Secondary markets such as Birchal Trading seek to enhance the exit options available to CSEF shareholders but caution should be exercised.⁹⁴ The very existence of a secondary market itself may cause confusion among retail

89 Nikkie Thatcher, 'Hop Stuff Brewery Sold to Molson Coors', *The Morning Advertiser* (online, 12 July 2019) <<https://www.morningadvertiser.co.uk/Article/2019/07/12/Hop-Stuff-Brewery-sold-to-Molson-Coors>>. See also 'Hopstuff Completely Screws All Its Investors as Crowdcube Yet Again Proves Itself Redundant [sic]' *ECF Buzz* (Blog Post, 12 July 2019) <<https://www.ecf.buzz/blog/hopstuff-completely-screws-all-its-investors-as-crowdcube-yet-again-proves-itself-redundant>>.

90 Thatcher (n 89).

91 Ibid.

92 'Birchal Trade: A Liquidity Solution for Unlisted Companies', *Birchal* (Web Page) <<https://www.birchal.com/birchal-trade>>; David Swan, 'Shebah Hails Ride with Birchal Trading', *The Australian* (online, 2 December 2019) <<https://www.theaustralian.com.au/business/technology/shebah-hails-ride-with-birchal-trading/news-story/aa8f5a5acdbabdb128b15d3d3cb15875>>; Matt Vitale, 'Announcing Birchal Trade', *The Birchal Blog* (Blog Post, 2 December 2019) <<https://blog.birchal.com/announcing-birchal-trade-eb37c4348842>>.

93 Swan (n 92); Australian Securities and Investments Commission, 'Licensing Relief for Low Volume Financial Markets' (Information Sheet No 217, December 2016) <<https://asic.gov.au/regulatory-resources/markets/market-structure/licensed-and-exempt-markets/exempt-markets/licensing-relief-for-low-volume-financial-markets>>.

94 The United Kingdom's Financial Conduct Authority ('FCA') has, for instance, expressed reservations on the operation of secondary markets for its peer-to-peer lending sector: Financial Conduct Authority (n 64) 32. On the UK's secondary markets for CSEF, see Douglas Cumming and Sofia A Johan, *Crowdfunding: Fundamental Cases, Facts and Insights* (Academic Press, 1st ed, 2019) 221; Janet Austin, 'How Do I Sell My Crowdfunded Shares: Developing Exchanges and Markets to Trade Securities Issued by Start-ups and Small Companies' (2018) 8 *Harvard Business Law Review Online* 21, 27; Bechara Kara, 'What's Next for Equity Crowdfunding?', *Toptal Finance* (Blog Post) <<https://www.toptal.com/finance/startup-funding-consultants/whats-next-for-equity-crowdfunding>>. For a discussion of secondary markets in South Korea and New Zealand, see also James Murray, 'Equity Crowdfunding and Peer-to-Peer Lending in New Zealand: The First Year' (2015) (2) *JASSA The Finsia Journal of Applied Finance* 5, 8; Austin (n 94) 26–7. For a discussion of secondary markets in the United States, see Danielle Lazarus, 'Combating Pump and Dump in Crowdfunding Markets', *Regulatory Review* (online, 15 November 2017) <<https://www.theregview.org/2017/11/15/lazarus-pump-dump-crowdfunding>>.

investors who may mistakenly believe that these small markets offer liquidity for their investments when they may not.⁹⁵ The creation of secondary markets of this nature also leave unaddressed problems with the valuation of shares on these markets due to a lack of transparency in pricing.⁹⁶ This means that even with the introduction of secondary markets, investment in CSEF is likely to continue to tie up investor funds for a significant amount of time.⁹⁷ In the meantime, the main practical options available for a successful exit are share buy-backs and sale to another private investor although the bargaining position of shareholders in these situations is generally weak.⁹⁸

In the absence of these market-based exit options, there are a range of alternative approaches that may promote the interests of shareholders. For instance, consideration may be given to permitting the issue of preference shares through the CSEF process with the potential to guarantee the payment of dividends. However, experience in the UK suggests, once again, that a cautious approach be adopted. The inclusion of different classes of shares could, for instance, be used by more sophisticated investors to obtain better terms, and importantly, negotiate for preferential payment where the corporation is sold or collapses as was the case in the Hop Stuff example explored above.⁹⁹

In the context where shareholders are locked-in to their investment, members' remedies most suitable to minority shareholders in private corporations may also provide some assistance. Both the oppression remedy and the statutory derivative action discussed in Part IV(A) have been used predominantly in these corporations to settle internal management disputes.¹⁰⁰ Indeed, in its review of CSEF, CAMAC noted that such remedies may be available to shareholders of CSEF corporations who are displeased with the direction of the corporation and

95 The secondary market for shares in private corporations has historically been illiquid. See, eg, Oscar Williams-Grut, 'Crowdfunding Platform Seedrs Will Let People Trade Shares in Private Companies They Invest In', *Business Insider* (online, 8 May 2017) <<https://www.businessinsider.com.au/crowdfunding-platform-seedrs-launches-secondary-market-for-private-shares-2017-5>>.

96 Financial Conduct Authority (n 64) 32. The FCA notes that bulletin board secondary markets for investment crowdfunding in the UK had not experienced the same problems but advised that investors still needed to be made aware that even with a secondary market, their investment was likely to be illiquid. Austin comprehensively outlines the challenges of associated with regulating secondary markets: Austin (n 94) 23–9.

97 For example, investors can expect their investment to be tied up for more than five years: Lisa Walls-Hester, 'Equity Crowdfunding: Is It Time to Show Investors the Door?', *AltFi* (Web Page, 6 June 2016) <https://www.altfi.com/article/2004_crowdfunding_is_it_time_to_show_investors_the_door>.

98 *Ibid.*

99 Clive Reffell, 'Has the Biggest UK Equity Crowdfunding Platform Shot Itself in the Foot?', *Crowdsourcing Week* (Web Page, 13 December 2018) <<https://crowdsourcingweek.com/blog/has-the-biggest-uk-equity-crowdfunding-platform-shot-itself-in-the-foot>>. A more radical proposal could require corporations funded through CSEF to include a mandatory dividend provision in their constitution, requiring that the corporation pay a dividend equalling a certain portion of profits each year. This option is available in jurisdictions such as Brazil, where public corporations are required to pay as dividends 25% of their annual earnings. See Theo Cotrim Martins and Walter Novaes, 'Mandatory Dividend Rules: Do They Make It Harder for Firms to Invest?' (2012) 18(4) *Journal of Corporate Finance* (2012) 953 <<https://doi.org/10.1016/j.jcorpfin.2012.05.002>>.

