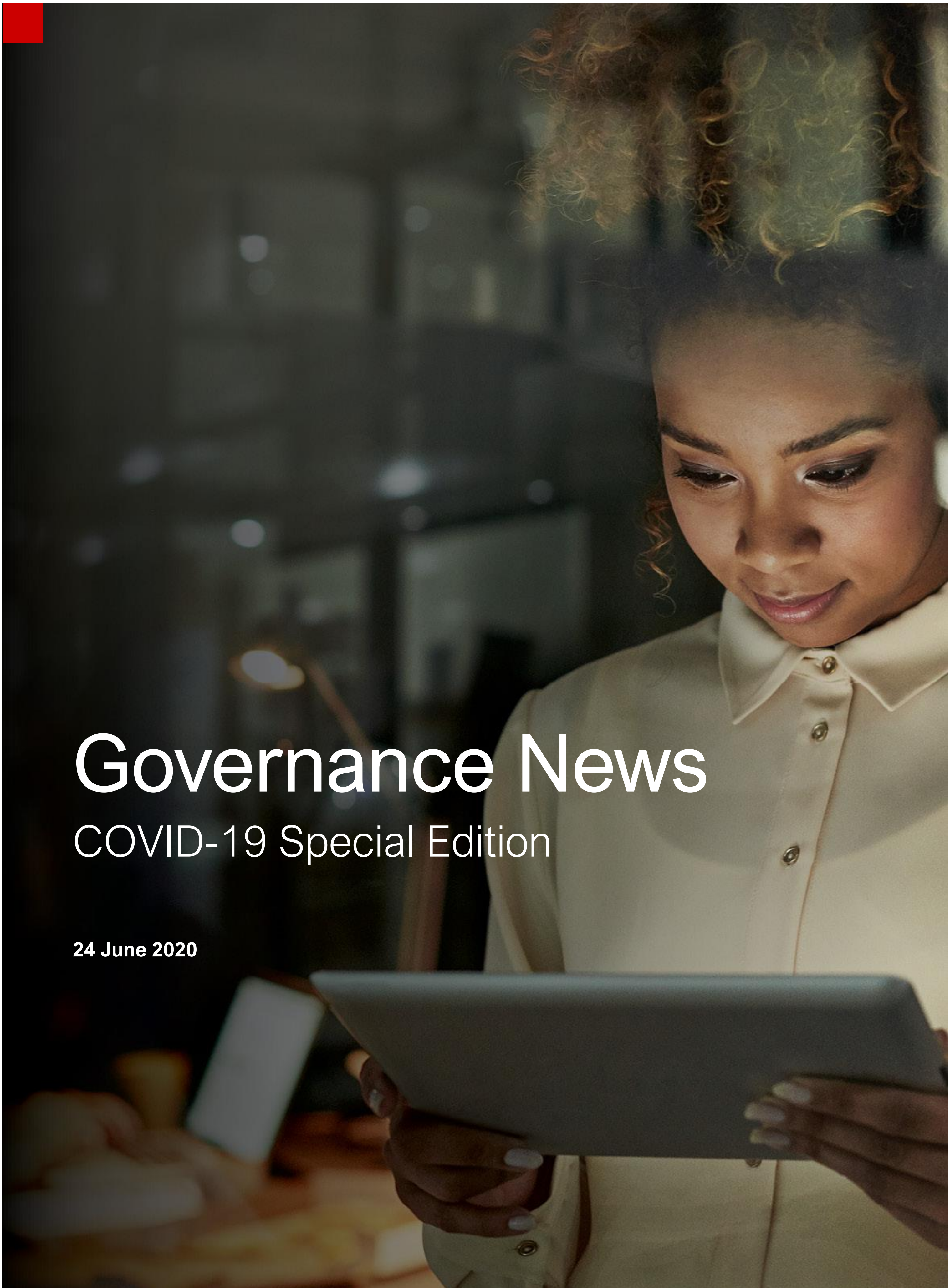

Governance News

COVID-19 Special Edition

24 June 2020

Contents

COVID-19 Key Developments

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COVID-19: Workplaces are already transforming: Goverance Institute survey into the impacts of the pandemic

The Governance Institute has released the results of a member survey looking at member attitudes to the COVID-19 pandemic. The report provides insights into where the pandemic has had/is expected to have the greatest impact, attitudes towards the recovery as well as insights into how different organisations are approaching the recovery, including the measures being implemented to facilitate a safe return to work for staff.

Some Key Points

- Most people are worried about the impact on the Australian economy in the broad sense: The survey found that most respondents (86%) are of the view that the pandemic poses a high/very high threat to the Australian economy. Less than half of those surveyed (40%) feel it poses the same level of threat to their profession and 37% said it poses a 'moderate' threat. Just over a third (34%) believe that their own job/business is under a high/very threat because of COVID-19. 29% believe the threat to be low or very low.
- Top three impacts COVID-19 restrictions have had so far: Asked to nominate the greatest impact COVID-19 restrictions have had on their profession to date, the Governance Institute received a range of responses. These were the top three impacts: 1) managing staff working from home (59%); 2) inability to provide services in the usual way (52%); and 3) managing my work from home (50%). Keeping staff/themselves protected at work was ranked next (47%).
- Expected impact on personal income and employment: 44% of respondents said that they expect that the COVID-19 pandemic to impact their personal income or employment. The same proportion expected no impact. Of those who expect to be impacted, 31% said their hours/income has already been reduced. 18% said that it is too early to tell what the impact will be/don't know what the impact will be. 15% expect their hours or income to be reduced. 5% said that they expect the pandemic to increase demand for the services.
- Strategies for returning to work: The top three measures organisations have implemented to support a safe return to work were: 1) implementation of nightly cleaning (60% of respondents indicated that this measure has been put in place and 29% said that this was being considered); 2) banning of shared desks (51% of respondents indicating it has already been implemented); and 3) flexible working conditions (ie everyone who wants to work from home is able to do so) (50% of respondents indicated that this measures is already in place). Many organisations (47%) have conducted a staff survey to understand employee preferences about working and the same proportion (47%) have reorganised office layouts to meet social distancing requirements. Just over a quarter of respondents (28%) said that their organisation has made available car parking spaces for staff returning to work.

Governance Institute CEO Megan Motto said the survey shows there is still a high level of uncertainty as well as 'important glimpses of positivity for the future'.

'We are currently in unchartered territory and governance and risk managers have a huge role to play in navigating this. This survey provides important insights into the key concerns for the profession and corporate Australia more widely Ms Motto said.

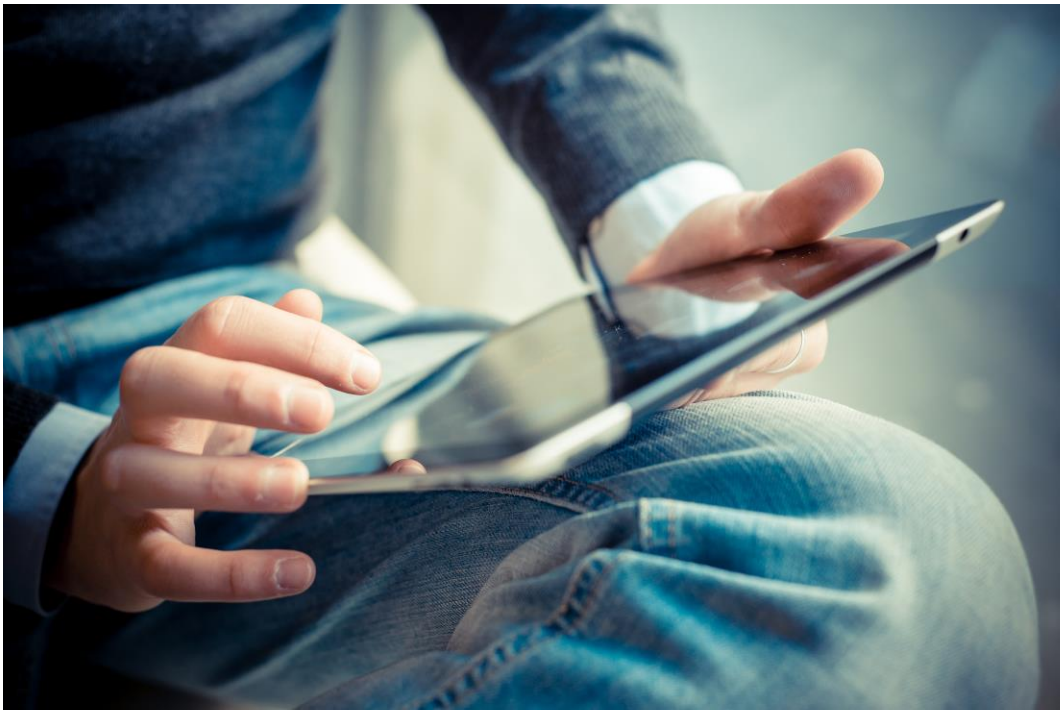
[Sources: Governance Institute media release 18/06/2020; Governance Institute of Australia COVID-19 Member Impact Survey]

COVID-19: The chorus of calls to modernise existing laws is getting louder: A 'coalition of associations' including the ABA have called on the government to make temporary changes permanent

The Australian Banking Association has issued a statement announcing that a 'coalition of associations' including: the Australian Banking Association, the Business Council of Australia, the Australian Institute of Company Directors, Council of Small Business Organisations, the Financial Services Council, the Real Estate Institute of NSW and the Australian Property Institute, are calling on the Federal government to permanently enable:

- deeds to be created and signed electronically

- electronic signatures to be used 'for a broader range of legal and business documents' (eg guarantees, statutory declarations and trust deeds)
- electronic witnessing of documents via audio-visual link with the use of an electronic signature
- mortgages to be processed digitally



ABA CEO Anna Bligh said that the changes would benefit consumers.

