CASE ANALYSIS

TPT PATROL PTY LTD V MYER HOLDINGS LIMITED: WHY SHAREHOLDERS CAN RELY ON MARKET-BASED CAUSATION

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Shareholder class actions provide improved access to statutory remedies in instances of company misconduct. However, access to these remedies hinges on the ability of plaintiffs to satisfy the causal requirements of the relevant statutory claim. In particular, the requirements for establishing causation in the case of a company's failure to adhere to continuous disclosure obligations or misleading or deceptive conduct has been disputed. TPT Patrol Pty Ltd v Myer Holdings Limited adds clarity to this debate by adopting the prognosticated 'market-based' theory of causation. This article examines why market-based causation is available as a matter of law and in doing so, highlights its distinction from other traditional media of establishing causation for shareholder loss.

I INTRODUCTION

Shareholder class actions provide a medium for investors to obtain justice, restitution and compensation in instances of company misconduct.[1] Shareholders with claims that do not justify the time and expense to litigate individually may band together and obtain improved access to justice, while the looming prospect of large-scale damages deters company wrongdoing.[2] These benefits derive their efficacy through a miscellany of statutory remedies for loss or damage 'resulted from' or 'by' company misconduct.[3] However, an aggrieved shareholder's access to these remedies is contingent upon satisfying the causal requirements of the relevant statutory claim. In Australia, shareholder class actions are typically brought under the *Corporations Act 2001* (Cth)

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[1] Lynsey Edgar, 'Evaluating Damages in Shareholder Class Actions for Misleading Conduct and Breach of Disclosure Duties' (2018) 7 *Journal of Civil Litigation and Practice* 147, 148.

[2] Ibid.

[3] See, eg, *Corporations Act 2001* (Cth) ss 1317HA, 1041I ('*Corporations Act*'). See also *Australian Securities and Investments Commission Act 2001* (Cth) s 12GF.

('*Corporations Act*'), for breach of continuous disclosure obligations under s 674 and engagement in misleading or deceptive conduct under s 1041H. Unfortunately, courts have provided little certainty regarding the basic causal requirements for statutory liability,[4] casting doubt over when shareholder loss may properly be attributed to the wrongdoing of the company in order to provide shareholders access to a remedy.

One contentious question is whether a company's failure to comply with continuous disclosure obligations or misleading or deceptive conduct can be said to have caused shareholder loss.[5] Australian courts have produced two lines of authority which are not easily reconcilable.[6] One line of authority adopts a test of causation requiring a causal link in the form of reliance.[7] Broadly speaking, this approach requires that conduct said to be misleading or deceptive must relevantly have been relied upon or operated to induce the plaintiff into action or inaction which has caused loss.[8] Conversely, the other line of authority has identified that the statutory causes of action do not necessitate reliance in order to establish causation, prognosticating the availability of an indirect causal mechanism absent of reliance.[9]

TPT Patrol v Myer ('*Myer*')[10] provides clarity on this debate. The Court was required to determine whether an indirect method of causation was sufficient to establish shareholder loss resulting from Myer's breaches of continuous disclosure obligations[11] and engagement in misleading or deceptive conduct.[12] Beach J adopted a model of 'market-based' causation which allows shareholder plaintiffs to establish causation in instances of non-disclosure or misleading or

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[4] Elise Bant and Jeannie Paterson, 'Statutory Causation in Cases of Misleading Conduct: Lessons from and for the Common Law' (2017) 24 *Torts Law Journal* 1, 2; James Argent, 'Requiring Proof of Individual Reliance to Establish Causation in Disclosure-Based Shareholder Class Actions: The Role of Principle and Policy' (2016) 34 *Companies and Securities Law Journal* 87, 87.

[5] Andrew Watson and Jacob Varghese, 'The Case for Market-Based Causation' (2009) 32(3) *UNSW Law Journal* 948, 949.

[6] Benjamin Saunders, 'Causation in Securities and Financial Product Disclosure Cases: An Analysis and Critique' (2019) 47(3) *Federal Law Review* 494, 495. See also *Re HIH Insurance Ltd (in liq)* (2016) 335 ALR 320, 345 [63] ('*HIH*').

[7] *Ford Motor Company of Australia Ltd v Arrowcrest Group Pty Ltd* (2003) 134 FCR 522 ('*Arrowcrest*'); *Digi-Tech (Aust) Ltd v Brand* [2004] NSWCA 58 ('*Digi-Tech*'); *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Market Ltd* (2008) 252 ALR 659 ('*Ingot*').

[8] See, eg, *Arrowcrest* (n 7) [126]; *Digi-Tech* (n 7) [156], [158]; *Ingot* (n 7) [13], [618].

[9] *Campbell v Backoffice Investments Pty Ltd* (2009) 257 ALR 610, 647 ('*Campbell*'); *Caason Investments Pty Ltd v Cao* (2015) 328 ALR 396, [93] ('*Caason*'); *Grant-Taylor v Babcock & Brown Ltd (in liq)* (2015) 322 ALR 723, [219] ('*Grant-Taylor*'); *HIH* (n 6) [123]. See also Saunders (n 6) 495.

[10] *TPT Patrol Pty Ltd v Myer Holdings Limited* [2019] FCA 1747 ('*Myer*').

[11] *Corporations Act* (n 3) s 674.

[12] Ibid s 1041H.

deceptive conduct which has caused the market price of shares to be artificially inflated.[13] Importantly, market-based causation does not require plaintiffs to demonstrate that they relied upon the company's misconduct.

