



ASIC
Australian Securities &
Investments Commission

Inquiry into criminal activity and law enforcement during the COVID-19 pandemic

Submission by the Australian Securities and Investments Commission

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Overview

ASIC's submission

- 1 ASIC welcomes the opportunity to provide comment to the 'Inquiry into criminal activity and law enforcement during the COVID-19 pandemic' and is willing to provide further information if this would assist the Inquiry.
- 2 Our submission provides information on:
 - (a) ASIC's observations on the operations of serious and organised crime during the pandemic, particularly in regard to the financial markets and financial services;
 - (b) ASIC's responses; and
 - (c) The impact of the pandemic on the operational capabilities of ASIC, particularly its enforcement capabilities.

ASIC's role in law enforcement

- 3 ASIC is the primary law enforcement agency in relation to Australian companies, financial markets and financial services.
- 4 The laws we administer¹ give us the powers necessary for us to perform our role. These include the power to:
 - (a) register companies, managed investment schemes, auditors and liquidators;
 - (b) grant Australian financial services and Australian credit licences;
 - (c) grant relief from the law where appropriate;
 - (d) maintain public registers of regulated entities;
 - (e) make rules aimed at ensuring the integrity of financial markets;
 - (f) stop the issue of defective disclosure documents;
 - (g) investigate suspected breaches of the law and in so doing require people to produce books or answer questions at an examination;
 - (h) issue infringement notices in relation to alleged breaches of some laws;
 - (i) ban people from engaging in certain regulated activities;
 - (j) seek civil penalties from the courts; and
 - (k) commence prosecutions.

¹ For a complete list of the laws that ASIC administers and enforces see <https://asic.gov.au/about-asic/what-we-do/laws-we-administer/>.

A Serious and organised crime during the pandemic

Key points

ASIC has observed serious and organised crime entities mostly using existing methodologies to exploit opportunities created by COVID-19.

ASIC has observed an increase in scam activity during the COVID-19 pandemic.

ASIC has also observed listed entities making statements that their product has potential to combat the COVID-19 pandemic. In a number of cases ASIC is investigating whether there have been disclosure failures or misleading statements made to the market.

Serious and organised crime using existing methods to exploit COVID-19 opportunities

- 5 The financial crimes investigated by ASIC have, in recent years, often been perpetrated through the use of digital tools and emerging technologies. These financial crimes have been facilitated through the use of online scams, identity fraud, cyber intrusions and the use of crypto assets to disguise the transfer of proceeds of crime. These methods appear to have continued to be used by serious and organised crime during the COVID-19 pandemic. Additional opportunities for exploitation have arisen due partly to the availability of significant funds via the economic stimulus package, and partly to the increased demand of investors for higher investment returns, making them more vulnerable to fraud.
- 6 For example, the COVID-19 environment – including use of digital lodgement of applications to facilitate prompt access to various elements of the economic stimulus package, including the Early Release of Superannuation (ERS) scheme – has created opportunities which have been attractive to, and to some degree exploited by, serious and organised crime. Through its involvement in the Serious Financial Crime Taskforce, ASIC has contributed to disruption and enforcement activities responding to exploitation of the ERS.

Scams and reports of misconduct

- 7 From April to June 2020, ASIC observed a 20% increase in general reports of misconduct compared with the same period last year.² During the period from January to July 2020, ASIC has received approximately 355 reports specifically connected with COVID-19.³ ASIC has seen a rise in the number of scam reports. Three broad themes emerge from these scam reports: fake crypto asset trading; fake investment schemes; and scams that start via romance websites.⁴ Reports of romance and crypto scams have more than doubled from the last two quarters of 2019, to the 2020 year to July.⁵
- 8 ASIC has received reports of misconduct in relation to ERS including reports of unsolicited and unlicensed financial advice recommending accessing the scheme.⁶ Reports indicate that promoters are targeting Australians facing financial hardship or uncertainty with promises of assistance.

In response ASIC has:

- (a) increased its daily environmental scans and intelligence gathering exercises, utilising tools to scrape social media, monitor blogs and news sites, as well as liaising closely with other Australian government agencies and ASIC's international counterparts;
- (b) provided advice and information about making financial decisions during this challenging time, as well as warning about scam activity through ASIC's MoneySmart website;
- (c) collaborated with other regulatory agencies (both domestically and internationally) to share information about emerging threats and harms posed by COVID-19 related scams and about ASIC's regulatory responses, including monitoring, surveillance and public messaging;
- (d) contributed to whole-of-government enforcement responses, through its involvement in the Serious Financial Crime Taskforce and the Commonwealth COVID-19 Counter Fraud Taskforce, to instances of fraudulent access to ERS; and

² See ASIC News Hub articles 'Scam alert: ASIC sees a rise in crypto scams' on 18 June 2020, <https://newshub.asic.gov.au/scam-alert-asic-sees-a-rise-in-crypto-scams/> and 'Rise in investment scams during COVID-19 pandemic' on 28 June 2020, <https://newshub.asic.gov.au/rise-in-investment-scams-during-covid-19-pandemic/>.