> 'Today we're calling on both Federal and State Governments to make these changes permanent in order to keep the ease, keep the lower cost and reduce the hassle of transactions which rely on wet signatures and paper documents…Federal and State Governments are to be congratulated for moving swiftly during COVID-19 to use their emergency powers to facilitate these e-transactions, it's now time to make these changes permanent to make transactions easier, keep the cost lower and reduce the hassle of transactions which rely on 'in person' signatures and paper documents'.

Separately, the Governance Institute has also previously called for temporary reforms to the Corporations Act 2001 (Cth) in Corporations (Coronavirus Economic Response) Determination (No 1) 2020 to be made permanent (see: Governance News 10/06/2020).

The government has indicated it is open to examining options?

In a recent address to the CEDA conference Prime Minister Scott Morrison observed that: 'COVID has shown that our laws have not kept pace with digital technology when it comes to business communications - for example, by requiring business to use paper for storing information, instead of using electronic delivery or adopting new technologies like blockchain. These laws, too, are ripe for modernisation'.

The deregulation taskforce subsequently announced that it is prioritising looking at ways to make business communications technology neutral.

[Note: The Prime Minister's speech and the deregulation taskforce's announcement are covered in more detail in Governance News 17/06/2020]

[Source: ABA media release 17/06/2020]

The UK citizen's climate assembly strongly supports a green COVID-19 recovery plan, six House of Commons Committee Chairs have written to the Prime Minister asking that he take the Assembly's views into account in the pandemic recovery planning process

Context: In June 2019, six House of Commons select committees – Business Energy and Industrial Strategy; Environmental Audit; Housing, Communities and Local Government, Science and Technology; Transport; and Treasury – commissioned Climate Assembly UK. Climate Assembly UK is representative group of 108 members of the UK public tasked with providing parliament with an understanding of public views on how the UK should reach the net-zero emissions target, and the priority the issue should be given in the context of COVID-19 economic recovery planning.

Interim Briefing: Ahead of the release of a final report in September, the group has released a short interim briefing which makes two recommendations. This has been released now because members were keen to ensure their views on the COVID-19 recovery were available, and could be taken into account as part of the government's COVID-19 recovery planning process.

The interim recommendations are:

1. The UK's COVID-19 economic recovery plan should be designed to assist in achieving the net-zero emissions target. This was supported by 79% of assembly members. Of the remaining group: 9% strongly disagreed or disagreed and 12% were unsure. A common theme running through the reasons given for disagreeing/being unsure, was the need to prioritise economic recovery above all other considerations.
2. As COVID-19 restrictions ease, government, employers and others should take steps to encourage lifestyle changes that are more compatible with reaching net zero. This was supported by 93% of assembly members. Of the remaining members: 3% were unsure, 3% disagreed and 1% strongly disagreed.

Next steps: The Committee Chairs of each of the six committees have written to the Prime Minister asking that he take the views of the Assembly members into account as part of the COVID-19 recovery planning process. The full text of the letter is here.

[Sources: Climate Assembly UK: media release 23/06/2020; Interim Briefing – COVID-10, Recovery and the path to net zero; Letter to the Prime Minister]

Diversity

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No excuses left for lack of action to improve (gender) diversity in leadership? WGEA study finds an increased proportion of women in leadership roles delivers stronger financial performance

The Workplace Gender Equality Agency (WGEA) and Bankwest Curtin Economics Centre (BCEC) have released their fifth joint annual report into gender equality in Australian workplaces.

The headline finding in the report is the identification of a 'causal relationship between increasing the share of women in leadership and subsequent improvements in company performance'. The report found that this link is present where: women's representation on boards increased; where the proportion of women in the most senior leadership tier of a company increased; and/or where a female CEO is appointed.

Drawing on five years of data, the report also puts a number of financial benefit to organisations.

Increased diversity translates into improved financial performance:

- an increase of 10% or more in the proportion of women on the boards of Australian ASX listed companies leads to a 4.9% increase in company market value. This is worth AUD $78.5m for the average company
- an increase of 10% or more in the proportion of female key management personnel leads to a 6.6% increase in the market value of ASX listed companies worth AUD $104.7m for the average company
- the appointment of a female CEO was found to lead to a 5% increase in the market value of ASX listed companies (equivalent to $79.6m on average).

Reduced diversity leads to poorer financial outcomes: The report also identified that companies that reduced the share of women as key managers by 10% or more over time faced a reduction in market value of 2.9% (AUD $46m) on average.

In her foreword to the report, WGEA Director Libby Lyons said the finding means that there are no excuses for avoiding action on the issue.

'The findings in this report mean that, if you are a business leader, you no longer have an excuse for avoiding action. Workplace gender equality is an imperative - for your employees' wellbeing, for your company's improved financial standing, for value-added shareholder returns and for the improved economic prosperity of our nation at a time when it is needed most. You need to act now' Ms Lyons writes.

[Source: BCEC WGEA Gender Equity Insights 2020]

Global report finds that the business case for diversity continues to build

Key Takeouts

- The report found that the business case for gender, cultural and ethnic diversity in company leadership continues to strengthen with diverse companies (companies with diverse leadership teams) increasingly likely to financially outperform their peers.
- Despite the benefits of diversity/inclusions, progress remains slow. The report attributes this both to a fragmented approach to diversity and a lack of focus on inclusion as well as representation.
- The report argues that diversity and inclusion remain relevant in the current circumstances. The report argues that diversity and inclusion are an 'essential enabler of recovery, resilience, and reimagination'.

Snapshot: McKinsey Report, Diversity Wins: How inclusion matters May 2020

McKinsey has released the third in a series of reports in to the relationship between diversity and financial performance.

The latest findings are based on data from 1, 039 large companies (each with annual revenues exceeding $1.5 billion) in fifteen countries over the period 2017 to 2019. The study also draws on data from UK and US companies exclusively for the period 2014 to 2019.

The fifteen countries included in the study were: Australia, Brazil, France, Germany, Norway, Denmark, India, Japan, Mexico, Nigeria, Singapore, South Africa, Sweden, the United Kingdom, and the United States

Some Key Findings

Relevance of diversity in the current circumstances: Diversity and inclusion are an 'essential enabler of recovery, resilience, and reimagination'

The report argues that continuing to focus on diversity and inclusion initiatives in the context of the COVID-19 recovery, makes sense for a range of reasons including the benefits of diverse decision making/innovation during the crisis and beyond.

The report found that the business case for gender, cultural and ethnic diversity in company leadership continues to strengthen with diverse companies (companies with diverse leadership teams) increasingly likely to financially outperform their peers.

- Analysis of 2019 data identified that companies in the top quartile of gender diversity on executive teams are 25% more likely to experience above-average profitability than peer companies in the bottom quartile. An increase of 10% on 2014 and 4% on 2017.
- Companies with 30%+ women on their executive teams are more likely to outperform less diverse companies.
- Companies with culturally and ethnically diverse leadership teams are also more likely to outperform their less diverse peers. Companies in the top quartile (for culturally/ethnically diverse leadership) outperformed companies in the bottom quartile by 36% in terms of profitability in 2019 (up from 35% in 2014).

Despite the benefits of diversity/inclusions, progress remains slow.

- Female representation on executive teams in UK and US companies has risen 5% since 2014 (from 15% in 2014 to 20% in 2019).
- Across the 15 countries included in the global data set, female representation has increased 1% since 2017 (up from 14% in 2017 to 15% in 2019).
- More than 33% of large companies overall have zero women on their executive teams.
- Representation of culturally/ethnically diverse people in the UK and the US has increased 6% over the period 2014-2019 (from 7% in 2014 to 13% in 2019. Globally, the proportion has increased 2% since 2017 (from 12% in 2017 to 14% in 2019).

- One reason put forward in the report for this, is the fragmented approach taken to diversity and lack of simultaneous focus on inclusion (in addition to representation) at many companies. The report observes that companies who have succeeded in progressing diversity efforts also focus on inclusion. 'Employees need to feel and perceive equality and fairness of opportunity in their workplace. Companies that lead on diversity have taken bold steps to strengthen inclusion' the report states.

Lack of diversity is costing companies? (evidence of a performance penalty)

The report found on diversity is unevenly distributed across companies with a third of companies overall making significant gains over five years, and the remainder making no progress or slipping backwards.

McKinsey found that this has financial implications and is actually translating into a 'performance penalty' for less diverse companies. In 2019, the least diverse companies (companies in the bottom quartile for both gender and ethnic diversity) were 27% more likely to underperform on profitability than all other companies in the study.