In their article, Byrne and Legg analyse the *Myer* case with a focus on the ramifications of the decision and how it has both resolved some and produced other uncertainties for claimants.[14] Like Byrne and Legg, this paper also considers the *Myer* decision. However, while the ramifications of the decision are briefly discussed, this paper looks at *why* market-based causation was available as a matter of law. In answering this question, this paper will highlight the distinction between market-based causation and other traditional media of establishing causation for shareholder loss.

II STATUTORY FRAMEWORK

In determining the appropriate test for causation, the starting point is the applicable statute. Accordingly, attention should be given to provisions under which shareholder class actions are commonly brought and their respective causal requirements. In Australia, shareholder class actions are typically brought under two related but distinct provisions under the *Corporations Act*: breach of continuous disclosure obligations under s 674 and engagement in misleading or deceptive conduct under s 1041H.[15]

A *Continuous disclosure obligations: s 674*

Continuous disclosure obligations are maintained through a combination of securities exchange listing rules and statutory provisions.[16] Rule 3.1 of the ASX Listing Rules requires that a listed corporation immediately disclose market sensitive information to the ASX once they are aware of such information.[17] Rule 3.1 is provided statutory force through s 674 of the *Corporations Act*.[18] This section has been described as 'protective legislation', encouraging it to be

[13] Watson and Varghese (n 5) 950.
[14] Corey Byrne and Michael Legg, 'Market-Based Causation after TPT Patrol Pty Ltd v Myer Holdings Ltd' (2020) 37 *Companies and Securities Law Journal* 295.
[15] Michael Duffy, 'Causation in Australian Class Actions: Searching for an Efficient but Balanced Approach' (2019) 93(10) *Australian Law Journal* 833, 838.
[16] Olivia Dixon and Jennifer G. Hill, 'The Protection of Investors and the Compensation for their Losses: Australia' (Legal Studies Research Paper Series No 18/64, The University of Sydney Law School, October 2018) 17.
[17] ASX, *Listing Rules* (at 6 September 2020) r 3.1.
[18] *Corporations Act* (n 3) s 674.

construed in a manner beneficial to public interest.[19] The purpose of the continuous disclosure regime has been described as operating to:

> enhance the integrity and efficiency of Australian capital markets by ensuring that the market is fully informed. The timely disclosure of market sensitive information is essential to maintaining and increasing the confidence of investors in Australian markets, and to improving the accountability of company management.[20]

Correspondingly, through s 1317HA, claimants may recover damages for loss which 'resulted from' a failure to adhere to continuous disclosure requirements under s 674.[21] Thus, the requisite causal connection between a contravention of s 674 and the remedy for those adversely affected by that contravention is provided by the words 'resulted from'.[22] In *Adler v Australian Securities and Investments Commission*, Giles JA stated that:

> In my opinion, the words 'resulted from' in s 1317HA are words by which, in their natural meaning, only the damage which as a matter of fact was caused by the contravention can be the subject of an order for compensation… they should be given their ordinary meaning of requiring a causal connection between the damage and the contravening conduct…[23]

Accordingly, the term 'resulted from' encourages questions about causation and how a plaintiff may demonstrate that a company's breach of s 674 disclosure obligations resulted in their losses.[24] In addition to the s 674 requirement that information be complete, there is also the requirement under s 1041H that the information be accurate.[25]

B *Misleading or deceptive conduct: s 1041H*

Section 1041H of the *Corporations Act* proscribes engagement in misleading or deceptive conduct.[26] The related section 1041I requires a party to establish loss

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[19] Dixon and Hill (n 16) 17, citing *Exicom Pty Ltd v Futuris Corporation Ltd* (1995) 123 FLR 394, 397; *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332, [354] ('*JHINV*'); *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129, [32].
[20] *JHINV* (n 19) [355].
[21] *Corporations Act* (n 3) s 1317HA.
[22] *Masters v Lombe (liquidator): In the Matter of Babcock & Browne Limited (in liq)* [2019] FCA 1720, [346] ('*Masters*').
[23] *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 156 [709].
[24] See *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185, [712], [717].
[25] *Corporations Act* (n 3) s 1041H. See also Dixon and Hill (n 16) 22, citing *Jubilee Mines NL v Riley* [2009] WASCA 62, [55]; *ASIC v Newcrest Mining Ltd* [2014] FCA 698, [87].
[26] *Corporations Act* (n 3) s 1041H.

or damage 'by' conduct of another person in order to recover damages for misleading or deceptive conduct. The term 'by' and its causal requirements has been subject to substantial judicial analysis[27] and mirrors the causal test found previously in ss 52 and 82 of the *Trade Practices Act 1974* (Cth) ('TPA').[28] No material difference has been identified between these provisions.[29] In *Wardley Australia v Western Australia*,[30] the High Court articulated the causal requirements of the word 'by' as follows:

> The statutory cause of action arises when the plaintiff suffers loss or damage 'by' contravening conduct of another person. 'By' is a curious word to use. One might have expected 'by means of', 'by reason of', 'in consequence of' or 'as a result of'. But the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s 82(1) [of the TPA] should be understood as taking up the common law practical or common-sense concept of causation recently discussed by this court in *March v Stramare (E. & M. H.) Pty. Ltd.*, except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act.[31]

Therefore, the term 'by' expresses an undefined notion of causation that may embrace common sense concepts of causation but must ultimately yield to the primacy of the ordinary meaning of the statute.[32]