³ Figures are from 01 January to 22 July 2020.

⁴ Opening statement by ASIC Chair, James Shipton at the Parliamentary Joint Committee on Corporations and Financial Services, Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament, public hearing, Wednesday 15 July 2020, Parliament House, Canberra, <https://asic.gov.au/about-asic/news-centre/speeches/parliamentary-joint-committee-on-corporations-and-financial-services-opening-statement-15-july-2020/>.

⁵ Figure is to 22 July 2020.

⁶ For example, ASIC has received reports of real estate agents advising tenants to apply for early release of their superannuation. In response, ASIC wrote to real estate institutes in each state. See <https://asic.gov.au/about-asic/news-centre/articles/asic-letter-unlicensed-financial-advice-by-real-estate-agents-to-tenants/>.

- (e) engaged with trustees, industry associations and other regulators in relation to superannuation, adjusted our regulatory posture,⁷ and issued a joint letter with the Australian Prudential Regulation Authority (APRA).⁸

Illegal phoenix activity

- 9 The impact of COVID-19 has created difficult economic conditions for some companies and is likely to have provided opportunities for untrustworthy advisors to promote and facilitate illegal phoenix activity.⁹
- 10 At a time when the various economic stimulus and relief measures are wound back, ASIC anticipates a significant increase in external administration appointments. ASIC expects large volumes of often unfunded liquidations may place additional pressure on registered liquidators' agreement to take on appointments. Large numbers of unfunded liquidations may also impact the discharge of registered liquidators' duties, including investigating and reporting to ASIC any allegations of officer misconduct, including illegal phoenix activity.

In response ASIC has:

- (a) provided guidance and support to directors, small businesses and registered liquidators;
 - (b) continued to monitor weekly external administration appointments;
 - (c) engaged with the Australian Financial Security Authority, the Attorney-General's Department, the Australian Taxation Office (ATO) and insolvency professional bodies regarding the impact of the pandemic; and
 - (d) continued its engagement with Treasury and participation and contribution to the ATO-led Phoenix Taskforce regarding the current environment to identify and respond to illegal phoenix activity.
- 11 ASIC has also continued its regular surveillance and enforcement work, including:
 - (a) working with the ATO to target directors, shadow directors and unregulated pre-insolvency advisors where allegations of illegal phoenix activity exist;
 - (b) maintaining work on joint agency operation matters to assist other government agencies with programs targeting illegal phoenix activity;

⁷ See media release 'The role of super funds during COVID-19' on 3 July 2020, <https://asic.gov.au/about-asic/news-centre/articles/the-role-of-super-funds-during-covid-19/>.

⁸ See joint ASIC-APRA letter on 1 April 2020, ASIC and APRA letter to superannuation trustees on impact of COVID-19, <https://asic.gov.au/about-asic/news-centre/articles/asic-and-apra-letter-to-superannuation-trustees-on-impact-of-covid-19/>

⁹ See ASIC News Hub article 'COVID-19 and illegal phoenix activity' on 28 May 2020, <https://newshub.asic.gov.au/covid-19-and-illegal-phoenix-activity/>.

- (c) continuing ASIC's enforcement work in relation to illegal phoenix activity independently, and also through the Serious Financial Crime Taskforce; and
- (d) funding liquidators through the Assetless Administration Fund to investigate and report to ASIC, with a particular focus on illegal phoenix activity.

Opportunistic statements in the market regarding products that have potential to combat COVID-19

- 12 ASIC's market surveillance activities have identified a number of instances where listed entities have made statements suggesting that their product can assist in combatting COVID-19 in one way or another, for example by avoiding or detecting infection by COVID-19.
- 13 ASIC is examining whether there was a reasonable basis for such statements at the time they were made and has commenced formal investigations in cases warranting closer examination, to determine whether there have been any disclosure failures or misleading statements to the market.

B ASIC responses to the pandemic

Key points

In response to COVID-19, ASIC swiftly shifted its priorities, enhanced its collaboration and information sharing with other agencies, and increased the use of technology to maintain its business operations.

ASIC has also adapted its law enforcement methods and practices, by enhanced utilisation of technological solutions wherever possible.