A focus on representation isn't enough – why inclusion also needs to be prioritised

The report argues that companies need to focus not only on increasing representation of diverse people but on fostering inclusion as well, to ensure that the benefits of diversity are realised – that employees stay, thrive and perform at their best. The report identifies three key aspects of inclusion - equality, openness, and belonging – as the areas employees feel there is the most work to do be done. 'Even where companies are more diverse, many appear as yet unable to cultivate work environments which effectively promote inclusive leadership and accountability among managers, equality and fairness of opportunity, and openness and freedom from bias and discrimination' the report states.

Better practice tips – a focus on both implementing a systematic approach to improving diversity and taking action to ensure inclusion

The report suggests a number of focus areas, based on the practices in the companies that have achieved the greatest progress on diversity/inclusion and the most significant financial benefits. These include: a) ensuring there is a robust process in place to advance diverse talent into leadership roles underpinned by hard (data driven) targets; b) strengthening accountability for progress on diversity and inclusion at all leadership levels by putting boards at the centre of diversity efforts and holding executives/managers to account; c) using analytics tools to ensure promotions/pay processes are fair, and to ensure visibility over the processes; d) implementing a zero-tolerance policy for discriminatory behaviour eg bullying and/or harassment; e) ensuring managers/staff have the tools they need to identify/address microaggressions should they occur and that there is a shared organisational understanding of acceptable behaviour; and f) focussing on building a culture where employees feel that they can bring their whole selves to work eg managers should communicate and 'visibly embrace' their commitment to diversity through involvement/support in employee initiatives/groups to support diversity. The report suggests that it may be helpful to conduct employee surveys to assess the extent to which they feel included/that they belong.

[Source: McKinsey Report, Diversity Wins: How inclusion matters May 2020]

A broader approach to diversity: ISS data has identified that the majority of companies globally now disclose diversity strategies/policies that include commitments to promote diversity beyond gender

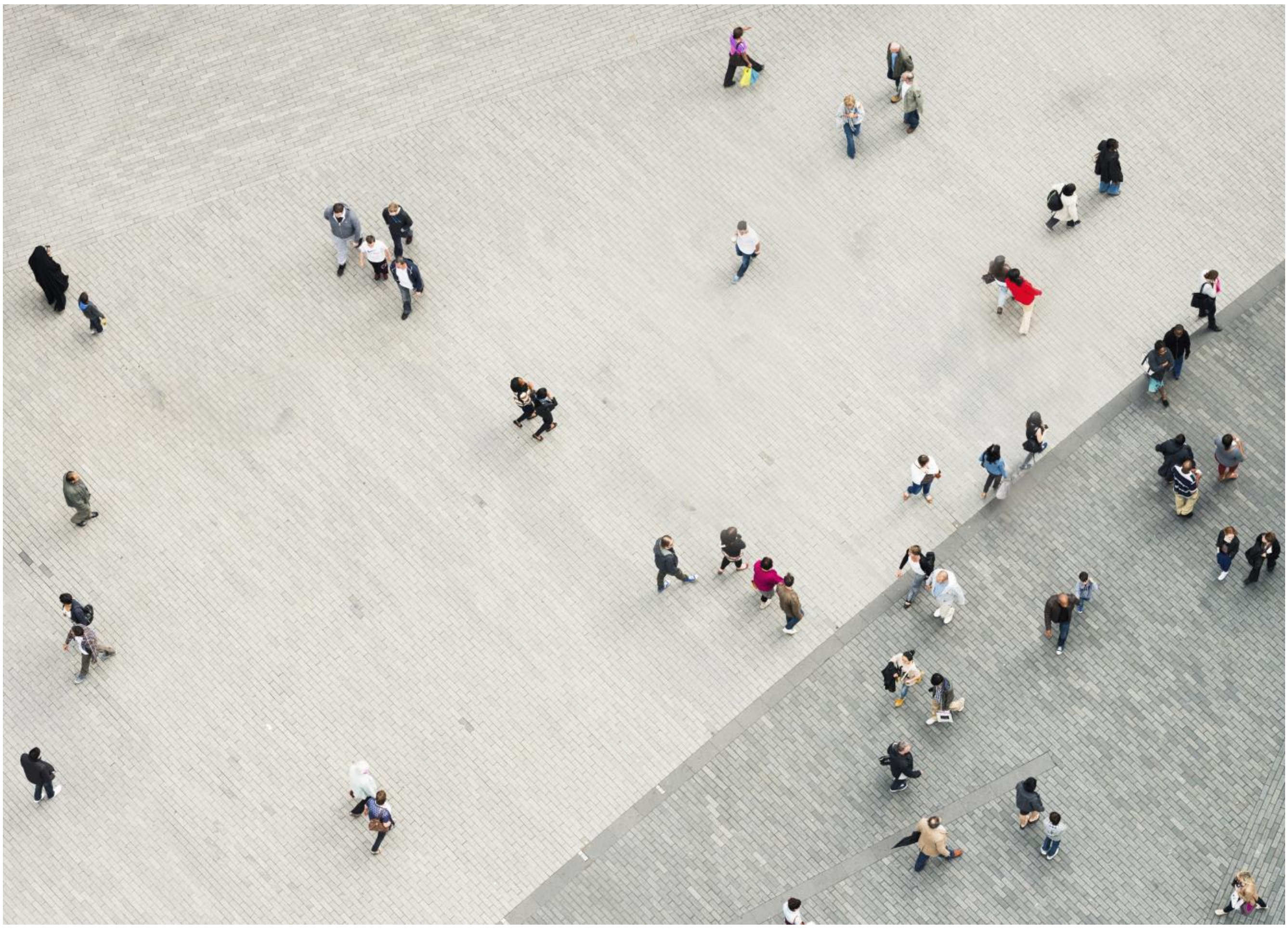
Key Takeouts

- The majority of companies globally now disclose diversity policies/strategies that include commitments to inclusivity in the broad sense (gender, age, race, disability, religion etc). These strategies/policies apply to the workforce.
- The proportion of strategies that include the same commitment to inclusivity at senior management or board level is significantly lower.

Institutional Shareholder Services' (ISS') analysis of 4800 companies in fifteen countries – Australia, Canada, France, Germany, Ireland, Italy, the Netherlands, Russia, South Africa, Spain, Sweden, Switzerland, Taiwan, The United Kingdom, and the United States – has identified that:

- Most companies (85%) disclose diversity policies/strategies that express a commitment to diversity in the board sense for their workforce.
- Only 7% of this group have diversity policies/strategies that include a commitment to diversity at senior management levels.
- ISS found a wide variation in the approaches taken in different countries. The proportion of countries that did include a commitment to inclusivity at senior management level was highest in the Netherlands (26.1%), Canada (24.2%), South Africa (20%) and Australia 19.2%. The proportion was lowest in the US at 3.2%.
- 56% of companies overall disclose a board level diversity strategy that includes commitments beyond gender. Again, there was a wide variation in the approaches taken. South Africa had the highest proportion at 90.7%. The proportion of companies with these policies in place was lowest in Russia at 3.2%. IN Australia the proportion is 30+%.

[Source: ISS insight 12/06/2020]



Corporate Social Responsibility__

Investors take a stand against racism: A coalition of 128 institutional investors (so far) have committed to addressing systemic racism through their portfolios, engagements and policy

In the wake of recent Black Lives Matter protests, Racial Justice Investing (a group of asset owners, investors and business leaders) has circulated the 'Investor Statement of Solidarity to Address Systemic Racism and Call to Action'.

The statement commits signatories to take five actions to address 'systemic racism' through their actions.

1. To actively 'engage with, amplify, and include Black voices in investor spaces and company engagements'.
2. To 'embed a racial equity and justice lens' into their own organisation. For example, signatories should ensure that their hiring/promotion/remuneration policies and procedures promote diversity, equity and inclusion.
3. To integrate racial justice into their investment decision-making and engagement strategies:
   - Review existing policies: Signatories are asked to 'commit to reviewing investment policies, due diligence, and risk management or controversy flags to investigate whether they adequately and explicitly integrate systemic racism concerns and update as necessary'.
   - Set goals for engagement/divestment: The statement encourages signatories to set 'time bound goals' to either engage with or, 'divest companies/issuers with practices or business relationships that further systemic racism or white supremacy, or that enable state-sanctioned violence'. The statement also encourages signatories to direct their attention to 'the prison, military, and immigration industrial complex, including technology, communications, services, and financial sectors, and those that are complicit in state violence'.
4. To reinvest in communities though 'reinvestment in community-driven alternatives to policing and safety'. The statement gives several examples including (among others): investing in community development financial institutions, affordable housing, Black-led community development projects.
5. To 'use the investor voice to advance anti-racist public policy': Signatories are encouraged to commit to advocating for policies/law reform aimed at reforming/eliminating systemic racism. The statement gives a number of examples of what this might look like. One suggestion is that signatories could advocate for anti-racist public policy in the context of COVID-19 relief package priorities.

So far, 128 institutional investors have signed the statement and new signatories will be able to join on a rolling basis. The full list of signatories as at 18 June is here.

