DANIEL MEYEROWITZ-KATZ

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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services

Dear Committee Members

Supplementary submission: inquiry into litigation funding and the regulation of the class action industry

I make this supplementary submission in order to briefly address two matters raised in other submissions which were not addressed in my original submission dated 3 June 2020 because they were not captured by the Committee's terms of reference. Those matters are the proposed introduction of a class certification mechanism, and the dilution of the continuous disclosure and the misleading or deceptive conduct laws as they apply to publicly listed companies.

I would be very grateful if the Committee would grant me the indulgence of accepting this supplementary submission notwithstanding that it is made after the deadline for submissions has closed.

1. Class certification

1.1 A number of submissions have encouraged the Committee to consider the idea of class certification, which is mechanism that originated in the American class action system pursuant to which class actions must be "certified" by a court in order to continue as a class action. That is, early on in the proceedings, there must be a hearing at which the proposed class representative persuades a judge that the matter is suitable to be conducted as a class action.

1.2 When it was designing the Australian class action system, the Australian Law Reform Commission considered the question of class certification, as discussed in its Report No. 46, *Grouped Proceedings in the Federal Court* (1988). At [146], the Commission observed:

> "In class actions in the United States and Quebec, the preliminary matter of the form of the proceedings has often been more complex and taken more time than the hearing of the substantive issues. Because the court's discretion is involved, appeals are frequent, leading to delays and further expense. These expenses are wasteful and would discourage use of the procedure. There is no need to go to the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure at any time."

1.3 For this and other reasons, the Commission concluded at [147] that:

> "the Commission sees no value in imposing an additional costly procedure with a strong risk of appeals involving further delay and expense, which will not achieve the aims of protecting parties or ensuring efficiency. No certification procedure is recommended."

University Chambers | Lv 19, 65 Martin Place, Sydney NSW 2000 | +61 2 8227 4400
dmkatz@universitychambers.com.au | www.dmkbarrister.com | ABN 30 460 519 142

1.4 The Commission revisited the question in its Report No. 134, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (2019). At [4.48] it reiterated the position that it had taken some three decades earlier.

1.5 In my submission, the Commission's reasoning is sound. The approach taken in Australia has been that a class action is presumed to have been properly commenced, but the respondent can apply for it to be "de-classed" if appropriate. This has avoided the requirement for a contested hearing on complex issues to occur early on in most class action litigation, as occurs in the US and other jurisdictions that have adopted certification, while also permitting applications to be brought that a matter no longer proceed as a class action where it has been desirable to do so. The Australian system has functioned as intended, and there is no reason it change it.

2. Continuous disclosure and misleading or deceptive conduct

2.1 Some submissions from publicly listed companies and those associated with them have argued that the continuous disclosure laws and the misleading or deceptive conduct laws applying to publicly listed companies should be watered down by lowering the standard of conduct to which such entities are held. For the following reasons I submit that the laws should not be amended in this manner.

Continuous disclosure

2.2 Rule 3.1 of the ASX Listing Rules requires a listed entity that is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities to immediately tell the ASX that information. The rule is subject to various exceptions which I do not presently propose to discuss. Read with that rule, s 674(2) of the *Corporations Act* 2001 provides, in effect, that if the entity has such information and the information is not generally available then it must notify the ASX of the information.

2.3 As many submissions have noted, the Government has recently introduced the *Corporations (Coronavirus Economic Response) Determination (No. 2)* 2020, such that information is required to be disclosed only where the entity "knows or is reckless or negligent with respect to whether that information would, if it were generally available, have a material effect on the price or value of ED securities of the entity". The standard common law test for negligence is that there is "a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another": *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [18].

2.4 Thus, there is no real distinction between a requirement to disclose information that would reasonably be expected to have a material effect on the price of securities and a requirement not to be negligent as to whether the information would have such an effect. It is, in effect, two different ways of saying the same thing. Accordingly, there is a real question whether the amendments made by the *Determination* will have any substantive impact on the operation of the law. If there is any such impact, it appears likely to be minimal.

Misleading or deceptive conduct

2.5 Section 1041H of the *Corporations Act* 2001 prohibits a person from engaging in conduct in trade or commerce, in relation to a financial product or a financial service, that is misleading or deceptive, or is likely to mislead or deceive. A similar provision exists in s 12DA of the *Australian Securities and Investments Commission Act* 2001. Both provisions mirror the language and effect of s 18 of the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act* 2010), which was formerly s 52 of the *Trade Practices Act* 1974. The reason why the relevant provisions have been included in the *Corporations Act* and the *ASIC Act* is that conduct relating to financial products and services has been excluded from the *Australian Consumer Law* to give effect to the division of regulatory responsibilities between ASIC and the ACCC—the former being responsible for regulating financial products and services, and the latter for other consumer-related matters.

2.6 These laws all embody a policy decision made long ago in Australia in relation to conduct in trade or commerce that is misleading or deceptive: that the onus of ensuring that a particular statement is not misleading or deceptive is placed on the person making the statement rather than the person to whom it is made. This standard applies across the board in all matters of a commercial nature, from the sale of securities by publicly listed companies to the sale of lemonade at street markets.

2.7 No one is suggesting wholesale reform to Australia's misleading or deceptive conduct laws in that regard. Nor should they. The laws have served Australia well for the half century during which they have been in operation.

2.8 This begs the question of why, if there is going to be latitude granted to a particular group of persons in relation to misleading or deceptive conduct, that group should be publicly listed companies. The proposition that the largest and wealthiest entities in the country should be granted defences not available to ordinary businesses appears deeply unpalatable from a public policy perspective, especially when the impetus is to relieve those companies from higher insurance premiums.

Yours faithfully

Daniel Meyerowitz-Katz
Barrister