100 See above Part IV(A) for discussion regarding the oppression remedy and the statutory derivative action.

who are otherwise locked-in to their investment.¹⁰¹ CAMAC pointed specifically to the duty imposed on directors to act in good faith in the best interests of the company and the requirement that they only issue new shares for a proper purpose, as well as reliance on the oppression remedy and use of class actions and statutory derivative actions where they are aggrieved by managerial decisions.¹⁰² However, CAMAC acknowledged that individual crowd investors may not be motivated to act, and the cost of doing so, even collectively, may for many of them exceed the funds invested.¹⁰³ In other words, members' remedies require a lot of work for such a small financial investment – and shareholders in CSEF corporations lack the requisite personal attachment to the corporation that might otherwise motivate use of members' remedies in spite of the significant financial obstacles associated with their use.

The current regulatory framework, therefore, creates a vulnerable cohort of shareholders who are neither able to protect their financial interests, nor participate in the pursuit of shared social preferences consistent with the democratisation and direct participation promise of CSEF as part of the broader FinTech movement. CSEF may, in essence, act as a wealth transfer between retail investors and entrepreneurs. These retail investors simply have to hope that management pursues the goals they advertised at the fundraising stage of the process or stay viable long enough to be bought out on the odd chance that they will receive a financial return on their investment. Reforms to corporate governance in line with more modern approaches that highlight diversity in corporate purpose and enhancement of engagement may help to address these problems. The next section outlines this new approach to corporate governance before proposing, in Part V, reforms necessary to give effect to the innovative promise of CSEF as a fundraising mechanism.

C A New Approach to Corporate Governance

The modern debate regarding the purpose of the corporation was first set out in detail in the pages of the *Harvard Law Review* in 1931–32 between preeminent legal scholars Adolph A Berle and Merrick Dodd.¹⁰⁴ Berle argued that the corporation represented an agency-principal relationship between the board of directors and shareholders and as a result, the corporation existed solely to make money for shareholders. Dodd, on the other hand, argued that corporations served a broader social purpose in addition to their profit-making function. According to Dodd, this meant that directors needed to take into account the interests, for instance, of employees in job security even where this may not contribute towards shareholder profit. Societal welfare factors, therefore, acted as an underpinning

101 *CAMAC CSEF Report* (n 12) 47.

102 *Ibid.*

103 *Ibid.*

104 The debate summarised in this paragraph was set out in the following articles: Adolph A Berle, 'Corporate Powers as Powers in Trust' (1931) 44(7) *Harvard Law Review* 1049, 1049; E Merrick Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45(7) *Harvard Law Review* 1145, 1148. For a useful outline of the debate, see Lynn A Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2002) 75(5) *Southern California Law Review* 1189; Kourabas (n 65) 228–36.

normative framework that limited the capacity of directors to make decisions in pursuit of shareholder profit.

While the view expressed by Berle prevailed for many decades, there has been increasing concern regarding the negative implications on society associated with an undue pre-occupation with corporate profit-making. The global financial crisis of 2007–08, in particular, contributed to a general shift towards preference for societal organisation that explicitly took into account social welfare goals such as ‘stability’ and ‘sustainable development’.¹⁰⁵ This has contributed towards burgeoning commentary in corporate governance on the growing significance of environmental, social and governance (‘ESG’) matters as important corporate objectives.¹⁰⁶ ESG matters have been identified as particularly important for the growing cohort of activist shareholders concerned with the lack of political leadership in areas such as climate change as well as the perception that corporations operating pursuant to the current shareholder primacy model of corporate governance underemphasise the negative impacts on society of corporate conduct.¹⁰⁷

In Australia, the need to ensure that corporations take into account broader societal effects in decision-making was an important finding of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (‘Hayne Royal Commission’).¹⁰⁸ The Final Report of the Hayne Royal Commission focused mainly on misconduct in the financial sector, however, the report included a number of observations that related more broadly to corporate governance. In particular, the Hayne Royal Commission re-affirmed the long accepted view in Australia that directors’ duties to the corporation accommodate decision-making that looks beyond shareholder short-term financial gain to take into account a broader range of interests.¹⁰⁹ Under this conception of the corporation, directors are empowered to take into account broader societal interests in their decision-making as this would ultimately benefit the corporation and, as a result,

105 For a discussion of the significance of stability and sustainable development as underlying principles of governance and regulation following the global financial crisis see Steve Kourabas, *Global Finance in the 21st Century: Stability and Sustainability in a Fragmenting World* (Routledge, 1st ed, 2021) 53–4, 68–72.

106 Alice Ross, ‘Getting Heard on Climate: Small Investors Take on Big Companies’, *Financial Times* (online, 22 October 2021) <<https://amp.ft.com/content/97a2df7c-5f13-4f20-b7f4-73a19cedb677>>. For a useful summary of the literature considering the shift towards ESG, see Tim Bowley and Jennifer G Hill, ‘Investor Stewardship Codes, ESG Activism and Transnational Ordering’ in Thilo Kuntz (ed), *Research Handbook on Environmental, Social and Corporate Governance* (Edward Elgar Publishing, forthcoming 2023). Kell notes that the abbreviation ‘ESG’ covers a broad spectrum of issues that are not commonly part of financial analysis: George Kell, ‘The Remarkable Rise of ESG’, *Forbes* (online, 11 July 2018) <<https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=738067eb1695>>. ESG overlaps with concepts such as corporate social responsibility, corporate culture and ‘stakeholderism’ to name a few.

107 Ross (n 106). See also Andrew Belyea-Tate, ‘Company Disclosure of Climate-Related Reputation Risks’ (2019) 37(2) *Company and Securities Law Journal* 82, 82.

108 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019).

109 *Ibid* vol 1, 402.

long-term shareholder profit (the so-called ‘enlightened shareholder’ conception of corporate governance).¹¹⁰

The attempt to reconcile broader societal interests with the interests of the corporation was also reflected in the work of Nobel Laureate, Oliver Hart, and Luigi Zingales. They argued that the goal of public corporations should be to advance shareholder *welfare* rather than shareholder *profits*.¹¹¹ The aim of this shift in terminology is to broaden the understanding of shareholder interests, which would then act as a proxy for the pursuit of goals consistent with societal interests. As with the Hayne Royal Commission, this approach continues to rely on existing corporate governance structures but offers managers a broader framework through which to view their authority.

