

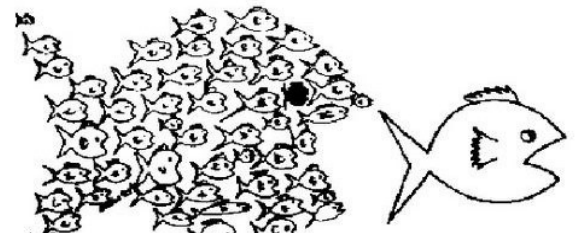
# Class Actions: The “by” word for recovery - the HIH decision and beyond.

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## CLASS ACTION



### Summary of the HIH Decision (in the matter of HIH Insurance Limited (in liquidation) and Others

1. On 21 April 2016, the Supreme Court of New South Wales held that certain shareholders in HIH were entitled to have part of their share losses admitted to proof in the liquidations of HIH, and its subsidiaries, FAI General Insurance Company Ltd and HIH Casualty & General Insurance Ltd.
2. HIH admitted that its financial statements failed to record the true position of reinsurance arrangements with Hanover Re and were misleading or deceptive or likely to be so.
3. The subsidiaries were found to be liable as participants in the conduct of HIH because of the knowledge of the CFO, who was also a director of each, and because they were parties to the reinsurance arrangements and their financial statements each contained the incorrect treatment of the arrangements.
4. The Court was satisfied, on the balance of probabilities, that the CFO knew that the incorrect treatment would be incorporated into the consolidated HIH results and would create a misleading appearance of HIH's profits in the relevant periods.
5. The Court accepted that the shareholder claims should be allowed, in the absence of any evidence that any shareholder relied upon the financial statement in purchasing shares, because they had proven that some of their losses were indirectly caused by the incorrect treatment in the accounts.

6. Indirect causation was found to have been proven by expert evidence of the ways in which analysts consider and report on financial statements and the market responses to analysis/commentary on them such that the share price did not reflect the true financial position or was inflated by the misleading treatment and materially caused or contributed to the loss making share purchase decisions.

7. The shareholders' claims were admitted to proof in the liquidations for damages equivalent to between 6.25% and 13% of the purchase price for the shares depending upon the periods in which they occurred.

## **IMPLICATIONS**

8. The HIH decision gives greater weight to investor plaintiffs' claims by rejecting an approach which would require proof of direct causation (reliance) before damages are recoverable.

9. The Court has accepted proof of indirect causation by expert evidence and from inferences about the behavior of the share market.

10. Whilst this may fall short of importing the US "fraud on the market" theory, consistently with Australian case law, it is approaching it.

11. It remains to be seen whether the decision will be the subject of appeals.

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