[Sources: Investor Statement of Solidarity to Address Systemic Racism and Call to Action; Racial Justice Investing media release 18/06/2020; ICCR media release]

In Brief | The tenth edition of Global Impact Investing Networks' annual survey highlights the growth in the sector over the past decade – the size of the impact investing market is now estimated to be US $715bn – and the growing sophistication of the sector over time. The report suggests that the current crisis is an opportunity for the sector to continue to expand and support the recovery

[Sources: Probono Australia 17/06/2020; GIIN Annual Impact Investor Survey 2020 executive summary; Full text report: GIIN Annual Impact Investor Survey 2020]

Regulators

APRA delegates power to ASIC to conduct BEAR investigation

Context: In December 2019, the Australian Prudential Regulation Authority announced it had launched an investigation into possible breaches of the Banking Act 1959 (Cth), including the Banking Executive Accountability Regime (BEAR) by Westpac, in connection with matters alleged by AUSTRAC. In addition, APRA said that it would conduct a review of Westpac's risk governance. Separately, the Australian Securities and Investments Commission (ASIC) is also conducting a review in connection with issues alleged by AUSTRAC.

APRA has delegated power to ASIC: To avoid 'significant duplication' in the investigative process and in the interests of efficiency and achieving a more 'coordinated regulatory outcome', APRA has announced that ASIC will consider whether the conduct it is investigating also gives rise to contraventions of the BEAR and/or of the standards of fitness and propriety under the Banking Act 1959 (Cth).

In line with this, APRA has delegated to ASIC the necessary functions and powers to enable ASIC to take court action (eg to apply for fines or the disqualification of individuals) depending on the outcomes of ASIC's investigation. APRA emphasises that ASIC will 'consult and collaborate with APRA in relation to any such proceedings'.

APRA states that the decision to delegate power to ASIC in this way was taken in consultation with ASIC, and is in alignment with proposed joint regulatory approach put forward in the government's proposed Financial Accountability Regime.

Status of the investigations: APRA writes that as yet, ASIC has not made any decision as to whether any enforcement action in the matter may be appropriate. APRA's 'comprehensive supervisory review program', which includes reviewing Westpac's risk management, governance, accountability, remuneration and culture is continuing.

[Source: APRA media release 17/06/2020]

United Kingdom | CMA Chair Andrew Tyrie will step down from his role in September, to focus on driving reform from outside the limits of the Chair role

Competition and Markets Authority Chair Andrew Tyrie has announced he will step down from his role in September.

In a statement explaining his decision, Mr Tyrie outlined the progress that has been during his Chairmanship, to strengthen the role of the CMA and improve its approach. Mr Tyrie said,

> 'On taking the role, I was asked by the Government to map out a route to a new type of competition authority, one better equipped to understand and respond to what most concerns ordinary consumers: penalties for loyal customers, price discrimination against vulnerable consumers, the difficulties faced by millions in getting good deals online, among them. I was also asked to suggest ways in which the CMA could become more agile, less legally encumbered, and also with closer international ties, reflecting both the increasingly global and often digital nature of consumer detriment, and the CMA's enhanced post-Brexit role. We've all, particularly the most senior executive team and the Board, worked hard at the CMA to do that…'

Mr Tyrie said that the decision to step down is motivated by a desire to take forward reform outside the limits of his role as Chair.

> 'The Government asked me to take this work forward at great pace. I have done so. I now want to make the case more forcefully for legislative and other reform – in Parliament and beyond – than is possible within the inherent limits of my position as CMA Chairman'.

Next steps: The Department for Business, Energy and Industrial Strategy will commence the process for recruiting a new Chair of the CMA.

[Source: CMA media release 18/06/2020]

In Brief | APRA funding Bills update: The package of seven Bills proposing to enable the Commonwealth to recover the costs of a wider range of APRA's activities from prudentially regulated entities, and to increase the statutory upper limit from $1.5m to $10m, received Assent on 19 June and are now in force

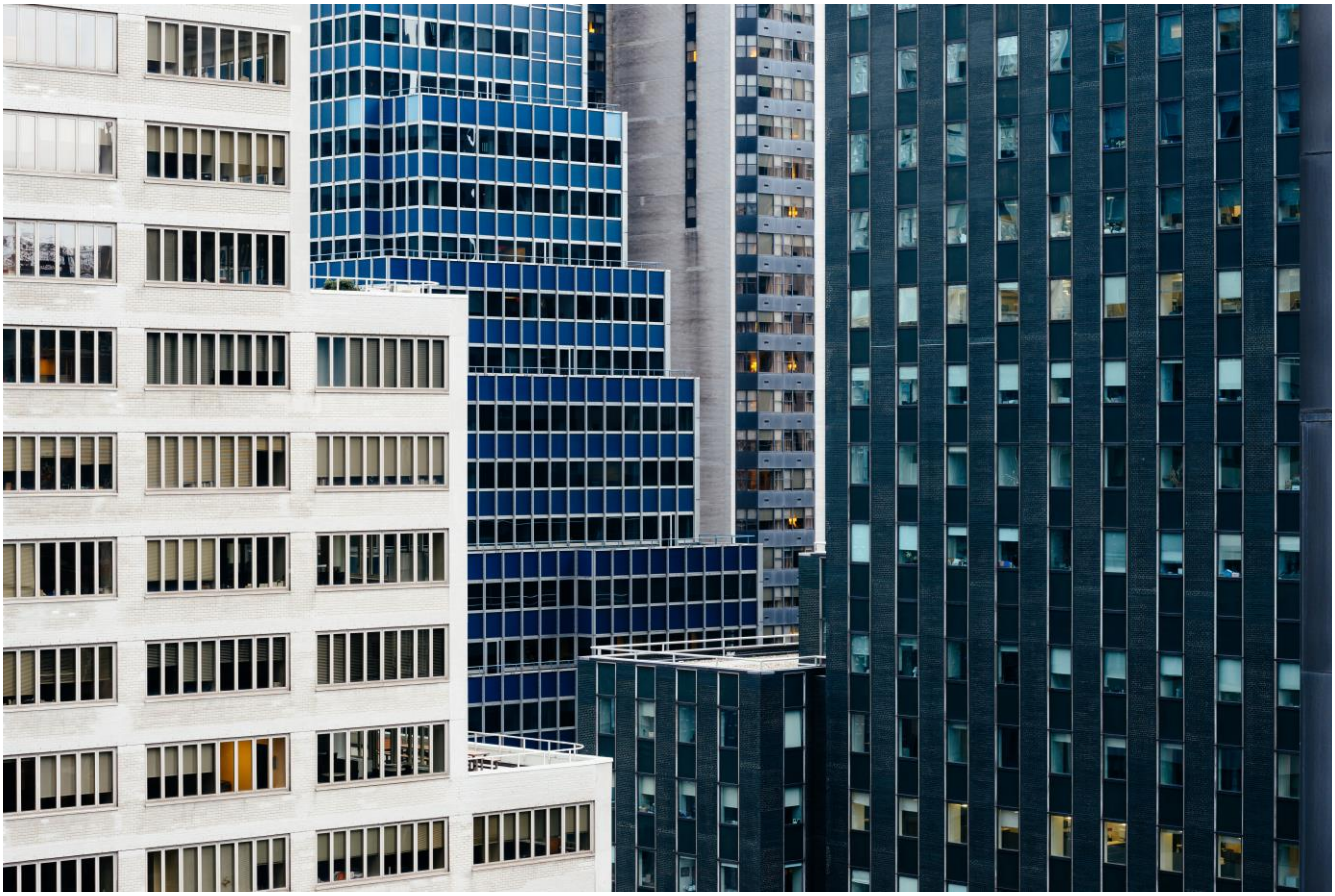
[Sources: Explanatory Memorandum; Australian Prudential Regulation Authority Amendment (APRA Industry Funding) Bill 2020; Authorised Deposit-taking Institutions Supervisory Levy Imposition Amendment Bill 2020; General Insurance Supervisory Levy Imposition Amendment Bill 2020; Life Insurance Supervisory Levy Imposition Amendment Bill 2020; Superannuation Supervisory Levy Imposition Amendment Bill 2020; Retirement Savings Account Providers Supervisory Levy Imposition Amendment Bill 2020; Authorised Non-operating Holding Companies Supervisory Levy Imposition Amendment Bill 2020]

In Brief | ASIC has released a report - ASIC Report 664: Overview of decisions on relief applications - outlining ASIC's work in reducing 'red tape'. ASIC says that the reporting of its decisions on relief applications is intended to both provide transparency around ASIC's decision making and to better inform businesses about the circumstances in which relief will be granted

[Sources: ASIC media release 23/06/2020; Overview of decisions on relief applications (October 2019 to March 2020) (REP 664)]

In Brief | HM Treasury has announced the appointment of Nikhil Rathi (current London Stock Exchange CEO) to the role of CEO of the Financial Conduct Authority for a five year term. Interim CEO Christopher Woolard will continue to serve in the role until Mr Rathi's appointment commences

[Sources: FCA media release 22/06/2020; HM Treasury media release 22/06/2020]



Financial Services

Top Story | ASIC maintains a high level, flexible approach to the product intervention power