There is, therefore, a clear shift away from corporate governance that encourages the narrow pursuit of maximising short-term shareholder profits.¹¹² The shift is reflected in the evolving emphasis on corporate purpose in the OECD’s influential principles of corporate governance. In the first iteration of the principles, the OECD noted that all good corporate governance regimes prioritised the financial interests of shareholders who place their trust in corporations to use their investment funds wisely and effectively.¹¹³ While continuing to acknowledge the importance of financial interests, more recently, the OECD has taken into account a broader range of corporate purposes. This includes acknowledgment of the importance of corporate governance as a means to support mechanisms that build the trust, transparency and accountability needed to foster long-term investment, financial stability and business integrity, and which ultimately support stronger

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- 110 *CAMAC Social Responsibilities Report* (n 70) 91–2. CAMAC notes that while there is no direct legal obligation on directors to take into account the interests of non-shareholder stakeholders, they are not precluded from doing so. However, this must be linked to ‘enlightened self-interest on the part of the company’. For a discussion of this enlightened shareholder primacy view, see Lucian A Bechuk and Roberto Tallarita, ‘The Illusory Promise of Stakeholder Governance’ (2020) 106(1) *Cornell Law Review* 91, 108–11. The United Kingdom has explicitly adopted this enlightened shareholder value approach to corporate governance through the adoption of section 172 of the *Companies Act 2006* (UK). See, eg, Georgina Tsagas, ‘Section 172 of the *Companies Act 2006*: Desperate Times Call for Soft Law Measures’ in Nina Boeger and Charlotte Villiers (eds), *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart Publishing, 2018) 131–50.
- 111 Oliver Hart and Luigi Zingales, ‘Companies Should Maximize Shareholder Welfare Not Market Value’ (2017) 2(2) *Journal of Law, Finance, and Accounting* 247 <<http://dx.doi.org/10.1561/108.00000022>>.
- 112 In the broader economic literature, this conception of the corporation was most famously put forward by Friedman: Milton Friedman, ‘The Social Responsibility of Business is to Increase Its Profits’, *New York Times* (online, 13 September 1970) <<https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>>; Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962).
- 113 *OECD Principles 1999* (n 66) 6. As the average duration of shareholding continued to decrease in many jurisdictions, a view took hold that the interests of the shareholders equated to the attainment of short-term, rather than long-term, profit: Graeme Salaman and John Storey, *A Better Way of Doing Business? Lessons from the John Lewis Partnership* (Oxford University Press, 2016) 8–9 <<https://doi.org/10.1093/acprof:oso/9780198782827.001.0001>>. Mayer notes that many shareholders are driven by short-term profit gains irrespective of the long-term effect on the company because their short-term investment strategy allows them to maximise their profits: Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press, 1st ed, 2018) 44.

growth and more inclusive societies.¹¹⁴ Therefore, modern preferences regarding corporate governance more accurately reflect the approach of Merrick Dodd in providing a normative underpinning based on financial stability and business integrity to support not only strong growth but also inclusive societies, and which limit the unencumbered pursuit of shareholder profit.¹¹⁵

The expansion of corporate purpose also raises questions regarding the role that different actors may play in decision-making. While the analysis thus far has considered how corporate purpose could be expanded to afford managers greater discretion in their decision-making, recent scholarship has also explored the growing impact of different forms of shareholder activism on corporate decision-making and, in particular, on the pursuit of non-financial goals. For example, Libson argues that there are several reasons that shareholders may be better positioned to achieve what she refers to as social welfare goals than directors.¹¹⁶ For instance, while shareholders may be willing to prioritise the pursuit of social welfare over profit, directors are less inclined to adopt this approach because they are, as a result of their financial management function within the corporation, more sensitive to profit-making.¹¹⁷ Further, the fact that managers are not as diverse as shareholders means that shareholders are more likely to have less interest in the financial performance of a corporation and a greater interest in promoting corporate decision-making that supports social welfare.¹¹⁸ Shareholders may also have diverse investment portfolios while managers invest their most valuable asset – their human capital – in a corporation. This means shareholders are not as likely to focus solely on financial returns.¹¹⁹ Finally, managers often have personal financial incentives, such as options and bonuses, which increase their sensitivity to profitability.¹²⁰

A great deal has already been written about a form of shareholder activism that preceded, and that is developing alongside, CSEF: the reconcentration of public share ownership within the hands of institutional investors, and, in particular, index funds.¹²¹ Beginning during the 1990s in Australia, the increasing power of institutional investors has resulted in a shift in decision-making power

114 *OECD Principles 2015* (n 69) 7.

115 *Ibid* 13.

116 Adi Libson, 'Taking Shareholders' Social Preferences Seriously: Confronting a New Agency Problem' (2019) 9(3) *University of California Irvine Law Review* 699, 701.

117 *Ibid*.

118 *Ibid* 707–12.

119 *Ibid*.

120 *Ibid*.

121 See, eg, Responsible Investment Association Australasia, *Responsible Investment Benchmark Report: Australia 2021* (Report, 2021) <<https://responsibleinvestment.org/wp-content/uploads/2021/09/Responsible-Investment-Benchmark-Report-Australia-2021.pdf>> ('*Responsible Investment Benchmark Report*'). For a comprehensive review of institutional investment in Australia, see generally Jennifer Hill, 'Institutional Investors and Corporate Governance in Australia' in Theodor Baums, Richard M Buxbaum and Klaus J Hopt (eds), *Institutional Investors and Corporate Governance* (De Gruyter, 1993) 583–607. For analysis of these developments in the USA see, eg, Coates (n 78) 2; Lucian A Bebchuk and Scott Hirst, 'The Specter of the Giant Three' (Working Paper No 608/2019, European Corporate Governance Institute, July 2019) 19 <<http://dx.doi.org/10.2139/ssrn.3385501>>.

away from the board to large investors, including a greater emphasis in decision-making on ESG matters.¹²² This reconcentration of corporate power takes place within the existing corporate governance framework, with a new central actor using its authority to represent the interests of shareholders. This is consistent with a hierarchical, centralised form of governance. The novelty of this approach to corporate governance is that an additional intermediary with the capacity to influence corporate decision-making is interposed between individual shareholders and the board of directors.

CSEF, however, seeks to empower members of a widely dispersed crowd who invest on the basis of a genuine interest in pursuing a goal advertised by a fundraiser. These investors are warned not to expect financial return on investment and are even warned of the very high risk that they will lose their entire investment. This is consistent with a view that shareholders may emphasise the pursuit of broader, non-financial goals through their investment, described in this article as a shared social preference. Similarly, limits placed on investment in any one particular corporation raising funds through CSEF help to ensure that shareholder portfolios are diversified. This means that these shareholders may be motivated to invest as much through their desire to pursue a shared social preference as they are by a desire to achieve a financial return on their investment.¹²³

The CSEF process offers a unique approach to corporate fundraising and, as a result, to corporate power dynamics. As part of the broader FinTech movement, CSEF does not rely on passivity or on reliance on large intermediaries to represent the interests imputed on the shareholders they represent but rather seeks to establish a new form of social interaction based on mutuality, cooperation and inclusiveness. The use of technology provides shareholders the opportunity to engage directly with management (and allows management to engage directly with shareholders) in a way that was not previously envisaged, and was not, as a result, contemplated in the construction of Australia's current corporate governance framework.