III ESTABLISHED METHODS OF DEMONSTRATING CAUSATION

Although several methods of causation exist in this context,[33] this paper will focus on two established methods within the causation taxonomy: reliance and the US fraud on the market doctrine. Reliance provides the traditional causal nexus between a defendant's misleading conduct and a plaintiff's subsequent loss,[34] while the US doctrine provides guidance to Australian practitioners on the use and limitations of economic theory in establishing causation in shareholder

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[27] James Argent (n 4) 102, citing *Henville v Walker* (2001) 206 CLR 459; [2001] HCA 52, [18]; *Digi-Tech* (n 7) [147]-[160]; *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 109 ALR 638, 640-2 ('*Janssen*').
[28] *Trade Practices Act 1974* (Cth) ss 52, 82 ('TPA'). See also *Myer* (n 10) 335 [1516]; Watson and Varghese (n 5) 954.
[29] Dixon and Hill (n 16) 24, citing *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* (2001) 117 FCR 23, [100].
[30] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.
[31] Ibid 525.
[32] *Myer* (n 10) 335 [1516].
[33] See generally Argent (n 4).
[34] Michael Legg and Madeleine Harkin, 'Judicial Recognition of Indirect Causation and Shareholder Class Actions' (2016) 44 *Australian Business Law Review* 429, 429.

class actions.[35] Both causal mechanisms are directly related to market-based causation. The role of reliance, as either a necessary or sufficient element in establishing causation, stands as a primary question on which the legal availability of market-based causation hinges. Additionally, the fraud on the market doctrine shares a common foundation with market-based causation, being that company misconduct may artificially affect the price of shares and that subsequent investors may suffer loss simply by purchasing those shares. However, as will be seen, the domestic applicability of the fraud on the market doctrine is limited as a result of its statutory context.

A *Reliance*

Courts have conventionally required proof of reliance in order to satisfy a causal link.[36] To establish reliance, a plaintiff must demonstrate that he or she detrimentally changed their position by doing or omitting to do some act, as a result of the defendant's conduct.[37] In the shareholder class action context, insistence on reliance necessitates causation as an individual question rather than a common one, as each individual shareholder must then establish that they relied on the misconduct.[38] Defendants may then provide lower settlement offers due to the inherent uncertainty of all members of a class being able to establish reliance individually. Furthermore, should the parties fail to settle, determining individual questions of causation for all members provides forensic difficulty for both the parties and the courts.[39] Notwithstanding these difficulties, there exists a strong line of authority advocating that reliance is a necessary element at some point in the causal chain in cases of misleading or deceptive conduct.

Initially, the case of *Janssen Cilag v Pfizer* ('*Janssen*')[40] concerning ss 52 and 82 of the TPA allowed a claim by a plaintiff who was not directly misled by the misconduct itself, but who suffered loss resulting from others relying upon the misconduct. In this case, Janssen was the subject of a competitor's misleading or deceptive advertising. By misrepresenting that Janssen's product was inferior, the

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[35] Argent (n 4) 95. See also *Myer* (n 10) 362 [1629].
[36] See, eg, *Digi-Tech* (n 7); *Ingot* (n 7). See also Ibid 90, citing Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (LexisNexis Butterworths, 4th ed, 2014) [10.10]; Michael Legg, John Emmerig and Georgina Westgarth, 'US Supreme Court Revises Fraud on the Market Presumption: Ramifications for Australian Shareholder Class Actions' (2015) 43 *Australian Business Law Review* 448.
[37] Bant and Paterson (n 4) 10.
[38] See Jonathan Beach, 'Class Actions: Some Causation Questions' (2011) 85 *Australian Law Journal* 579, 584.
[39] Watson and Varghese (n 5) 951.
[40] *Janssen* (n 27).

competitor led consumers away from Janssen's product to their own. After analysis of the forgoing case authorities and in upholding the plaintiff's claim, Lockhart J found that there is no general requirement that the applicant themselves relied upon the relevant conduct. Accordingly, 'applicants may claim compensation when the contravener's conduct caused *other* persons to act in a way that led to loss or damage to the applicant'.[41] This reasoning was subsequently cited and approved in *Stockland v Retail Design Group* ('*Stockland*').[42]

However, the case of *Ford Motor Company of Australia v Arrowcrest Group* ('*Arrowcrest*')[43] provided that *Janssen* was not authority for the proposition that causation may be established without reliance. Rather, *Janssen* should be interpreted to provide that a plaintiff may succeed in an action for damages by demonstrating that persons *other* than the plaintiff relied upon the conduct, resulting in the plaintiff's loss.[44] In this way, reliance remains a necessary element in order to establish causation, although it need not be the plaintiff's reliance.[45]

The decision in *Digi-Tech v Brand* ('*Digi-Tech*')[46] is consistent with the ratio in *Arrowcrest*. Digi-Tech had provided misleading forecasts to accountants who, assuming their accuracy, formulated an investment scheme. On the basis of this investment scheme, the plaintiff's purchased shares in Digi-Tech and suffered loss when the shares became worthless upon the subsequent collapse of the company. The crux of the plaintiff's argument was that if Digi-Tech had not produced the misleading forecasts, the products would not have been valued at their inflated amount and therefore, they would not have invested and would have suffered no loss. On this basis, it was submitted that Digi-Tech's misleading conduct caused the plaintiff to act in a manner which led to loss.[47] The Court distinguished the *Janssen* and *Stockland* cases from these facts. In those prior cases, the loss may be viewed as the natural consequence of the misleading or deceptive conduct.[48] For instance, in *Janssen*, the defendant's misleading

