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Article Information

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Shareholder class actions – considerations for investors

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Continuous disclosure and prohibitions on misleading and deceptive conduct

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Under Australia's continuous disclosure rules listed entities are required to disclose price sensitive information to the market. The *Australian Securities and Investments Commission* is tasked with enforcing compliance with those rules and can impose pecuniary penalties and, in the most serious of cases, bring criminal proceedings against those culpable. The imposition of pecuniary penalties and criminal prosecutions may deter future misconduct but it offers little comfort to those investors who suffer loss as a result of investment decisions made on the back of inaccurate, incomplete or otherwise misleading market disclosures.

Further, there may be cases where ASIC declines to proceed with regulatory action – for any number of reasons – but shareholders still have questions. A recent example is the demise of Blue Sky Alternative Investments Limited (formerly ASX:BLA). Blue Sky was a former ASX darling that faced difficulties after short-seller Glaucus reported on a number of practices that Glaucus argued inflated the value of BLA's reported fee-earning assets under management, its key revenue driver as an asset manager. In the fall-out of the Glaucus report, BLA reviewed its asset valuations and deal pipeline. As a result of that review BLA significantly reduced its reported fee earning assets under management and saw its share price drop from around $12.50 to 18.5c before entering external administration, being suspended from quotation and later de-listed, taking hundreds of millions in shareholder's funds with it.

Civil penalty provisions available to shareholders

Under the *Corporations Act 2001* (Cth), any investor that suffers loss or damage as a result of breaches of the continuous disclosure laws, or the prohibitions on misleading and deceptive conduct, can bring court proceedings to recover those losses using the civil penalty provisions.

Historically, Australia's civil penalty provisions have been "no fault" provisions – meaning the existence of a breach was a question of objective fact and there was no element of knowledge, recklessness or negligence required on behalf of the contravener. Temporary changes to the civil penalty provisions were introduced in response to the COVID-19 pandemic, introducing an element of fault to the civil penalty provisions. Under these temporary changes there is no breach of the civil penalty provisions unless the contravener acted with knowledge, recklessness or negligence.

Under the auspice of making it easier for listed companies to release reliable forward – looking guidance to the market, the federal parliament is presently considering a bill to make the temporary changes permanent.

Regulatory gaps and class actions

For the vast majority of investors, the costs of conducting proceedings against a well resourced ASX listed entity mean that it is simply uneconomical, even before factoring in other risks such as adverse costs. With the proposed introduction of fault elements to the civil penalty provisions, proving contraventions of the civil penalty provisions is only going to become more difficult and further increase the costs of conducting proceedings.

Australia has a well developed class action regime which allows investors to aggregate their (often relatively modest) losses and run proceedings through a single representative known as a lead applicant, against common respondents, for example an ASX listed entity and its directors.

In a shareholder class action, the lead applicant generally takes all responsibility for conducting the proceedings on behalf of the group members, who place themselves in a position to receive a distribution from any proceeds recovered in the action, be it through a settlement or favourable judgment.

Many shareholder class actions are backed by third party litigation funders who pay all of the costs associated with the action – including any costs payable to the respondent if the action is unsuccessful – in exchange for an interest in the proceeds of the action. Third party funding is typically no recourse, enabling shareholders to participate in class actions with no out of pocket costs or financial risk.

Shareholders can take comfort in the fact that the courts also have an oversight role in approving the settlement of class actions and the distribution of the proceeds of a successful action.

Shareholder class actions are becoming an important tool for lifting the standards of corporate behaviour and enforcement of the *Corporations Act 2001*. Again, the demise of Blue Sky is a key example of this. Despite ASIC's disinclination to take further steps against Blue Sky, an interested shareholder – with the support of external funding has recently obtained orders to inspect the company's books and records for the purposes of investigating a prospective class action against the company and its officers.

About the Blue Sky Class Action | Piper Alderman has been investigating a prospective class action against Blue Sky Alternative Investments Limited since the release of the Glaucus Report. The investigation is on-going and registration is open to all persons who purchased shares in Blue Sky Alternative Investments Ltd (ASX:BLA).

The class action will be run by Piper Alderman with financial support provided by Litigation Capital Management Limited (AIM:LIT) (LIT) through its wholly owned subsidiary LCM Operations Pty Ltd (LCM), the litigation funder to the action.

Interested shareholders can register their interest here