The internet and social networking technology promote active and direct participation in finance by the crowd that reflects a broad generational shift away from passive forms of social interaction.¹²⁴ For instance, in its Australian investor study of 2020, the Australian Securities Exchange ('ASX') found that the 27% of intended investors aged under 25 were generally more interested in pursuing ESG issues through their investment and actively monitored their investment portfolio even where this involved a small amount of funds.¹²⁵ Further, these investors were interested in obtaining information through a wide variety of sources including social media.¹²⁶

122 See, eg, *Responsible Investment Benchmark Report* (n 121).

123 See above n 65.

124 Barzuza, Curtis and Webber (n 22); Sergio Alberto Gramitto Ricci and Christina M Sautter, 'Corporate Governance Gaming: The Collective Power of Retail Investors' (2021) 22(1) *Nevada Law Journal* 51.

125 *ASX Investor Study 2020* (n 22) 14, 44. Relevant to the small value of investments made through CSEF, these next gen investors monitor their portfolios relatively frequently, despite having little capital at their disposal: at 26.

126 *Ibid* 26.

Although modern approaches to corporate governance emphasise the significance of ESG and related social welfare goals in corporate purpose as well as the empowerment of shareholders in corporate decision-making, this has not been reflected in the regulation of corporations funded through CSEF. This means that the Community Crowdfunding and FinTech origins of the process have not been adequately reflected in the CSEF regulatory framework. Perhaps of even greater concern, the effect of this regulatory inaction has been to create a particularly vulnerable cohort of shareholders that runs contrary to the underlying ethos of CSEF as a process that seeks to enhance mutuality, cooperation and inclusivity. Part V sets out regulatory reforms that reflect both a change in corporate governance objectives and which seek to give effect to the shared social preference motivations of CSEF investment in a context where financial return on investment is admittedly limited.

V EMPHASISING THE DISTINCTIVE ASPECTS OF CSEF

Part IV(B) sets out the case of Hop Stuff and the complete loss of financial investment for CSEF shareholders as part of a buy-out to save the corporation.¹²⁷ Interestingly, after apologising for losing their money, the Hop Stuff founders asked their soon-to-be former shareholders to continue working with them through the creation of a ‘Hop Stuff Collective’ that would provide exclusive access to events, a product subscription, participation in product development through tastings, and innovation sessions.¹²⁸ The example is interesting because it highlights the potential significance of Community Crowdfunding underpinning CSEF where the process has very limited financial benefits. If the corporation is viewed purely through the lens of financial return on investment, however, this offer is problematic: management failed to protect the financial interests of investors and they were now being told that they would receive a non-financial reward in place of their equity ownership in the corporation.

While this article certainly does not advocate an approach to CSEF that encourages this type of replacement of financial with non-financial reward, particularly when not advertised as a possibility during the fundraising campaign or specifically identified as an option in the corporate constitution, it may be useful to reset expectations of shareholding to take into account different models of fundraising and new approaches to investment.

There are a number of already accepted ‘visions’ of the shareholder reflected through different corporate governance frameworks. The shareholder is, for instance, viewed as dispossessed owner/principal, as beneficiary or bystander, as participant in a political entity, as investor, as gatekeeper or as victim or collaborator

¹²⁷ See above nn 89–99 and accompanying discursive text.

¹²⁸ Thatcher (n 89).

in corporate malpractice or societal crisis.¹²⁹ Reforms to Australia's corporate governance framework could be implemented to give effect to the view of the CSEF shareholder as an engaged, active collaborator in the pursuit of a shared social preference. This article proposes a number of reforms designed specifically with this vision of the shareholder in mind.¹³⁰ These proposed reforms would seek to satisfy the following aims:

- (1) Encouraging corporations to afford greater weight during the post-fundraising stage of the process to the pursuit of shared social preference through the inclusion of an objectives statement in their constitution;
- (2) Outlining an engagement framework in the corporate constitution that leverages technological innovations to facilitate ongoing, instantaneous, two-way interaction as a supplement to existing engagement mechanisms; and
- (3) Adopting a revised version of the ASX Corporate Governance Principles and Recommendations ('ASX Principles') currently applicable to listed corporations to encourage best practice corporate governance in all corporations funded through CSEF, including the requirement that corporations have an objectives statement and an engagement framework in their corporate constitution.¹³¹

These aims support a model of shareholding and corporate fundraising that reflects a broader trend in corporate governance, facilitated through technological innovation, of direct, flatter interactions.¹³² The reforms, therefore, offer a way forward for corporations and prospective investors wishing to support decentralised decision-making and direct participation as a form of social interaction.¹³³

129 Hill, 'Images of the Shareholder: Shareholder Power and Shareholder Powerlessness' (n 76) 53; Hill, 'Visions and Revisions of the Shareholder' (n 85) 42–64. Fisch and Sepe have questioned the ongoing relevance of the debate between manager versus shareholder power models of the firm. Instead, they argue that a new, insider-shareholder collaborative dynamic is taking hold in corporations: Jill E Fisch and Simone M Sepe, 'Shareholder Collaboration' (Working Paper No 415/2018, European Corporate Governance Institute, August 2020) <<http://dx.doi.org/10.2139/ssrn.3227113>>.

130 Reforms to CSEF have typically emphasised the need to make the process more attractive for issuers. For a useful analysis of reforms that would enhance the value of CSEF for issuers, see Matthew (n 13). While consideration of these reform proposals as well as proposals that seek to enhance engagement through different intermediaries remain vital, this article contributes to the debate regarding corporate governance through critical analysis of the mechanisms that can give effect to the underlying ethos of CSEF as part of the broader FinTech movement. As such, a comprehensive analysis of reforms that do not give effect to this underlying ethos is out of scope.

131 'ASX Corporate Governance Principles and Recommendations' (n 68).

132 Mark Fenwick and Erik PM Vermeulen, 'Technology and Corporate Governance: Blockchain, Crypto, and Artificial Intelligence' (Working Paper No 424/2018, European Corporate Governance Institute, November 2018) 8 <<http://dx.doi.org/10.2139/ssrn.3263222>>.

133 Ibid.

A Giving Effect to Shared Social Preference

As highlighted in Part II(B), one of the unique features of CSEF for both fundraisers and funders is the opportunity to be a part of a community coalescing around the pursuit of a shared social preference. For fundraisers, the opportunity to collaborate with members of the crowd has potential non-financial as well as financial benefits. Evidence from the UK suggests, for instance, that crowdfunding has helped approximately 70% of business that used the process to increase their sales by turning customers into investors and then turning those investors into brand advocates.¹³⁴ Setting out and then giving effect to shared social preference need not, therefore, be viewed as a restraint on managerial discretion or an unjustified financial burden, but rather as an opportunity for fundraisers to pursue a goal that they genuinely believe in through a business venture.