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[41] Ibid 642 (emphasis added).
[42] *Stockland (Constructors) Pty Ltd v Retail Design Group (International) Pty Ltd* [2003] NSWCA 84 ('*Stockland*').
[43] *Arrowcrest* (n 7).
[44] Ibid 538-9 [115], [118]-[119].
[45] Saunders (n 6) 504; Duffy (n 15) 843.
[46] *Digi-Tech* (n 7).
[47] Duffy (n 15) 844; *Digi-Tech* (n 7) [149].
[48] *Digi-Tech* (n 7) [155]. The Court identified the *Janssen* and *Stockland* cases as adhering to the following causal chain: (i) misleading conduct by the defendant; (ii) an innocent party is induced by the misleading conduct to act in some way; (iii) the innocent party's act, by its very nature, causes the plaintiff loss.

representations to the plaintiff's customers caused the customers to shift their business away from the plaintiff and to the defendant. The conduct of the plaintiff was entirely passive, forming no link in the causal chain.[49] Conversely, in *Digi-Tech*, the plaintiffs were actively induced to enter into the transaction and therefore their conduct *essentially* formed a link in the causal chain.[50] The Court found that in these circumstances, where the conduct of the plaintiff constitutes a necessary link in the causal chain, reliance upon the misrepresentation must be proved by the plaintiff.[51] This conclusion was justified by the observation that otherwise, representees could succeed in a claim even if they were aware or indifferent to the subject matter of the representation made.[52] The ratio in *Digi-Tech* has been cited as strong authority against adoption of any form of indirect causation.[53]

The Court in *Ingot Capital Investments v Macquarie Equity Capital Market* ('*Ingot*')[54] faced analogous questions to those in *Digi-Tech* and arrived at a similar conclusion. *Ingot* involved plaintiff investors in a company which subsequently went into liquidation. The plaintiffs brought proceedings against members of the due diligence committee and others who had been involved in the production of an allegedly misleading prospectus. The plaintiffs argued that in the absence of the misrepresentations maintained in the prospectus, the directors of the listed company would not have approved the allotment of shares and therefore the plaintiffs would not have suffered loss.[55] In this way, causation was argued without evidence that the plaintiffs themselves were misled. In determining this issue, the Court endorsed the distinction in *Digi-Tech* and proceeded to clarify that although the purpose of the statutory scheme was to ensure accurate disclosure of information, the causal requirement is defined through the word 'by'.[56] Accordingly, the wrongdoing is not simply issuance of misleading prospectuses. Rather, it is *misleading investors* by issuing misleading prospectuses.[57] Therefore, subject to the circumstances in *Janssen*, where an

[49] Ibid [156].
[50] Ibid.
[51] Ibid [159].
[52] Ibid [159]-[160]. The Court held that on this ground alone they would not uphold the plaintiff's argument.
[53] Duffy (n 15) 844.
[54] *Ingot* (n 7).
[55] The loss was suffered by the investors when the shares became worthless upon the collapse of the company.
[56] *Ingot* (n 7) [37].
[57] Ibid.

investor engages in decision-making regarding whether or not to invest, the investor must have relied on that misleading material in order to succeed.[58] Citing *Digi-Tech*, the Court again reinforces this point as a method to exclude persons who were aware of the false representations or did not read the disclosure document as potential claimants.[59]

In the shareholder class action context, the action of purchasing shares forms a link in the causal chain. Thus, under the ratio of both *Digi-Tech* and *Ingot*, shareholders would be required to individually demonstrate reliance on the misconduct to establish causation. Such a requirement would add significant forensic difficulty, undermining the ability for shareholders to receive an appropriate remedy. Furthermore, as identified by Byrne and Legg, few investors actually read each ASX release or attend all investor presentations.[60] Accordingly, the authors state that demonstrating reliance by shareholders on the particular misrepresentation made by the company would be extremely difficult, leading to a decrease in claims and in many cases causing proceedings to be commercially unviable to litigation funders.[61]

Foreshadowing the decision in *Myer*, two principal observations may be made regarding this line of authority. First, no cases concern causal requirements in the context of a failure to disclose, pursuant to s 674 of the *Corporations Act*. Second, these cases did not involve shareholder class actions. Nevertheless, defendants have advanced the forgoing cases as authority militating against advocated forms of indirect causation[62] and the need to establish reliance on misrepresentations has been affirmed in subsequent decisions.[63] However, this has not been immune to challenge by advocates of indirect causation. One avenue through which proponents of indirect causation have attempted to circumvent the ostensible necessity of reliance is to plead the US fraud on the market doctrine of causation.[64]

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[58] Ibid.
[59] Ibid [618]. See also Duffy (n 15) 845.
[60] Byrne and Legg (n 14) 297.
[61] Ibid.
[62] See *Myer* (n 10).
[63] See, eg, *Manday Investments Pty Ltd v Commonwealth Bank of Australia (No 3)* [2012] FCA 751, [28]; *De Bortoli Wines v HIH Insurance Ltd (in liq)* [2012] FCAFC 28, [63]; *Woodcroft-Brown v Timbercorp Securities Ltd* (2013) 96 ACSR 307, [227].
[64] Legg, Emmerig and Westgarth (n 36) 456, citing *Johnston v McGrath* (2008) 67 ACSR 169, [16]; *Camping Warehouse Australia Pty Ltd v Downer Edi Ltd* [2014] VSC 357, [35] ('*Camping Warehouse*'); *Caason Investments Pty Ltd v Cao* [2014] FCA 1410, [102]; *Bonham v Iluka Resources Limited* [2015] FCA 713, [71]. See also *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, [10]-[11] ('*Dawson*').

