

ARE COURTS EASING THE WAY FOR SHAREHOLDER CLASS ACTION CLAIMS?

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Legal Briefings - By **Damian Grave** and **Helen Mould**

Directors and officers of listed companies are acutely aware of the class action risks posed by corporate continuous disclosure obligations.

A securities class action may be commenced if shareholders allege that a company's disclosure (or failure to disclose) breached the Corporations Act or the ASIC Act. To recover damages in this type of claim, a shareholder plaintiff must prove that the contravention caused their loss - a concept known as causation.

What is required in order to prove causation has been the subject of significant debate.

In Australia, courts have traditionally found that where a misrepresentation has induced a transaction (including a share transaction) the plaintiff must show that they relied on the misrepresentation in order to establish causation.

On 20 April 2016, In the matter of *HIH Insurance Limited (in liquidation) & Ors* [2016] NSWSC 482, the NSW Supreme Court held that the plaintiffs:

- could establish causation by showing that they purchased shares on the market at an inflated price, and
- did not need to establish that they relied on the misrepresentation in order to recover loss (direct reliance). It was enough that the market relied on, and was misled by, the misrepresentation (indirect market based causation).

This is the first time an Australian court has applied indirect market based causation.

The plaintiffs were investors who acquired shares in HIH Insurance Limited. The investors claimed that HIH's 1999 and 2000 financial results contained misleading or deceptive representations. HIH admitted that it had contravened the former Trade Practices Act 1974 and Corporations Law by releasing the results.

When HIH entered liquidation, the investors lodged proofs of debt stating that they had suffered loss and damage by paying more for their shares than they would have, had the market price not been inflated. The liquidators did not admit their proofs and the investors appealed to the NSW Supreme Court.

The investors did not seek to argue that they read or directly relied on the financial results. Instead, they argued that they purchased the shares in a market regulated by the ASX and the Corporations Law and that this market was distorted by the misrepresentations in the results.

Although the decision relates to a liquidation proceeding and not a class action, the judgment will be relevant to the issues considered in securities class actions.

The decision has not been appealed. Plaintiffs and defendants alike will wait to see if this decision is followed by other courts. In the interim, questions remain as to whether indirect market based causation supports the objectives of the continuous disclosure regime, which include encouraging investors to read and consider corporate disclosures.

Debate will also continue as to how it is proven that the market price was in fact inflated because of the alleged contraventions.

This article was written by Damian Grave, Partner, Helen Mould, Executive Counsel and Leah Watterson, Senior Associate, Melbourne.

The full text of this judgment is available [here](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



DAMIAN GRAVE

PARTNER,

MELBOURNE

+61 3 9288 1725

Damian.Grave@hsf.com

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