One way to inculcate a feeling of collaboration is through the inclusion in the corporate constitution of an objectives statement that clearly sets out corporate aims and re-affirms, in the case of CSEF, the shared social preferences advertised at the fundraising stage of the process. Evidence drawn from the corporate and not-for-profit sector suggests that such statements increase effectiveness within organisations.¹³⁵ An objectives statement allows those involved in the corporation to set out a long-term vision for the corporation (useful in the CSEF context where shareholders are effectively locked-in to their investment), to allocate expected roles and obligations in achieving those long-term visions, and to set out a corporate philosophy and values that guide decision-making within the corporation.¹³⁶ The commitment to objectives consistent with the shared social preference advertised at the funding stage also has the potential to encourage the perception by the crowd-turned-shareholders of the sincerity of management in their desire to pursue those preferences, even if the objectives statement is later amended to reflect changes in corporate direction.¹³⁷ It would make a strong statement to the crowd that the

134 Assenova et al (n 21) 129.

135 Susanne Braun et al, 'Effectiveness of Mission Statements in Organizations: A Review' (2012) 18(4) *Journal of Management and Organization* 430. The authors note that the effectiveness of corporate mission statements depends on factors such as the rationale underlying their development, the process of their development and implementation, their content and form, and individual attitudes toward the mission statement. The British Academy has argued in favour of policies that support 'purposeful business', which refers to a 'system in which the purpose of business is creating profitable solutions for problems of people and planet, and not profiting from creating problems': British Academy, *Policy and Practice for Purposeful Business: The Final Report of the Future of the Corporation Programme* (Report, 2021) 6. To encourage purposeful business, the British Academy proposes, among other reforms, that corporations incorporate purpose in their legal form (which, in the Australian context, would be the corporate constitution): at 20.

136 Braun et al (n 135) 431. Fisch and Solomon argue similarly that corporate purpose is useful in establishing a voluntary mechanism which facilitates the goals of different constituents within the corporation: Jill E Fisch and Steven Davidoff Solomon, 'Should Corporations Have a Purpose?' (2021) 99(7) *Texas Law Review* 1309.

137 Generally, more effective purpose statements are constructed with involvement of the board and the organisation's members: Chris Bart and Nick Bontis, 'Distinguishing between the Board and Management in Company Mission: Implications for Corporate Governance' (2003) 4(3) *Journal of Intellectual Capital* 361, 376; Mohammad Taghi Alavi and Azhdar Karami, 'Managers of Small and Medium Enterprises:

issuers are willing to commit to the ongoing pursuit of shared social preference through the inclusion of such a statement in the corporate constitution attached to the offer document at the fundraising stage of the process.¹³⁸

The requirement for corporations to include an objectives statement in their constitution has been optional since amendments to the *Companies Act 1981* (Cth) gave corporations in Australia the full capacity of natural persons. Conferring full capacity of natural persons to corporations removed the ability to challenge a corporation's actions on the basis that they were *ultra vires*.¹³⁹ Further amendments clarified the intention to abolish the doctrine of *ultra vires*,¹⁴⁰ and provided that although corporations could impose restrictions on their conduct through an objectives statement, this would not affect third party legal rights.¹⁴¹ The main aim of making the inclusion of an objectives statement in the corporation's constitution optional is, therefore, to protect innocent third parties who have contracted in good faith with corporations.¹⁴²

Section 125 of the *Company Law Review Act 1997* (Cth) provided explicitly that an act of the corporation is not void merely because it goes beyond any objectives outlined in the constitution.¹⁴³ This means that a contravention of an objectives statement or any limitation on corporate power in the constitution does not constitute a contravention of the legislation.¹⁴⁴ Despite this limitation, contravention of an objectives statement can still be relied on in other actions under the law,¹⁴⁵ including, for instance, the oppression remedy.¹⁴⁶

Some commentators have argued that the abolition of the mandatory requirement to include an objectives statement in the corporate constitution unduly shifts responsibility for good governance onto shareholders.¹⁴⁷ According to these

Mission Statement and Enhanced Organisational Performance' (2009) 28(6) *Journal of Management Development* 555, 561. The adoption of engagement mechanisms should take into account the potential need to amend corporate objectives as the corporation grows or needs to pivot to meet new demands. These engagement mechanisms are discussed in Part V(B) below.

- 138 ASIC recommends that issuers attach a copy of the constitution to their offer document outlining shareholder rights: 'ASIC Guide for Companies' (n 42) 42, 47. This would provide a useful mechanism for consideration, and inclusion of, an objectives statement which reflects the advertised shared social preference.
- 139 R Baxt (ed), '*Ultra Vires*: Has It Been Revived?' (1991) 9(2) *Company and Securities Law Journal* 101, 101.
- 140 Ibid.
- 141 Explanatory Memorandum, Companies Securities Legislation (Miscellaneous Amendments) Bill 1985 (Cth) 17–18 ('EM Companies Securities Bill').
- 142 Ibid 66 [187]–[188]; BJ Watson, 'Corporate Collapses: Time to Reintroduce the *Ultra Vires* Rule?' (1990) 8(4) *Company and Securities Law Journal* 240, 245.
- 143 The section was retained in the *Corporations Act* (n 30) in section 125.
- 144 Susan Woodward, "'*Ultra Vires*': Over Simplified: Changes to Company Powers under the Second Corporate Law Simplification Bill' (1997) 15(3) *Company and Securities Law Journal* 162, 162; Explanatory Memorandum, Company Law Review Bill 1997 (Cth) 24 [8.4] ('EM Company Law Review Bill').
- 145 EM Companies Securities Bill (n 141) 17–18. After the abolition of the *ultra vires* doctrine, the claim that a corporation lacked power (by acting outside of its objectives clause) could be 'asserted only in proceedings against directors and others for committing breaches of the law' and in oppression actions or injunction applications: Baxt (n 139) 101.
- 146 EM Company Law Review Bill (n 144) 24 [8.4].
- 147 Woodward (n 144) 172.

commentators, statutory recognition that corporations should have constitutionally enshrined objectives or restrictions may provide officers with incentive to give effect to them.¹⁴⁸ While this view relates predominantly to interactions with third party stakeholders and its effects on managerial authority, Watson argues for the reinstatement of a mandatory requirement for public listed corporations to include an objectives statement in their constitution because investors purchase shares on the understanding that corporations will retain the focus that initially motivated the investment.¹⁴⁹

Although not made with CSEF in mind, Watson's argument holds particular relevance to corporations that raise funds through CSEF, which are often reliant on the explicit advertisement of a shared social preference to motivate investment. An official requirement to include an objectives statement in a corporate constitution may provide incentive for officers to give effect to those objectives and, as a result, may ensure that the corporation retains focus on pursuing the shared social preference advertised during the funding phase. This need not, however, be in the form of a prescriptive legislative requirement. Instead, as Part V(C) below explains, a collaborative approach may be more consistent with the goals of CSEF. A requirement to include an objectives statement could also act as a catalyst for further engagement and could help facilitate open, transparent communication between management and shareholders when it comes to ongoing pursuit of shared social preference.