B *Fraud on the market*

1 *Fraud on the market in the US*

The fraud on the market doctrine allows for plaintiff investors to claim loss where misleading disclosures or non-disclosures of material information to the market have caused the price of shares to inflate beyond their true value.[65] This is achieved by the operation of a rebuttable presumption of reliance that the market for the relevant shares was efficient and that the plaintiffs traded in reliance on the integrity of the market price.[66]

A lynchpin to class certification in securities fraud proceedings,[67] this presumption was developed as a medium to resolve the requirements of s 10(b) of the *Securities Exchange Act of 1934*[68] and its implementing regulation Rule 10b-5.[69] These provisions operate to provide a general prohibition against misleading conduct.[70] Under s 10(b) proceedings, proof of reliance is required as the necessary causal nexus between a defendant company's alleged misconduct and a plaintiff investor's decision to trade.[71] This creates difficulty for class action certification. Rule 23(b)(3) under the *Federal Rules of Civil Procedure* requires that 'questions of law or fact common to class members predominate over any questions affecting only individual members in order to achieve class certification'.[72] Traditionally, reliance existed only as an individual question.[73]

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[65] Michael Duffy, 'Developments in United States Securities Class Actions: The Status of 'Fraud on the Market' Causation and Implications for Australia' (2011) 40 *Common Law World Review* 345, 347.
[66] Ibid, citing *Dawson* (n 64) [11].
[67] Joseph McLaughlin, *McLaughlin on Class Actions: Law and Practice* (Thomson West, 16th ed, 2019) ch 5:26.
[68] *Securities Exchange Act of 1934*, 15 USC §10(b) (1934). This legislation was enacted in response to the Great Depression and stock market crash of 1929.
[69] 17 CFR §240.10b-5 (2013).
[70] Legg, Emmerig and Westgarth (n 36) 449, citing Grundfest J, 'Disimplying Private Rights of Action under Federal Securities Laws: The Commission's Authority' (1994) 107 *Harvard Law Review* 961, 965; A Rose, 'Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5' (2008) 108 *Columbia Law Review* 1301, 1302.
[71] See, eg, *Basic Inc v Levinson*, 485 US 224, 243 (1988) ('*Basic*'); *Halliburton Co v Erica P John Fund Inc*, 134 S Ct 2398, 2418 (2014) ('*Halliburton*'); *Arkansas Teachers Ret. Sys. v Goldman Sachs Group Inc*, 879 F 3d 474, 482 (2nd Cir, 2018); *Lentell v Merill Lynch & Co Inc*, 396 F 3d 161, 172 (2nd Cir, 2005).
[72] *Federal Rules of Civil Procedure*, r 23(b)(3). Rule 23 sets out four prerequisites to any class action: (i) the class must be so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) class representatives must have claims that are typical of the class; (iv) class representatives must fairly and adequately protect the interests of the class: Duffy (n 65) 350 n 21.
[73] Legg, Emmerig and Westgarth (n 36) 449, citing Cox J, 'Understanding Causation in Private Securities Lawsuits: Building on Amgen' (2013) 66 *Vanderbilt Law Review* 1719, 1739-40.

Thus, class members would be required individually to demonstrate reliance,[74] causing individual issues to overwhelm common ones and preventing class certification.[75] The fraud on the market doctrine provides the solution to this problem.[76] Where an investor purchases a security at a price inflated by false or misleading information, in reasonable belief that the market price reflects available information, reliance may be presumed.[77] The corollary is that reliance then transforms from an individual question to a common one,[78] resolving the class certification difficulties provided by s 23(b)(3). Lower courts had accepted the doctrine with varying degrees of enthusiasm[79] before its formal adoption in *Basic Inc v Levinson* ('*Basic*').[80] Since then, the US Supreme Court has heard arguments taking aim at the fraud on the market doctrine.[81] Although *Basic* has remained good law,[82] the cogency of the 'efficient market hypothesis' ('EMH'), as the foundation upon which the presumption is based, has been questioned.[83]

The fraud on the market doctrine may be viewed as a form of judicial progeny derived from the EMH, being the theory that share prices fully reflect available information.[84] This relationship is elucidated by Blackmun J in *Basic*, stating that:

> The 'fraud on the market' theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.[85]

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[74] *Amgen Inc v Connecticut Retirement Plans & Trust Funds*, 133 S Ct 1184, 1209 (2013).
[75] *Basic* (n 71) 242; *Halliburton* (n 71) 2406-7.
[76] See *Basic* (n 71) 242.
[77] Ibid 245-6; McLaughlin (n 67) ch 5:26.
[78] Duffy (n 65) 350.
[79] Michael Duffy, 'Fraud on the Market: Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia' (2005) 29(3) *Melbourne University Law Review* 621, 632. See also *Affiliated Ute Citizens of Utah v United States*, 406 US 128 (1972); *Shapiro v Merrill Lynch, Pierce, Fenner & Smith Inc*, 495 F 2d 228 (2nd Cir, 1974); *Reeder v Mastercraft Electronics Corp*, 363 F Supp 574 (SDNY, 1973); *Blackie v Barrack*, 524 F 2d 891 (9th Cir, 1975); *Arthur Young & Co v United States District Court*, 549 F 2d 686 (9th Cir, 1977); *Panzirer v Wolf*, 663 F 2d 365 (2nd Cir, 1981).
[80] *Basic* (n 71).
[81] See, eg, *Halliburton* (n 71); *Dura Pharmaceuticals Inc v Broudo*, 123 US 1627 (2005).
[82] See Duffy (n 15) 857.
[83] Brief for Petitioners in *Halliburton* (n 71) 14-6.
[84] Duffy (n 79) 631, citing James Lorie and Mary Hamilton, *The Stock Market: Theories and Evidence* (Dow Jones Irwin, 1973) 70. See also Christopher Saari, 'The Efficient Market Hypothesis, Economic Theory and the Regulation of the Securities Industry' (1977) *Stanford Law Review* 1031, 1031.
[85] *Basic* (n 71) 241-2.