Key Takeouts

- Under the product intervention power, ASIC can take temporary action (by making a product intervention order) to intervene where it is satisfied that financial and/or credit products 'have resulted in, or are likely to result in', significant consumer detriment.
- Product intervention orders can include a wide range of actions or combination of actions including: banning a product and/or product feature; imposing sale restrictions; and/or amending product information (among many other options).
- Regulatory Guide 272 – Product Intervention Power (RG 272) sets out the scope of the product intervention power, how ASIC will use it and how an intervention order will be made.
- RG 272 retains the high level and principled approach to guidance in the draft version on which ASIC previously consulted. The guidance does not set hard benchmarks or thresholds for when ASIC will intervene. ASIC maintains that this is appropriate because it 'reflects the broad and flexible nature of the product intervention power' and the need for ASIC to be able to tailor its response to the particular circumstances.
- The guidance makes clear that 'significant consumer detriment' may arise as a result of a product's inherent design features and/or consistent with the decision in Cigno Pty Ltd v Australian Securities and Investments Commission [2020] FCA 479, as a result of the circumstances in which the product is offered (eg marketed or targeted at) consumers. That case and the short term credit product intervention order it related to demonstrate that the product intervention power can be used as a form of reverse anti-avoidance regime, giving ASIC the power to address deficiencies in statutory measures by making a product intervention order.
- ASIC may use its product intervention power in combination with other regulatory tools. For example, ASIC contemplates that there will be occasions where it exercises its product intervention power and takes enforcement action for the breach of design and distribution obligations (once they are in force).
- Announcing the release of the guidance, ASIC Deputy Chair Karen Chester suggested that 'over time the targeted solving of problems through product intervention may result in less regulation of industry overall. In recommending the power, the Financial System Inquiry identified the objective of limiting or avoiding the future need for more prescriptive regulation.'
- ASIC has already demonstrated its willingness to exercise its product invention power, for example ASIC's banning of a specific short term lending model that it considered caused 'significant consumer detriment' to vulnerable customers. ASIC has also consulted on the use of the power in relation to over-the-counter (OTC) binary options and CFDs and separately in relation to the sale of add-on financial products by car yards. This was reinforced by Deputy Chair Karen Chester in announcing the release of the final guidance and is also evident in ASIC's interim corporate plan 2020-21 which flags the regulator's intention to use its product intervention power in the context of predatory lending.

Overview of RG 272 Product Intervention Power

Following consultation, The Australian Securities and Investments Commission (ASIC) has released guidance – RG 272 Product Intervention Power – on how it will exercise the product intervention power introduced by the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019. The guidance sets out the scope of the product intervention power, how ASIC will use it and how an intervention order will be made.

In addition, ASIC has released a report - REP 661 Response to submissions on CP 313 Product intervention power - outlining the key issues raised in the consultation on the draft guidance and its response to those issues.

A 'timely' addition to ASIC's regulatory toolkit

Announcing the release of the final guidance, ASIC Deputy Chair Karen Chester described the product intervention power as an 'incredibly important addition to ASIC's regulatory toolkit' that will allow the regulator to be proactive in its approach to 'confront[ing], and respond[ing] to, harms in the financial sector in a targeted and timely way'. This she said, is particularly 'timely' in light of the COVID-19 pandemic and its impacts on consumers. In addition, Ms Chester suggested that over time, the 'targeted solving of problems through product intervention may result in less regulation of industry overall' by limiting/avoiding the need for more regulation.

Context: What is the product intervention power?

The product intervention power (PIP) enables ASIC to take a proactive approach to the regulation of financial and credit products by enabling it to intervene in a range of ways (through making a product intervention order), where it considers that a product or class of products have resulted/will result/are likely to result in 'significant consumer detriment'.

Importantly, the power may be exercised by ASIC whether or not there has been a breach of the law, provided that ASIC considers there is risk of 'significant consumer detriment'. This 'enables us [ASIC] to take action before significant detriment, or further detriment, is done to consumers, so that we can better uphold community expectations on the conduct of firms that issue or distribute products'.

The guidance notes that the PIP is complemented by the design and distribution obligations regime (DDO regime) which is set to commence from October 2021. ASIC writes that once the DDO regime is in place, consumer outcomes should improve and it 'may be less likely that we [ASIC] will be required to exercise the product intervention power' going forward.

'Significant consumer detriment' – the basis for ASIC intervention

As already stated, ASIC can make a product intervention order if it is 'satisfied that a product (or class of products) 'has resulted, will result or it likely to result' in significant consumer detriment'.

Regulatory Guide 272 provides high level guidance on the meaning of 'significant consumer detriment, and the factors the regulator will take into account when deciding whether there has been 'significant consumer detriment'.

Broad approach

- 'Consumer detriment': Referencing the revised explanatory memorandum, the guidance says that detriment is intended to 'take its ordinary meaning', though it is 'intended to cover a broad range of harm or damage that may flow from a product'. The guidance states that this might include: a) harm that is financial in nature (eg actual/potential financial loss to consumers resulting from a product); and/or b) harm that is non-financial in nature (eg impacting a person's credit rating).
- When is consumer detriment significant? The term 'significant' is not defined in either the Corporations Act 2001 (Cth) (Corporations Act) or the National Consumer Credit Protection Act 2009 (NCCP Act). The guidance states that whether consumer detriment (or likely detriment) is significant will depend on the individual circumstances of the matter.
- Significant detriment to consumers may result from a product itself and/or from the circumstances in which it is offered to consumers: ASIC states that significant detriment to consumers can 'emerge at any point in the lifecycle of a product' and may be the result of 'intentional, reckless or inadvertent industry conduct'. The guidance makes clear that detriment may arise as a result of a product's inherent design features and/or consistent with the decision in Cigno Pty Ltd v Australian Securities and Investments Commission [2020] FCA 479 (Cigno) as a result of the circumstances in which the product is offered (eg marketed or targeted at) consumers. ASIC gives a number of examples of where detriment could occur including where: products are not fit for purpose, sales or marketing techniques prioritise commercial interests over consumer interests, and 'shrouding key features of a product, including fees and how they are charged'.

Factors ASIC will take into account

- Table 1 (p17) of the guidance sets out the factors ASIC will take into account when determining whether there has been significant consumer detriment. These include: a) the nature and extent of the detriment; b) the actual or potential financial loss to consumers resulting from the product; c) the impact that the detriment has had, will have or is likely to have on consumers; d) any other matter prescribed by regulations; and e) any additional factors that ASIC considers relevant in determining whether a product (or class of products) has resulted, will result or is likely to result in significant consumer detriment.

- Consistent with the approach in the draft guidance, the final version does not specify the weight to be given to any factor on the basis that it will depend on the individual circumstances.
- The consultation sought feedback on additional factors that ASIC might take into account. Report 661 explains that ASIC declined to include the following additional factors - the number of complaints about the product; the socio-economic context of consumers who are impacted; the principle of fairness in assessing the nature and extent of detriment; the potential benefits of the product to the consumer – in the guidance on the basis that it considers them to already be 'encapsulated' in the factors set out in Table 1.
- Report 661 also flags that ASIC declined to include two other suggested factors in the list - the age of the product and whether there has been a breach in the law - on the basis that it considers it 'unlikely' that either 'will be relevant to determining whether the product (or class of products) has resulted, will result or is likely to result in significant consumer detriment'.

When will ASIC be likely to intervene?

- ASIC states that the 'product intervention power is not directed towards eliminating all risk from the financial markets' adding that it will not exercise the power 'solely on the basis that a particular investment product has reduced in value and resulted in losses to consumers'.
- The guidance states that ASIC is more likely to intervene when significant consumer detriment has resulted/will result or is likely to result because the product has been designed without consumer needs in mind; or 'is being distributed to, or targeted at, consumers who are unaware of the product's risk and whose objectives are inconsistent with that product offering'.
- Consistent with the approach taken in the draft guidance, the final guidance does not set benchmarks or thresholds as to when ASIC will exercise the product intervention power. In report 661, ASIC explains that this is because: a) what will constitute significant consumer detriment will depend on the individual circumstances in each case; and b) because it considers that 'providing additional benchmarks for when we [ASIC] will exercise the power may unduly limit the scope of the power and, in turn, limit our ability to improve consumer outcomes'. ASIC suggests that over time, as it uses the product intervention power, its interpretation of significant consumer detriment may become clearer as industry will have access to examples of ASIC's approach.

It's not necessary that the product be 'inherently harmful'

Consultation Paper 313 included two case studies - automatic rollover of term deposits and the practice of 'flex commissions' - to illustrate the circumstances in which ASIC may have considered using the product intervention power (had it been available) to address consumer detriment identified at the time.

Report 661 notes that some submissions expressed the view that the detriment identified in each example was due to mis-selling of the product rather than to the product being 'inherently harmful' and argued on that basis that the product intervention power should only be used when a feature of a product, rather than mis-selling of the product, results in significant consumer detriment.

Responding to this, ASIC emphasises that,

> 'the product intervention power is not limited to cases where products are inherently harmful….we are of the view that significant consumer detriment can arise throughout the life cycle of a product. This includes harm arising from: the product's intrinsic features; how, and to whom, the product is distributed; or a combination of these factors. When significant consumer detriment arises as a result of the use of a product by consumers to whom it has been inappropriately sold, we will consider the range of regulatory and enforcement tools available to us, including the product intervention power'.

Products that can be subject to intervention

ASIC may make product intervention orders in relation to:

- financial products regulated under the Corporations Act 2001 (Cth) (Corporations Act) e.g. securities, interests in managed investment schemes, derivatives, insurance products, superannuation products and deposit-taking facilities
- credit products regulated under the National Consumer Credit Protection Act 2009 (Cth) (NCCP Act) eg credit contracts, mortgages, guarantees or consumer leases
- financial products, as defined by the Australian Securities and Investments Commission Act 2001 (ASIC Act) e.g. some types of extended warranties, some types of short-term credit and certain buy-now-pay-later arrangements not covered by the Corporations Act or the NCCP Act.