B Enhancing Shareholder Engagement

One of the core aims of CSEF as part of the broader FinTech movement is to democratise finance and to promote a new form of social interaction based on mutuality, cooperation and inclusiveness. There have been attempts to give effect to this new form of social interaction during the fundraising stage of the CSEF process, through requirements, for instance, that CSEF platform operators make available communications facilities.¹⁵⁰ Similar reforms have not been made, however, to the corporate governance framework to reflect this new form of social interaction.

The internet and social networking technology provide an opportunity to revitalise Australia's corporate governance framework to reflect a preference for more active, informal, and ongoing engagement. According to Couldry, technological innovations such as the internet have helped to create '... a network of networks that connects all types of communication from one-to-one to many-to-many into a wider "space" of communication'.¹⁵¹ This promotes information sharing at a low cost and through two-way, instantaneous, and ongoing interaction.¹⁵²

148 Ibid. This view is consistent with the approach advocated by the British Academy: see British Academy (n 135) 31.

149 Watson (n 142) 245. Watson proposes the re-introduction of the *ultra vires* rule limited in application to listed public corporations, in particular, for large and material transactions: at 246.

150 See above nn 4–5 (on FinTech) and 56–9 (on communication) and accompanying discursive text.

151 Nick Couldry, *Media, Society, World: Social Theory and Digital Media Practice* (Polity Press, 2012) 2.

152 See Koh (n 70) 172–3.

Ensuring that Australia's corporate governance framework recognises this emerging form of social interaction will become increasingly important as Millennials and members of Gen Z who grew up with smart phone technology and who are more comfortable communicating through the internet and social media platforms enter the investment market.¹⁵³ These investors are projected to control approximately \$68 trillion of assets worldwide within a decade and are more accustomed to active, ongoing, two-way engagement through online platforms such as Twitter, YouTube, and other dedicated online forums.¹⁵⁴ These considerations are particularly important for corporations that raise funds through CSEF, which is a corporate fundraising model predicated on online community-building for its business model.

Yet, as outlined in Part IV(A), the current Australian corporate governance framework continues to support periodic engagement that treats retail shareholders as a disinterested cohort of passive investors generally content to leave it to others to promote their financial interests. In its submission to the Parliamentary Joint Commission on Corporations and Finance, for instance, the federal Treasury argued that apathetic retail shareholders cause a free rider problem: they refrain from undertaking acts of managerial oversight because it is in their interest for someone else to incur the costs associated with this oversight while they reap the benefits.¹⁵⁵ Similarly, the Productivity Commission has previously noted that all investors are expected to weigh up the costs and benefits associated with monitoring, engaging, and voting.¹⁵⁶ According to the Commission, for small retail investors, the benefits associated with engagement through voting are likely to be small and outweighed by the costs involved.¹⁵⁷

Current engagement mechanisms for retail shareholders reflect this passive view of the shareholder and the understanding that shareholders can either sell their shares or rely on members' remedies where dissatisfied with the corporate direction. Accordingly, the main engagement mechanism for retail investors is the option to ask questions of management at the general meeting regulated through part 2G.2 of the *Corporations Act*. These meetings are predominantly

153 Ricci and Sautter (n 124) 75. Gen Z is now 2.5 billion strong and is expected to surpass Millennials in spending power by 2031: 'Gen Z to the World: Watch Out, Here We Come', *Bank of America* (Web Page, 2020) <<https://web.archive.org/web/20211007101004/https://www.privatebank.bankofamerica.com/articles/gen-z-defining-characteristics-understanding-impact.html>>. For further discussion of these issues see above n 26 and accompanying discursive text.

154 Coldwell Banker Global Luxury, *A Look at Wealth 2019: Millennial Millionaires* (Report, 2019) 6 <https://blog.coldwellbankerluxury.com/wp-content/uploads/2019/10/CBGL-Millennial-Report_SEP19_FINAL-4a.1-1-1.pdf>; Remus Valsan, 'Social Media and Shareholder Activism', *Edinburgh Centre for Commercial Law Blog* (Blog Post, 8 May 2014) <<http://www.ecclblog.law.ed.ac.uk/2014/05/08/social-media-and-shareholder-activism>>. As the ASX notes, next generation investors are more likely than older cohorts of investors to seek information through sources such as YouTube, podcasts, social messaging, and social media platforms: *ASX Investor Study 2020* (n 22) 26, 40.

155 Joint Committee on Corporations and Financial Services, Parliament of Australia, *Better Shareholders – Better Company: Shareholder Engagement and Participation in Australia* (Report, June 2008) 21 [3.51].

156 'CAMAC Shareholder Engagement Discussion Paper' (n 84) 21.

157 Ibid.

conducted in-person,¹⁵⁸ although section 249S long provided, somewhat vaguely, that a corporation may hold a meeting of its members at two or more venues using technology that gives the members a reasonable opportunity to ‘participate’.¹⁵⁹

The COVID-19 crisis forced governments around the world to re-think their approach to general meetings as lock downs and travel restrictions forced much of the world to move online. In Australia, temporary measures were put in place to permit general meetings conducted entirely over the internet in line with social distancing requirements,¹⁶⁰ while the *Corporations Amendment (Meetings and Documents) Act 2022* (Cth) sets out permanent changes that allow in-person, hybrid or, where expressly required or permitted in a corporation’s constitution, wholly virtual meetings, to satisfy requirements regarding general meetings.¹⁶¹ These provisions require that members have a reasonable opportunity to participate in the meeting, however it is held, including a requirement to allow members participating virtually to exercise orally and in writing any rights to ask questions and to make comments.¹⁶²

While these developments seek to leverage modern technology to enhance the effectiveness of the general meeting, they do not seek to promote engagement consistent with goals of democratisation and direct participation through ongoing, two-way, and instantaneous communication that is integral to CSEF as part of the FinTech movement. Reforms that encourage the use of technology to support this form of engagement will, therefore, be an important supplement to engagement through the general meeting.¹⁶³

158 Shareholders around the world generally have a right to attend meetings in person. See, eg, Dirk A Zetsche et al, ‘COVID-19-Crisis and Company Law: Towards Virtual Shareholder Meetings’ (Working Paper No WPS 2020-007, Faculty of Law, Economics and Finance, The University of Luxembourg, 17 April 2020) 12 <<http://dx.doi.org/10.2139/ssrn.3576707>>. For a comprehensive overview of the different forms of engagement currently supported through the corporate governance framework see ‘CAMAC Shareholder Engagement Discussion Paper’ (n 84) 17–43.