The EMH itself exists in a weak, semi-strong and strong form.[86] In its weakest form, the EMH provides that all past price information is incorporated into security prices, meaning that past prices cannot be used to predict future prices.[87] In its semi-strong form, the EMH asserts that prices will react quickly and in unbiased fashion to publicly available information.[88] The strong form of EMH asserts that even non-public information is reflected in share prices.[89] In relation to the ASX, the semi-strong form of the EMH has been relatively well accepted.[90] In such a market, misrepresentations or omissions by a defendant company may inflate the share price. Investors who purchase these shares between the time of the misinformation and its subsequent correction will have purchased those shares at an artificially inflated level.[91] When the misinformation is corrected, leading to a decline in share price, the purchaser's loss resulting from that misinformation will be realised.[92]

As mentioned, both the fraud on the market and market-based causation doctrines incorporate the premises that company misconduct may artificially affect the price of shares and that subsequent investors may suffer loss by purchasing those shares.[93] However, although contiguous, these two causal mechanisms serve different purposes within their respective statutory context, restricting the domestic applicability of the US approach.

2 *Fraud on the market in Australia*

The fraud on the market doctrine is a creature of its statutory context and is therefore not directly applicable in the Australian statutory scheme.[94] As discussed, in the US the doctrine provides a practical solution to class

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[86] Duffy (n 65) 349; Saari (n 84) 1041.
[87] Saari (n 84) 1041.
[88] Ibid 1044. Publicly available information includes corporate disclosure, such as a corporate earnings report or annual earnings announcements.
[89] Ibid 1050.
[90] Duffy (n 65) 349, citing M Blair and I Ramsay, 'Mandatory Corporate Disclosure Rules and Securities Regulation' in G Walker, B Fisse and I Ramsay (eds), *Securities Regulation in Australia and New Zealand* (Law Book Company, 2nd ed, 1998) 79. See also *Myer* (n 10) 155 [676].
[91] Duffy (n 65) 350.
[92] Ibid.
[93] See Byrne and Legg (n 14) 298.
[94] The fraud on the market doctrine has been described as existing purely to meet US class certification requirements of reliance under s 10(b) of the *Securities Exchange Act of 1934* (and the concomitant r 10b-5) and to circumvent the restrictions placed upon class certification under r 23(b)(3) of the *Federal Rules of Civil Procedure*: D Grave, K Adams and J Betts, *Class Actions in Australia* (Lawbook, 2nd ed, 2012); *Myer* (n 10) 339 [1535].

certification requirements of reliance and a predominance of common issues.[95] By contrast, in Australia the satisfaction of s 33C of the *Federal Court of Australia Act 1976* ('*FCA*')[96] will automatically advance a class action proceeding.[97] Accordingly, the operation of the fraud on the market doctrine as a solution to class certification is irrelevant under Australian class action certification laws.[98] Furthermore, the judicial interpretation of s 33C has gone so far as to permit group members with differences in their claims to join in a single class action proceeding regardless.[99] For instance, in the case of *Bright v Femcare Ltd*,[100] the respondents sought to have proceedings discontinued as a class action under s 33N of the *FCA*.[101] Commenting on this submission, Lindgren J stated:

> let it be assumed that in respect of the resolution of each woman's claim, two-thirds of the time to be spent will be devoted to issues unique to that claim and one-third to issues which are common to all claims. Is it still not preferable that the common issues be heard and determined once so as to be binding as between each claimant and the respondents rather than many times?[102]

This rhetorical question captures the practical approach to class action certification in Australia, with courts tentative to deny class certification solely due to the existence of individual or causal issues.[103] Moreover, the relevant causation tests within the *Corporations Act* do not necessarily require reliance, meaning the adoption of the US doctrine would operate to 'impermissibly rewrite the statutory causation tests'.[104] Accordingly, the domestic utility of the fraud on the market doctrine has been limited to assisting Australian courts in understanding alternative indirect causal mechanisms.[105]

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[95] *Basic* (n 71) 242.
[96] *Federal Court of Australia Act 1976* (Cth) s 33C ('*FCA*').
[97] Section 33C allows for a class action to be commenced where: (i) there are seven or more persons with claims against the same person; (ii) the claims of all those persons arise out of the same, similar or related circumstances; and (iii) the claims of all those persons give rise to a substantial common issue of law or fact.
[98] Argent (n 4) 95, citing Beach (n 38) 586.
[99] Legg, Emmerig and Westgarth (n 36) 459, citing *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, [28]; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179, [13]; *Guglielmin v Trescowthick (No 2)* (2005) 220 ALR 515, [48].
[100] *Bright v Femcare Ltd* (2002) 195 ALR 574 ('*Femcare*').
[101] *FCA* (n 96) s 33N. Section 33N provides a court discretion to terminate the class action proceeding where a court is satisfied it is in the interest of justice to do so.
[102] *Femcare* (n 100) [77].
[103] See, eg, *Hall v Australian Finance Direct Ltd (No 2)* [2007] VSC 233, [48]; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394, [129].
[104] *Myer* (n 10) 339 [1533].
[105] See, eg, *Grant-Taylor* (n 9) [9].