Section 1023B of the Corporations Act specifies that ASIC cannot intervene in relation to a financial product issued, or offered for sale, by an exempt body or an exempt public authority.

Types of orders ASIC can make

- ASIC is able to make two types of product intervention order: 1) an individual product intervention order, which applies to a specified person, or specified persons, in relation to a product; and 2) market-wide product intervention order, which applies to a person, in relation to a class of products This takes the form of a legislative instrument and is more likely to be used, the guidance states, where ASIC is seeking to 'address a practice that is relatively widespread or, even if the practice is not currently relatively widespread there is a risk the practice will be "phoenixed" or it is one that could be adopted by others'. Consistent with the Cigno decision, the guidance notes that there is no requirement that a 'class' of products include more than one product.
- Multiple elements: ASIC has wide flexibility in terms of the form that interventions might take depending on the circumstances. A product intervention order may comprise 'multiple elements'. These include (among others): banning a product or product feature, and/or imposing sale restrictions and/or amending product information or 'choice architecture' (ie design features of a product and its distribution that present choices and processes to consumers that influence their take-up and use of the product). In certain circumstances, ASIC may also require that consumers be notified about the terms of a product intervention order (and set the timeframe for doing so). This flexibility, ASIC writes, enables it to adopt a case by case approach to determining the form of intervention that is likely to be most effective in reducing the likelihood of 'significant detriment' occurring or further detriment in the particular circumstances.
- The product intervention power may be used in combination with other regulatory tools: The guidance states that where ASIC identifies instances of 'significant consumer detriment' it may use one of a combination of regulatory tools to address it. For example, where the detriment also involves unlawful conduct, ASIC may consider exercising its enforcement powers in addition to making a product intervention order. After the design and distribution obligations come into force in October 2021, ASIC says that there may be instances where it exercises its product intervention power and takes enforcement action for the breach of design and distribution obligations.

Limitations on the power

ASIC sets out a number of limitations on the use of the power. For example: an order 'cannot impose requirements in relation to a person’s remuneration, other than so much of the remuneration as is conditional on the achievement of objectives directly related to the product interventions'.

ASIC comments in relation to this that it considers that the limitation on dealing with remuneration 'does not prevent us from intervening in relation to remuneration that is linked to the distribution of the product'.

How ASIC will make a product intervention order: consultation with affected persons

- Before making a product intervention order, ASIC 'proposes' to consult persons who are 'reasonably likely' to be affected by the order.
- The guidance says that as part of its formal consultation process ASIC will 'usually': a) identify the product and its availability to retail clients; b) describe the detriment it considers to have occurred/will occur or is likely to occur; c) outline its proposed intervention or a description of its proposed intervention. In certain circumstances the guidance says that this could include presenting a range of options for intervening.
- ASIC states that the aim of the consultation process is to 'seek feedback on our proposal to intervene'. Accordingly, ASIC will publish the proposed product intervention order, or a description of the content of the proposed order, on the ASIC website and invite the public to comment on the proposed order .
- The guidance states that the terms of the final order may differ from the draft version.
- ASIC will 'generally undertake public consultation' in this way for both market-wide and individual product intervention orders.
- If a proposed product intervention order will apply to a body that is regulated by the Australian Prudential Regulation Authority (APRA), ASIC will also consult with APRA before making the order, or with other regulators as appropriate.

Commencement and duration of product intervention orders

ASIC is able to specify when the product intervention order will come into force.

ASIC notes that this allows it to set a later commencement date if it considers it appropriate in the circumstances.

The duration of a product intervention order will depend on the circumstances of the case. ASIC can make an initial order for up to 18 months from the date it comes into force, which can be extended or made permanent with the approval of the Minister.

Public notification of decisions

The guidance says that,

> 'As a general principle, it is our view that there is significant public interest in ensuring that consumers and the broader community are aware of and informed about action taken by us. Transparency and disclosure are important factors in market integrity and investor confidence, and serve to promote deterrence as well as to educate'.

On this basis, ASIC plans to publish details on the ASIC website.

The guidance states that where ASIC determines that the consultation document is market sensitive, it will be published at the weekend or overnight (ie at a time when licensed Australian securities markets are not trading).

In Report 661, ASIC notes that some respondents from the financial industry called for ASIC to engage confidentially with firms before publishing a proposed product intervention order on the basis that doing so could enable the firms in question to address ASIC's concerns with the need to make an order. Some respondents also pointed to the possible reputational damage that may result from publication of a proposed product intervention order.

In response, ASIC said that it 'will consider the best way to engage and consult with stakeholders, including firms that are reasonably likely to be affected by a proposed product intervention order and consumers who are affected, or are likely to be affected, by the product' and though under no legal obligation to confidentially engage with/notify firms before formal consultation, ''it would be likely that firms will be aware of our concerns through the course of our regulatory work, before we consult on a proposed product intervention order'.

The consequences of breaching an intervention order

If a person or firm contravenes a product intervention order, or related obligation under Pt 7.9A of the Corporations Act or Pt 6-7A of the NCCP ASIC may take enforcement action through civil proceedings or criminal prosecution.

> [Sources: ASIC media release 17/06/2020; RG 272 Product intervention power; Report 661 Response to submissions on CP 313 Product intervention power (REP 661)]

FSRC referral: ASIC has commenced proceedings against CBA and CFSIL

The Australian Securities and Investments Commission (ASIC) has commenced proceedings in the Federal Court against CBA and Colonial First State Investments Ltd (CFSIL) in connection with matters considered by the Hayne Commission.

ASIC's allegations relate to arrangements between CBA and CFSIL for the sale of CFSIL's superannuation product, Essential super, through CBA's retail branches/digital channels. Broadly, ASIC alleges that fee arrangements breached the ban on conflicted remuneration (as defined in s963A of the Corporations Act 2001 (Cth)) under ss963E and 963K of the Corporations Act.

ASIC alleges that the $22 million in payments made by CFSIL to CBA during the period 2013-2019 could reasonably be expected to influence either the choice of financial product recommended by CBA to retail clients or the financial product advice given by CBA to retail clients.

ASIC is seeking civil penalties against both CBA and CFSIL in relation to the alleged misconduct.

> [Note: ASIC's statement of claim outlines ASIC's allegations in detail. This can be accessed on ASIC's website here.]

Deputy Chair Daniel Crennan commented that the proceedings reflect ASIC's 'ongoing commitment 'to bring the Royal Commission’s referrals and case studies to litigation when appropriate.’

In a short statement acknowledging the proceedings, CBA said that CFSIL and CBA are 'reviewing ASIC's claim' and will provide further updates 'as required'.

> [Sources: ASIC media release 23/06/2020; Statement of Claim, Originating Process, CBA media release 23/06/2020]

COVID-19: Early release of superannuation scheme: The ATO says it has observed some instances of 'people doing the wrong thing' and is investigating

The Australian Taxation Office (ATO) has advised that it has observed some instances in which early release of superannuation applicants are 'doing the wrong thing' and has cautioned applicants that it will stop applications or prevent superannuation money from being released where claims are made incorrectly.

The ATO cites the following four examples, as 'behaviours that attract our attention':

- making an application when there is no change in usual salary, wage or employment information
- 'artificially arranging your affairs to meet the eligibility criteria'
- 'making false statements or fraudulent attempts to meet the eligibility criteria'
- 'withdrawing and recontributing super for a tax advantage'.

The ATO says that it is investigating some cases and adds that in cases where applicants have withdrawn and recontributed superannuation for a tax benefit, it may consider applying the general anti-avoidance rule for income tax (Part IVA). This would mean that any tax benefit obtained could be cancelled and that administrative penalties and interest charges could also apply.

In a short statement, Industry Super Australia welcomed the ATO's efforts to ensure the integrity of the scheme.

[Source: ATO media release; [accessed via Capital Monitor] Industry Super Australia media release 16/06/2020]

COVID-19: So far funds have paid out $15.9bn under the government's early release of superannuation scheme

The Australian Prudential Regulation Authority (APRA) has released industry-level and fund-level data on the early release of superannuation scheme for applications received during the period 20 April (inception of the scheme) to 14 June 2020.

- Total payments made since the inception of the scheme have taken an average of 3.3 business days to process, with 95% of payments made within five business days.
- Over the week to 14 June, superannuation funds made payments to 148,000 members worth a total of $1.3 billion.
- Since the inception of the scheme, 2.1 million payments worth $15.9 billion have been paid.
- The average payment made over the period since inception is $7,486.

[Source: APRA media release 22/06/2020]

COVID-19: Peak accounting and tax practitioner professional bodies have called on the government to rethink aspects of the Superannuation Guarantee Amnesty in light of the disruption caused by the pandemic

Representatives of the National Tax Liason Group - Chartered Accountants Australia and New Zealand, the Corporate Tax Association, CPA Australia, the Institute of Public Accountants, the Law Council of Australia, The Tax Institute and the Self-managed Independent Superannuation Funds Association (Joint Bodies) - have written to Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume seeking that the government make two amendments to the Superannuation Guarantee Amnesty (SG Amnesty) in light of the disruption caused by COVID-19.