159 *Corporations Act* (n 30) s 249S, as repealed by *Treasury Laws Amendment (2021 Measures No 1) Act 2021* sch 1 item 16. As CAMAC noted in its review of shareholder engagement, the provision contemplates a meeting taking place in more than one physical place with technology used to link venues, but does not clearly refer to the use of the internet to attend meetings or the capacity to hold virtual meetings: ‘CAMAC Shareholder Engagement Discussion Paper’ (n 84) 14.

160 Treasury (Cth), *Using Technology to Hold Meetings and Sign and Send Documents: August 2021* (Stakeholder Consultation, 30 August 2021 – 16 September 2021) <<https://treasury.gov.au/consultation/c2021-203516>>.

161 *Corporations Amendment (Meetings and Documents) Act 2022* (Cth) sch 2 item 11 (‘*Corporations Amendment (Meetings and Documents) Act*’); Josh Frydenberg, ‘Permanent Changes to Annual General Meetings and Electronic Communications’ (Media Release, 20 October 2021) <<https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/permanent-changes-annual-general-meetings>>.

162 *Corporations Amendment (Meetings and Documents) Act* (n 161) sch 2 item 11.

163 Angus Armour, Australian Institute of Company Directors Chief Executive Officer and Managing Director, has argued that we need to review the legislative framework to accommodate the capacity of technology to improve accountability through visibility and accessibility :Australian Institute of Company Directors, ‘AICD Welcomes Announcement from Treasurer to Allow Fully Virtual AGMs’ (Media Release, 6 May 2020) <<https://aicd.companydirectors.com.au/media/media-releases/aicd-welcomes-announcement-from--treasurer-to-allow-fully-virtual-agms>>. CAMAC argued early on that electronic communication (among other innovations) meant that the annual general meeting (‘AGM’) was now only one way in which the corporation could provide information to, and engage with, shareholders: ‘CAMAC Shareholder Engagement Discussion Paper’ (n 84) 103. Freeburn and Ramsay argue in favour

This is particularly the case for shareholders of corporations funded through CSEF, where the ability to sell shares is limited.¹⁶⁴ In this case, the annual general meeting ('AGM') may in effect be the main tool available to shareholders to engage with the corporation.¹⁶⁵ For corporations that retain their private status after raising funds through CSEF, the AGM is optional and the considerable costs associated with holding in-person or hybrid meetings mean that shareholders may not even have this forum in which to engage with management.¹⁶⁶ An engagement framework that allows management and shareholders to collaborate in relation to the pursuit of shared social preference may be particularly attractive to these shareholders and management of these corporations looking to recruit their shareholders as brand ambassadors.¹⁶⁷ The question remains, however, how to encourage these practices without unduly restricting early stage corporations. The ASX Principles offer a useful template.

C Creating a Framework to Enhance Collaboration

The ASX Principles provide a framework to encourage listed public corporations in Australia to adopt best practice corporate governance mechanisms.¹⁶⁸ According to the ASX Corporate Governance Council, the ASX Principles 'are likely to achieve good governance outcomes and meet the reasonable expectations of most investors in most situations.'¹⁶⁹ The ASX Principles attempt to achieve this result by requiring listed corporations to disclose to the public whether they have complied with the principles and recommendations and, if not, to provide reasons for non-compliance.¹⁷⁰ This approach has been adopted instead of a prescriptive legislative approach to encourage meaningful dialogue between the board, management, shareholders and other stakeholders on governance matters and provides information to prospective investors on whether or not to invest in a corporation.¹⁷¹

of the retention of in-person or hybrid AGMs to overcome limitations in replicating effective in-person engagement and participation through virtual meetings: Lloyd Freeburn and Ian Ramsay, 'Virtual Shareholder Meetings in Australia' (2021) 32(2) *International Company and Commercial Law Review* 53.

164 For instance, Nowak and McCabe argued that it was not reasonable to expect retail shareholders to engage with corporations and that these shareholders could instead simply sell their shareholding when dissatisfied with corporate performance: cited in Parliamentary Joint Committee on Corporations and Financial Services (n 155) [3.50].

165 Freeburn and Ramsay (n 163) 71.

166 Ibid.

167 Valsan (n 154). While this article discusses these developments in the context of CSEF, analysis from Freeburn and Ramsay highlights a broader trend of shareholders putting forward shareholder resolutions related to ESG without a commensurate increase in the desire to take a more active role in management: Lloyd Freeburn and Ian Ramsay, 'An Analysis of ESG Shareholder Resolutions in Australia' (2021) 44(3) *University of New South Wales Law Journal* 1142, 1145. This is consistent with the approach adopted in this article of providing shareholders of CSEF corporations with greater voice in relation to pursuit of shared social preference without necessarily disturbing the governance balance as it relates to financial management.

168 'ASX Corporate Governance Principles and Recommendations' (n 68).

169 Ibid 1.

170 Ibid 2.

171 Ibid.

This offers a useful template, or starting point to encourage adoption of the objectives statement and engagement framework outlined in Parts V(A) and V(B) of this article. The ASX Principles have been drafted with large, publicly listed corporations in mind (although the ASX Corporate Governance Council recognises that other corporations may find them useful)¹⁷² and any principles and recommendations applicable to CSEF should be tailored to address the unique circumstances of corporations funded through the process. Perhaps most relevantly, the ASX Principles include recommendations for an objectives statement and a communication and participation policy that may be useful for CSEF.

Principle 6 of the ASX Principles dealing with provision of information emphasises the significance of corporations providing information about the corporation and its approach to governance on the corporation's website.¹⁷³ Commentary to Recommendation 6.1 provides as follows:

A fundamental underpinning of the corporate governance framework for listed entities is that security holders should be able to hold the board and, through the board, management to account for the entity's performance. For this to occur, a listed entity needs to engage with its security holders and provide them with appropriate information and facilities to allow them to exercise their rights as security holders effectively. This includes:

- giving them ready access to information about the entity and its governance;
- communicating openly and honestly with them; and
- encouraging and facilitating their participation in meetings of security holders.

In the digital age, investors expect information about listed entities to be freely and readily available online.

A listed entity should have a website with a 'corporate governance' landing page from where all relevant corporate governance information can be accessed. There should be an intuitive and easily located link to this page in the navigation menu for the entity's website.