IV INDIRECT CAUSATION PRE-*MYER*

Despite the ostensible judicial authority requiring proof of reliance, Australian courts have entertained the availability of indirect causation. In *Australian Breeders Co-operative Society Ltd v Jones*,[106] causation was established in relation to a valuation of racehorses notwithstanding the fact that the Court explicitly identified that no evidence indicated that any investor relied on the valuation.[107] In the context of s 52 of the TPA, it was held that reliance is not the only manner in which causation may be demonstrated.[108] The High Court case of *Campbell v Backoffice Investments* ('*Campbell*')[109] drew similar conclusions in the context of the TPA and its state *Fair Trading Act* analogues,[110] holding that reliance is *not* a substitute for the essential question of causation and that it may be artificial to speak of reliance in determining what would have occurred if the true position had been known. [111] In the Full Federal Court case of *Caason Investments v Cao*,[112] Edelman J cited this reasoning from *Campbell* before identifying that market-based causation has reasonable prospects of success as a matter of law under s 729(1) of the *Corporations Act*.[113]

Perhaps the strongest support for market-based causation prior to *Myer* is found in the New South Wales Supreme Court case of *Re HIH Insurance Ltd (in liq)* ('*HIH*').[114] *HIH* concerned shareholders who acquired shares at an inflated price due to overstatements of operating profit in contravention of s 52 of the TPA. Brereton J stated that the relevant issue was 'one of causation, not one of reliance and reliance is not a substitute for the fundamental question of causation'.[115] His Honour found that indirect causation was available and that

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[106] *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488.
[107] Ibid 529-30.
[108] Ibid. This much is clearly correct, demonstrated by the forgoing analysis of *Janssen*.
[109] *Campbell* (n 9).
[110] Watson and Varghese (n 5) 954.
[111] *Campbell* (n 9) 647 (emphasis in original).
[112] *Caason* (n 9).
[113] Ibid [145]-[182], [187]. Edelman J provided four reasons why the causal requirement in s 729(1) does not require reliance: (i) reliance is not a substitute for the essential question of causation; (ii) s 729 permits liability in the case of omissions; (iii) there exists indirect forms of both reliance and market-based causation; and (iv) market-based causation has not been expressly rejected in any prior authority: at [155]-[158].
[114] *HIH* (n 6).
[115] Ibid [42].

direct reliance need not be established.[116] In attempting to reconcile the *Digi-Tech* and *Ingot* cases with this approach, Brereton J stated that the policy which informs those cases is to deny recovery where the misconduct did not deceive or mislead anyone.[117]His Honour noted the typical rationale for this approach, being that otherwise claimants who knew the true position or were indifferent to it could still recover.[118] Brereton J held that such circumstances may operate to break the chain of causation as a *novus actus interveniens*.[119] *HIH* was then distinguished from this hypothetical scenario, his Honour stating:

> This is not a case in which… no-one was misled: while the contravening conduct did not directly mislead the plaintiffs, it deceived the market (constituted by investors, informed by analysts and advisors) in which the shares traded and in which the plaintiffs acquired their shares. Investors who acquire their shares do so at the market price. In that way, they are induced to enter the transaction… on the terms on which they do by the state of the market.[120]

Although *HIH* was not a class action, no doctrinal reasons prevented the applicability of Brereton J's judgment in the context of a proceeding brought as a class action.[121] Thus, it was open to Beach J to consider market-based causation in the subsequent case of *Myer*.

V *Myer*

A *Facts*

On 11 September 2014, Myer CEO Bernie Brookes made representations regarding Myer's expected profit over the coming financial year to financial analysts and journalists. Brookes stated that it was Myer's expectation that its net profit after tax ('NPAT') in FY15 would be greater than the FY14 NPAT of $98.5 million ('2014 representation'). On 19 March 2015, Myer announced to the ASX

[116] Ibid [123]. However, the plaintiffs were still required to demonstrate, by evidence or inference, that the contravening conduct did inflate the market: at [123].
[117] Ibid [72].
[118] Ibid.
[119] Ibid.
[120] Ibid [73]. This approach was further adopted in circumstances where a plaintiff who purchased the shares in the inflated market then on-sold in the inflated market but at a time when the inflated component is less than at the time of purchase: *In re HIH Insurance Limited (In Liquidation) and Others* [2017] NSWSC 380, [14].
[121] See Duffy (n 15) 850.

that the expected FY15 NPAT was now between $75 to 80 million ('2015 correction'). Subsequently, Myer's share price declined materially.

TPT Patrol brought a shareholder class action against Myer representing all investors who purchased Myer shares between the 2014 representation and 2015 correction. It was alleged that in making the 2014 representation and failing to correct it, Myer engaged in misleading or deceptive conduct and breached its continuous disclosure obligations under the *Corporations Act*. Neither TPT Patrol nor any other group members claimed they had relied on the 2014 representation and instead relied solely on market-based causation.

Beach J found that at various points in time after the 2014 representation and before the 2015 correction, Myer had become aware that their FY15 NPAT would be materially less than their FY14 NPAT.[122] At these points, Myer's continuous disclosure obligations were engaged[123] and by not disclosing this opinion Myer engaged in misleading or deceptive conduct.[124] However, as the skepticism of the market had already factored in a lower earnings outlook, all demonstrations of loss failed.[125] The decline in Myer's share price was instead deemed a result of the fact that the 2015 correction provided a value below the market consensus, not the 2014 representation.[126] Notwithstanding this failure to demonstrate loss, and the resultant failure of the plaintiff's claim, Beach J adopted market-based causation as a matter of law.