The group has called on the government to:

- Extend the deadline to submit an SG Amnesty application for six months (from 7 September 2020 to 7 March 2021): 'In view of the business disruption caused by COVID-19 and severe impact on the cash flow of most businesses, the Joint Bodies are concerned about the difficulties confronting many employers in being able to make an application for the SG Amnesty by 7 September 2020' the group writes. The proposed extension would give employers, they argue, sufficient time to apply.
- Enable the Commissioner to retain 'broad discretion' to apply anything from a zero to 200% penalty for liabilities that would have qualified for the SG Amnesty (had an eligible application been made by the deadline) depending on the circumstances of the particular case. The group argues that this is justified on the basis that: a) many

employers may miss the existing SG Amnesty deadline and, given the impact of the COVID-19, may even miss the extended deadline; and to mitigate the 'otherwise harsh operation of the part 7 penalty'.

[Source: Tax Institute – Joint Bodies submission 17/06/2020]

Best interests duty for mortgage brokers: ASIC guidance released

Following consultation, The Australian Securities and Investments Commission has released Regulatory Guide 273 Mortgage brokers: Best interests duty (RG 273) which provides principles based, high level guidance (supplemented with worked examples) for brokers on how ASIC will approach assessing compliance with the new best interests duty obligation and the steps brokers can take to minimise the risk of non-compliance. The new obligation will apply from 1 January 2021.

From that date, mortgage brokers will be required to act in the best interests of consumers and to prioritise consumers' interests when providing credit assistance. The change was legislated in response to Hayne Recommendation 1.2.

ASIC has also released a report – Report 662 Response to submissions on Consultation Paper 327 Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty (CP 327) – which outlines ASIC's response to feedback received during the consultation on the draft guidance.

Releasing the guidance, ASIC Commissioner Sean Hughes said that

> 'We released this regulatory guide as early as effectively possible, to help industry prepare on a timely basis for the best interests duty and related obligations before January 2021.'
>
> 'From 1 January 2021, ASIC will closely monitor conduct and outcomes to ensure mortgage brokers are complying effectively with the best interests duty'.

[Note: The guidance was released on 24 June. We plan to include a more detailed summary in our next issue of Governance News.]

[Source: ASIC media release 24/06/2020; Regulatory Guide 273 Mortgage brokers Best interests duty (RG 273)]

'Expelled from membership of AFCA': AFCA has published the details of 680 financial firms that have not paid their AFCA membership levy

The Australian Financial Complaints Authority (AFCA) has released the details of 680 financial firms that have not paid their AFCA membership levy. The firms have been 'expelled from membership of AFCA'.

AFCA has called on the firms to contact AFCA to discuss payment terms and, for firms legally required to be members of AFCA, the reinstatement of their membership.

[Source: AFCA media release 16/06/2020]

In Brief | Open Banking consultation: The ACCC has released draft rules and an accompanying draft Privacy Impact Assessment outlining the proposed combined accredited person (CAP) arrangement which will enable accredited persons to use other accredited third parties to collect CDR data on their behalf. The due date for submissions is 20 July 2020

[Sources: ACCC media release 22/06/2020; CDR - Consultation draft Rules; CDR - Explanatory note - draft Rules that allow for accredited collecting third parties ('intermediaries'); CDR - Update 1 to privacy impact assessment]

The Greens have introduced a Bill proposing to ban electoral donations from certain sectors including banks

The Greens have introduced a Bill - Commonwealth Electoral Amendment (banning dirty donations) Bill 2020 - proposing to:

- ban electoral donations from specific industries including banks, property developers, the tobacco industry, liquor/gambling businesses, pharmaceutical companies, mining industry and 'representative organisations for these industries'
- cap donations from any single source (whether a person or an organisation) to $3000 per electoral term

- expand the definition of 'gift' to include subscription and membership fees and attendance at fundraising events

The explanatory memorandum accompanying the Bill says that the measures are aimed at 'strengthening the independence of parliament and increasing public confidence that politicians are guided by the public interest when making decisions'.

[Source: Commonwealth Electoral Amendment (banning dirty donations) Bill 2020; Explanatory memorandum]

Corporate Misconduct and Liability

Commonwealth penalty unit to increase from $210 to $222 from 1 July 2020

The Commonwealth Attorney General has registered a notice increasing the penalty unit in s 4AA(1A) of the Crimes Act 1914 (Cth) from $210 to $222 from 1 July.

The new penalty unit will only apply to offences committed on or after 1 July.

[Source: Notice of Indexation of the penalty unit amount 14/05/2020]

Risk Management__

CLIMATE RISK

Top Story | Top five considerations for meaningful climate-related corporate governance

In light of increasing investor and regulatory expectations around corporate governance of climate-related risk, MinterEllison has released a report considering five key questions to guide assurance and disclosure process in the FY20 reporting season.

You can access the full text of the report on our website here

The MCA has released a climate action plan endorsing the goals of the Paris Agreement, the ACCR has questioned whether it is sufficiently detailed to achieve change and satisfy investors

Key Takeouts

- The Minerals Council of Australia (MCA) has released a three-year Climate Action Plan endorsing the goals of the Paris Agreement (including net zero emissions).
- The plan has a strong technology focus, and to this extent appears positioned to support the government's 'technology led transformation' plan.
- The MCA's plan advocates 'pursuing decarbonisation including through operational efficiencies, abatement, developing and deploying low emissions technologies including renewables, hydrogen, proven, safe and reliable Carbon Capture Utilisation and Storage (CCUS) and advanced nuclear solutions, as well as digitisation, automation, and electrification'.
- The Australian quotes MCA CEO Tania Constable as saying that the release of the plan in light of/in response to changed community expectations and the need for the resource industry to be more sustainable.
- The ACCR has questioned the lack of detail in the plan and in particular the lack of specific time-bound targets. For example, the plan does not include dates/milestones for the transition to decarbonisation, or address Scope 3 emissions.

The Minerals Council of Australia (MCA) has released a climate action plan, endorsing the goals of the Paris Agreement and outlining how the MCA will 'support the shift towards lower emissions mining in Australia'.

The plan has a strong technology focus, and because of this, looks to be positioned to support the government's 'technology led transformation' plan. The MCA describes the plan as a 'comprehensive three year rolling workplan' which outlines how the MCA and its members will contribute to the achievement of the net-zero emissions target.

The plan is underpinned by three objectives.

- **'Developing technology pathways to achieve significant reductions in Australia's greenhouse gas emissions':** The activities identified under this objective are intended to encourage 'substantial investment across a broad range of low emissions technologies'. These activities include: a) establishing an expert panel to advise the MCA on sustainable pathways to decarbonisation; b) informing/assisting to implement the government's technology investment roadmap; c) developing a minerals sector specific technology roadmap; d) encouraging use of renewable energy sources at mine sites and the use of electric vehicles; e) identifying 'innovative business models that can support the uptake of nascent low-emissions technologies'; f) supporting ARENA's work in accelerating the uptake of clean energy; g) advocating for 'programmatic support to enable deployment of mining technologies to assist in the sector's decarbonisation' and h) a commitment to 'consider aspirational uptake rates and timeframes across a broad portfolio of low emitting and high-abating technologies' and release a twice yearly statement on progress towards achieving these 'aspirational uptake rates'.

- **More transparent climate change reporting and 'informed advocacy':** Actions under this objective include: a) modelling the opportunities and costs of net zero emissions to the minerals sector; b) hosting a biannual climate-related financial disclosure forum for purposes of awareness raising and knowledge sharing; c) identifying 'current disclosure practices amongst members to inform their alignment with TCFD recommendations'; d) reporting on how member commitments compare against 'reputable publicly released climate scenarios'; and e) setting MCA advocacy priorities based on member feedback on 'climate related policy issues and opportunities'.

- **'Knowledge sharing of the sector's responses to addressing climate change':** Actions identified under this objective include: a) establishing an online registry including minerals sector climate-related collateral (this will initially be member-only access, but 'could allow future public access); b) understanding the 'types of adaptation investments needed in the minerals sector' across various areas (eg operations, employee, health, supply chains, water use, energy resources and local communities) to minimise the adverse impacts of climate change; c) communicating how mining operations 'are assessing and managing the physical impacts of climate change on site to build operational resilience'; d) reporting on the role of the minerals sector in transitioning to a circular economy; and d) 'productively' engaging in the 'business of the United Nations Framework Convention on Climate Change including the implementation of the Paris Agreement and the work of the Intergovernmental Panel on Climate Change'.

The Australian quotes MCA CEO Tania Constable as saying that that plan has been released in response to changed community expectations and the need for the resource industry to be more sustainable.

[Sources: MCA media release 22/06/2020; Climate Action Plan; [registration required] The Australian 22/06/2020]

Response to the plan

In a short statement the Australasian Centre for Corporate Responsibility (ACCR) questioned whether the plan represents a shift in approach given the lack of time-bound commitments/actions included eg the plan does not include dates/milestones for the transition to decarbonisation, or address Scope 3 emissions.

ACCR Director of Climate and Environment Dan Gocher commented that 'investors will be sorely disappointed. Investors have given MCA member companies the benefit of the doubt that they could achieve change from within. This policy represents business as usual and further delays to action.'

Separately, The AFR reports that Aberdeen Standard Investments has questioned the level of detail in the plan and called for more information about how the commitments included will be achieved.