One of the pieces of information that the ASX Principles provides should be included on the website is a statement of an entity's 'values' – which might be expanded to cover the objectives of the corporation for the purpose of CSEF.¹⁷⁴

This then links back to Principle 3 and Recommendation 3.1 which provide that a corporation should reinforce a culture of acting lawfully, ethically and responsibly and articulating and disclosing corporate values.¹⁷⁵ As previously discussed, this would be consistent with the desire of Millennial and Gen Z investors to use their financial investments in pursuit of broader social goals. Corporate governance principles applicable to CSEF might, therefore, usefully require that a corporation clearly articulate and disclose its objectives through the inclusion in its constitution of an objectives statement. This could then be

172 Ibid.

173 Ibid 23.

174 Ibid.

175 Ibid 16. The UK Corporate Governance Code of 2018 is even more explicit in providing that the board should establish 'the company's purpose, values and strategy, and satisfy itself that these and its culture are aligned': Financial Reporting Council (UK), *UK Corporate Governance Code* (July 2018) 4.

linked to a requirement for corporations to include in their constitution a detailed engagement policy that emphasises the use of technology to encourage two-way, instantaneous and ongoing communication regarding corporate performance as it relates to the pursuit of the objectives set out in the objectives statement.

CSEF governance principles could also set out requirements for management to regularly report through technological means on performance against these objectives and could require that the corporation clearly set out both financial and non-financial rewards available to shareholders. This would be particularly important where a corporation contemplates the potential to trade financial benefit for non-financial reward in the case of a takeover. The approach would promote openness and would reduce the potential for the process to be viewed cynically as means to transfer funds from the crowd to entrepreneurs with little benefit for members of the crowd.

Finally, it may also be useful, in line with the centrality of the internet and social networking technology to CSEF, to provide an explicit link between engagement and the objectives statement. The CSEF governance principles could adapt the ‘investor relations’ provisions currently outlined in Recommendation 6.2 of the ASX Principles, which encourage corporations to facilitate regular, two-way communication on these matters outside of the general meeting process.¹⁷⁶ It would also allow for the inclusion of ‘investor feedback’ provisions (in place of more combative ‘dispute resolution’ provisions) to support ongoing feedback that would benefit both management and shareholders.¹⁷⁷

Adopting an approach for CSEF similar to that adopted for listed corporations through the ASX Principles has the benefit of encouraging greater openness, transparency, and a sense of collaboration. This would require management to be upfront about engagement and the pursuit of non-financial goals, while providing adequate leeway for corporations to pivot when necessary after consultation with shareholders. The approach is most useful in the CSEF context where engagement and collaboration are viewed as a corporate asset rather than a burden.

Conversely, fundraisers (or members of the crowd) who do not want to adopt this approach, will be made aware upfront that the regulatory framework supports this form of corporate fundraising. They can then have the option to use the process in pursuit of their own goals or to avoid the process in preference for another fundraising and investment option that is more aligned to their investment approach. The goal is to ensure that the process remains a distinctive, attractive corporate fundraising mechanism and in the process, one that offers a significant means by which to encourage economic growth and innovation. In other words, the regulatory framework should be devised to lean into the distinctive aspects of CSEF in hopes of offering a truly innovative form of corporate fundraising.

176 ‘ASX Corporate Governance Principles and Recommendations’ (n 68) 24.

177 Kourabas (n 65) 249. On dispute resolution in CSEF, see Kamalnath and Lin (n 18) 299. The inclusion of an objectives statement, the provision of an engagement framework and investor feedback or dispute resolution provisions may, in addition to providing an environment of collaboration, also make existing members’ remedies, such as the oppression remedy, more relevant to the CSEF context.

VI CONCLUDING COMMENTS

This article has sought to advance scholarship regarding CSEF and corporate governance in a number of important ways. First, the article highlights the combined Community Crowdfunding and financial investment origins of CSEF. The article illustrates that this creates a distinctive model of corporate fundraising whereby financial investments are used not only with financial return in mind, but also, the pursuit of a shared social preference. As Karas puts it ‘[they say] “don’t buy the house because you think it will sell in 10 years; buy the house because you think it suits your family.” And hopefully, it will also sell in 10 years and make you a nice return’.¹⁷⁸

Second, and closely related to the first point, the article highlights the importance of CSEF as part of the broader FinTech movement. This means that the distinctive attraction of CSEF as a corporate fundraising mechanism rests not only on the combined financial and non-financial motivations, but also the promotion of a new form of social interaction based on mutuality, cooperation, and inclusiveness. The main promise of CSEF rests on its role as part of the broader FinTech movement to democratise finance and to enhance direct participation in financial markets. This is inconsistent with corporate governance models that promote passivity in investment and an unduly restrictive emphasis on financial motivations to the exclusion of other interests.

The third aim of this article has been to illustrate that the Australian regulatory framework treats the process as merely another form of corporate fundraising despite the distinctive and innovative nature of CSEF. The result of attempting to fit CSEF into the existing regulatory framework is the creation of a particularly vulnerable cohort of investors. Once shareholders, these investors have fewer rights available to them than is typical of shareholders in Australia. The fourth aim of the article is, therefore, to outline corporate governance reforms that acknowledge these limitations and seek to give effect to the ethos underpinning CSEF. Greater emphasis on non-financial objectives and on providing a collaborative environment by leveraging technological innovations that enhance engagement are particularly well-suited to giving effect to the democratisation and direct participation aspects of CSEF. Further, relying on a process similar to the ASX Principles currently used by listed corporations in Australia provides flexibility in recognition of the differences between corporations funded through CSEF.

More broadly, the fifth aim of this article has been to highlight the need for greater flexibility when it comes to corporate governance in Australia. While not suggesting that Australia replace director decision-making with some nebulous framework that provides absolute control to shareholders, this article suggests that we need to acknowledge, consistent with more modern approaches to corporate governance, that there are many reasons that people engage, or invest, in business and that a greater range of actors have an interest in corporate decision-making than was once accepted. This article does not, therefore, seek to engage in a binary

debate regarding what the purpose of a corporation should (or should not) be in all cases or who should (or should not) have a say in how the corporation is run in all cases. To a certain extent, the Community Crowdfunding and FinTech underpinnings provide an answer to these questions as they relate to corporations funded through CSEF. The aim of this article has, therefore, been to devise a corporate governance framework suited to these goals rather than to dismiss or disprove the value of other approaches.

The hope is that this offers a first, albeit important, step in a new direction of corporate governance debate in Australia. We should not need to start with the premise that Australia's existing managerialist approach is the 'norm' and all alternatives need to justify their existence. This unduly restricts debate in the area and progress in the evolution of our corporate governance framework. With these considerations in mind, and without limiting the scope of future scholarship, more work needs to be undertaken on matters such as third-party liability and accountability where sources of corporate power are increasingly diversified and the role of non-shareholder stakeholders in corporate decision-making. Even the most basic of corporate concepts, such as the meaning of shareholding as representing a form of equity ownership attached to financial gain, may need to be reconsidered. Approaching these issues with an open mind offers a series of exciting opportunities to bring Australia's corporate governance framework into the 21st century where it belongs.