ASIC considers that there are opportunities for enhanced collaboration and sharing of information and methodologies with other law enforcement agencies, as a result of work conducted in the course of the COVID-19 response. ASIC expects that many of its new practices and tools are likely to remain in use to some degree following the pandemic and will enhance ASIC's ability to respond to similar future events.

ASIC shifting priorities during the COVID-19 pandemic

- 14 In response to COVID-19 ASIC has shifted its priorities – outlined fully in *ASIC's Interim Corporate Plan 2020-21*,¹⁰ which include:
- (a) stepping up its markets supervision work to support the fair and orderly operation of markets, ensure investors are appropriately informed, and protect against manipulation and abuse; and
 - (b) providing heightened support for consumers who may be vulnerable to scams and sharp practices, receive poor advice, or need assistance in finding information and support should they fall into financial hardship.

Enhanced cross-agency collaboration

- 15 In response to the heightened risks, and changing priorities and needs of our partner agencies, ASIC has enhanced collaboration and information-sharing through a range of cross-agency groups, including:
- (a) Criminal Justice and Law Enforcement Forum (CJLEF) – continued involvement as a member of the CJLEF;
 - (b) Inter-Regulator Call on COVID-19 Scams – a working-level cross-agency group established by ASIC to share insights on scams;
 - (c) Serious Financial Crime Taskforce – continued support as a member of this taskforce which has included a shift in focus to serious financial crime affecting the ATO-administered measures of the Commonwealth

¹⁰ See 20-131MR ASIC's Interim Corporate Plan for 2020-21, <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-131mr-asic-s-interim-corporate-plan-for-2020-21/>.

Coronavirus Economic Response Package, while maintaining focus on existing priorities including Illegal Phoenix Activity;

- (d) COVID-19 Taskforce – in March 2020 the Attorney-General's Department's Commonwealth Fraud Prevention Centre and the Australian Federal Police (AFP) established a temporary Commonwealth COVID-19 Counter Fraud Taskforce under Operation Ashiba;
- (e) Fintel Alliance – continued support as a member agency.

16 ASIC considers that timely cross agency sharing of information is vital to effectively respond to crime facilitated in the pandemic. ASIC supports consideration of enhancements to cross-agency data sharing platforms and coordination and deconfliction efforts across Commonwealth agencies.

Monitoring and detection approach

17 ASIC routinely monitors our regulated environment for potential exploitation by serious and organised crime entities, including but not limited to, changes to company status, reports of misconduct and market activity as a means of early detection, prevention and response.

18 ASIC continues to monitor and share information and intelligence with relevant agencies in response to COVID-19 and other fraud or criminality. For example, ASIC has shared with relevant agencies information about changes to company status where it was suspected that such changes may have been for the purposes of fraud against the Commonwealth Coronavirus Economic Response Package.

Maintaining operational continuity during the COVID-19 pandemic

Rapid transition to remote access working

19 In March 2020, ASIC was able to use its existing remote access capability, which utilises a virtual desktop environment, to transition a significant proportion of its 2,500 staff to work remotely. ASIC's technology and digital work practices enabled staff to work from home as if they were in the office environment, with full secure access to all ASIC systems. Additional remote access connections were procured to cater for increased internal needs. Significant numbers of staff are still working remotely, with other ASIC team members continuing to work in ASIC offices due to the nature of their work being unsuitable for remote work.

Use of ICT to support evidence gathering and court hearings

- 20 COVID-19 has in some circumstances affected ASIC's ability to conduct face to face interviews and examinations as a key strategy for progressing investigations into suspected breaches of the law.
- 21 In response, ASIC has used online video conferencing technology to conduct voluntary and compelled interviews of some witnesses and persons of interest. We expect that this tool will continue to have broad application beyond the COVID-19 environment.
- 22 ASIC has also successfully utilised online video conferencing technology and other similar tools in several civil court proceedings, meaning that important civil trials have been able to proceed. In another civil case, the Federal Court has not allowed the civil trial to proceed by way of video conferencing at this stage due to concerns, on the particular facts and circumstances of the relevant case, that a fair trial will not be possible in circumstances where an important witness for ASIC resident overseas is not present in person in the Court room. The Court did, however, leave open the ability for ASIC to reapply at the end of August to ask the Court to again balance relevant considerations when more is known about the likely timeframe of the impact of the pandemic on travel arrangements.
- 23 COVID-19 has impacted jury trials. Trials in five cases referred by ASIC to the Commonwealth Director of Public Prosecutions (CDPP) have been delayed and trials in a further three cases, in Victorian Courts, will be vacated.