[Sources: ACCR media release 22/06/2020; [registration required] The AFR 22/06/2020]

CYBERSECURITY, PRIVACY AND TECHNOLOGY

Australian organisations are being targeted by a 'sophisticated state based cyber actor', the Prime Minister has flagged that the new cybersecurity strategy will include increased investment

- On 19 June Prime Minister Scott Morrison announced that Australian organisations across a range of sectors are under cyber-attack by (an unnamed) 'sophisticated stated based cyber actor'. Mr Morrison said that it was clear from both the scale and the nature of the attacks that a state-based cyber actor is behind them. Mr Morrison said that the activity is 'not new' but that the frequency of attacks on Australian organisations has increased.

- The Prime Minister encouraged all organisations, but especially health, critical infrastructure and essential services to 'take expert advice and implement technical defences to thwart this malicious cyber activity'.

- Mr Morrison called on organisations concerned about their vulnerability to: 1) patch internet facing devices promptly; b) use multifactor authentication; and 3) become an Australian Cyber Security Centre partner.

- Mr Morrison emphasised that 'cybersecurity is a whole of community effort – government, industry and individuals' and that he considers it 'vital' that organisations are alert to the threat and take the necessary steps to ensure 'the resilience of their networks'.

- Having outlined the government's investment in cybersecurity/technology, Mr Morrison said that the government will increase investment in the area. More details about this will be included in the new cybersecurity strategy to be released in the 'coming months'.

[Sources: Prime Minister Scott Morrison media release 19/06/2020; [registration required] The AFR 22/06/2020]

New data standards on the way? ITNews and the AFR report that following the Prime Minister's announcement, the government may be working on new minimum cybersecurity standards for industries that manage critical infrastructure (though ITNews reports that the government has not directly confirmed this).

[Sources: IT News 22/06/2020; [registration required] The AFR 22/06/2020]

Crypto-asset scams on the rise: ASIC flags a 20% uptick in misconduct in connection with 'crypto scams'

The Australian Securities and Investments Commission (ASIC) has observed an uptick in the number of crypto investment scams over the period March to May 2020 as compared to the same period last year. According to ASIC, there was been a 20% increase reported misconduct.

ASIC has also observed an increase in the number of romance scams where scammers target people online under the guise of seeking a romantic connection. These scams usually involve investment in crypto-assets or forex trading and often are also aimed at mining personal data for the purposes of identity fraud.

ASIC cautions consumers to be aware of the risk, observing that most crypto-asset investment opportunities reported to ASIC 'appear to be outright scams'. ASIC also warns consumers that recovering money lost to scammers, and/or taking action against offenders is often difficult especially where all communication has been online and the scammer is located outside Australia.

ASIC calls on consumers who think that they may have been targeted by scammers to stop sending any money – even if advised by the suspected scammer that it is necessary in order to enable the consumer to withdraw their finds, and instead to: a) report the suspected scam to their financial institution/bank; and b) lodge a report of misconduct with ASIC.

[Source: ASIC media release 18/06/2020]

Australians lost $634+ million to scams in 2019: ACCC report finds that the cost of scams has increased by 34% on 2018 levels

The Australian Competition and Consumer Commission (ACCC) has released a report – Targeting Scams Report – highlighting the increase in scam activity over the past 11 years (in light of the increased use of technology) and the growing cost to consumers. The report also includes tips for consumers and businesses to avoid scammers/how to report scams.

The report includes data not only from Scamwatch, but from the big four banks and other government agencies where scams are reported.

Some Key Points

- According to the report, though the number of reported scams was 5.5% down on 2018 (at 167797 reports), the amount of money lost increased 30+% on 2018 levels. Australians lost $634+ million to scams in 2019 as compared with $489 million reported lost in 2018.

- The report comments that this cost is 'grossly understated' given the high level of under-reporting. According to the report, 33% of people who lost money over the past five years have never reported it.

- The three most financially costly scam types (based on the among of money lost) were: 1) business email compromise scams (ie tricking businesses into paying invoices into a false account) ($132 million lost); 2) investment scams ($126 million lost); and dating/romance scams ($83 million lost).

- There was a sharp uptick in reported losses from crypto-currency scams. According to the report, losses exceeded $21.6 million, more than four times the amount lost the previous year. Younger Australians (25-34) were most likely to report scams of this kind.

- The scams that received the highest numbers of reports to Scamwatch were: 1) phishing (25 168); 2) threats to life, arrest or other (13 375); and 3) identity theft (11 373).
- People aged 55 to 64 reported higher losses than other age groups ($30 million in losses reported).
- The report found that scammers are adapting their approach as technology changes. Though scams based on contact (persuading a person to part with money/personal information) are 'still the norm', the report found that increasingly scammers are operating without contact/limited contact. Scammers are also targeting people through games and social platforms. In 2019, scams originating on social media increased by 20% and contacts via mobile phone apps increased by 29%.
- The report found that scams awareness has increased since 2009 and that this is reflected in the number of people now able to recognise/avoid scams is increasing and this is limiting financial loss. For example, in 2019 the majority of reported scams did not involve loss of personal data or money. Only 11.8% of scams reported included financial loss.
- COVID-19 scams: The report found that scammers are quick to adapt to/exploit a crisis. There has been an 'explosion of scams' seeking to exploit both the bushfires and the COVID-19 pandemic.

Conclusions

The report concludes by calling for urgent broad based action to stem the increasing losses to scammers.

> 'Australians lose large amounts of money to scams, which would be better spent improving lives and the overall economy. Scams are a pervasive threat to our society and we all have a role to play in defeating them. It is not enough for consumer regulators and law enforcement agencies to pursue scammers. We also need the continued efforts of governments, financial institutions, businesses, digital platforms, and telecommunications and internet providers if we are to make a meaningful difference By raising public awareness about scams, and implementing scams disruption measures as ordinary business practice, we can all work together to make Australia a harder target for scammers'.

Echoing this, in her foreword to the report, Deputy Chair, Australian Competition and Consumer Commission Chair, Scams Awareness Network Delia Rickard said,

> 'Scams are a whole-of-community problem and governments, industry and business all have a role in preventing them. It is not enough to react to scams; we must all work together to find ways to disrupt them early or prevent them. Only then can we limit the significant financial and emotional harm that Australians experience as a result of being scammed. We look forward to continuing this increased cooperation and action with government and private sector organisations throughout 2020'.

ASIC has reiterated its warning to consumers about the risk of investment scams and cautioned that it will consider taking enforcement action where misconduct is identified

On 24 June, following the release of the ACCC's report, the Australian Securities and Investments Commission (ASIC) released a statement reiterating its concern about the uptick in investment scams and calling on consumers to be aware of the risk and to report scam activity to ASIC.

ASIC Executive Director for Assessment and Intelligence Warren Day highlighted the risk of crypto-scams as an area of particular concern for the regulator. 'Most crypto-asset investment opportunities reported to ASIC appear to be outright scams and there is no actual underlying investment' Mr Day said.

Citing the ACCC's report, ASIC states that it 'uses the information it receives from the public to target entities with more intensive surveillance. Where we identify unlawful conduct or practices that harm investors, ASIC can consider its full suite of regulatory tools and enforcement powers to take action'.

[Sources: ACCC media release 22/06/2020; ACCC report: Targeting Scams Report; ASIC media release 24/06/2020]

In Brief | Australia has joined a global partnership on AI: On 16 June Minister for Industry, Science and Technology Karen Andrews announced that Australia has joined Canada, the EU, Germany, France, India, Italy, Japan, New Zealand, the Republic of Korea, Singapore, Slovenia, the UK, and the US as a founding member of the Global Partnership on Artificial Intelligence, which she described as 'the world's first multilateral forum dedicated to AI'

[Sources: [accessed via Capital Monitor] Minister for Industry, Science and Technology Karen Andrews media release 16/06/2020]

OTHER DEVELOPMENTS

AML/CTF compliance and reporting: AUSTRAC has called on Australian reporting entities to take note of FATF statements

The Australian Transaction Reports and Analysis Centre (AUSTRAC) has flagged two reports from the Financial Action Task Force (FATF) identifying jurisdictions that the FATF considers 'may pose a risk to the international financial system':

- High-Risk Jurisdictions subject to a Call for Action - 21 February 2020: outlines 'ongoing issues' in relation to two jurisdictions, the Democratic People's Republic of Korea and Iran.
- Jurisdictions under Increased Monitoring - 21 February 2020 – identifies 18 jurisdictions on the 'grey list' ie jurisdictions that the FATF considers to have 'strategic deficiencies in their AML/CTF regimes' and which are under 'increased monitoring' on that basis. These are as follows: Albania, the Bahamas, Botswana, Cambodia, Ghana, Iceland, Jamaica, Mauritius, Mongolia, Myanmar, Nicaragua, Pakistan, Panama, Syria, Uganda, Yemen, and Zimbabwe. The report also identifies that Trinidad and Tobago have been removed from the list of jurisdictions subject to monitoring.

AUSTRAC says that Australian reporting entities should use FATF's statements to 'help guide' their AML/CTF assessment and compliance programs and decisions about submitting suspicious matter reports to AUSTRAC.

[Source: AUSTRAC media release 16/06/2020]

Supply chain risk: The ICAC has released a new procurement guide for the NSW public sector to assist in conducting due diligence checks on potential suppliers

[Source: Supplier due diligence: a guide for NSW public sector agencies]

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