B *Market-based causation*

1 *Reconciliation of prior authorities*

In determining the availability of market-based causation, Beach J was first required to reconcile previous authorities surrounding the role of reliance. Myer unsurprisingly relied upon the proposition said to derive from the *Arrowcrest*, *Digi-Tech* and *Ingot* cases that some form of reliance is necessary in a claim of misleading or deceptive conduct.[127] Further, Myer claimed that *Janssen* stands for the proposition that applicants may establish causation in cases where a third party relied upon the misrepresentation and that the third party's reliance caused

[122] *Myer* (n 10) 4 [16].
[123] *Corporations Act* (n 3) s 674.
[124] Ibid s 1041H; *Myer* (n 10) 4 [18].
[125] *Myer* (n 10) 5 [20].
[126] Ibid.
[127] See Ibid 341 [1546].

the applicant's loss.[128] Myer argued that *Janssen* does not support any 'wider proposition concerning the centrality of reliance to the causal requirements applicable to a claim of misleading and deceptive conduct'.[129]

However, Beach J opined that no authority provided by Myer related to s 674 and causational analysis concerning a breach of continuous disclosure obligations.[130] It was stated to be a 'category mistake to think that such analysis [of reliance in the context of misleading and deceptive conduct] could or should drive the analysis for normative causation concerning a breach of the continuous disclosure provisions'.[131] Further, regarding the *Janssen* category of cases, Beach J found that although reliance by the applicant or a third party may be sufficient to establish causation, it is a non-sequitur to argue that therefore reliance *must* be established in either form in *any* and *every* case.[132]

2 *Availability within the statute*

Beach J noted that his analysis 'starts and finishes with the statutory text, albeit to be considered in the context and in the light of its purpose'.[133] In this exercise, his Honour found no exclusion of market-based causation within the statutory wording of 'resulted from' and 'by' in the continuous disclosure and misleading or deceptive conduct provisions respectively.[134]As the statutory language does not necessitate reliance, it implies the inclusion of some form of indirect causation theory.[135] Further, Beach J held that the subject matter, scope and purpose of the statute is consistent with an indirect causation theory being 'embedded within the statutory language'.[136] His Honour found that the statute produced the availability of market-based causation as a causal mechanism in both positive and negative dimensions.[137] These dimensions will be explained in turn.

With respect to the negative dimension, his Honour identified that the relevant statutory text makes no reference to reliance or inducement and that to

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[128] Ibid 348-9 [1574].
[129] Ibid.
[130] Ibid 346 [1564].
[131] Ibid 364 [1641].
[132] Ibid 349 [1575] (emphasis in original).
[133] Ibid 364 [1640].
[134] Ibid 337 [1526].
[135] Ibid.
[136] Ibid.
[137] Ibid 364 [1642]. 'Positive' in the sense of what the text actually says and promotes, 'negative' in the sense of what the text does not say and does not require.

do so would be conceptually incoherent.[138] This is because 'common sense ends and philosophising begins' when attempting to demonstrate reliance on a pure omission.[139] Demonstrating reliance may be more appropriate in actions against defendant companies for misleading or deceptive conduct in the form of *positive* statements.[140] But proving reliance upon undisclosed information provides great conceptual difficulty[141] and attempts to fit a square peg through a round hole. This distinction fortifies his Honour's opinion that analysis regarding the centrality of reliance for causation in cases of misleading or deceptive conduct should not drive the analysis of causational requirements concerning a failure to disclose.[142] Reliance upon an omission has been further described as a 'strain of language'[143] and as being 'artificial'.[144]

With respect to the positive dimension, Beach J began by outlining the purpose of the continuous disclosure regime, namely, to achieve a well-informed market leading to greater investor confidence alongside enhancing the integrity and efficiency of capital markets through timely disclosure of market sensitive information.[145] A well-informed market of a particular company's shares is one which is trading upon material information of which the company is aware.[146] Failure to disclose information under s 674 would not be conducive of a well-informed market.[147] This may be in the form of an inflated share price resulting from the company withholding materially adverse information or a deflated share price resulting from a failure to disclose materially favorable

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[138] Ibid 364-5 [1643].
[139] Ibid.
[140] Duffy (n 15) 839.
[141] Ibid 838. Note that silence may still, in some circumstances, constitute misleading or deceptive conduct: See, eg, *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.
[142] *Myer* (n 10) 364 [1641].
[143] *Caason* (n 9) [156].
[144] See *Smith v Noss* [2006] NSWCA 37, [25], quoting *Smith v Maloney* (2005) 92 SASR 498, 514-5; *Campbell* (n 9) 647; *Camping Warehouse* (n 64) [47], [59]. Cf an intuitive approach to this seemingly paradoxical concept of reliance upon an omission by distinguishing between the 'but-for' and 'a factor' causal tests: See Elise Bant and Jeannie Paterson, 'Limitations on Defendant Liability for Misleading or Deceptive Conduct Under Statute: Some Insights from Negligent Misstatement' in Warren Swain, Kit Barker and Ross Grantham (eds), *The Law of Misstatements: 50 years on from Hedley Byrne v Heller* (Bloomsbury Publishing, 2015) 159. See also Elise Bant, 'A Road Map to Decision Causation in Misleading Conduct and Failure to Disclose Cases' (2020) 157 *Precedent* 4, 5; Bant and Paterson (n 4); Henry Cooney, 'Factual Causation in Cases of Market-Based Causation' (2021) 26 *Torts Law Journal* 51.
[145] *Myer* (n 10) 365 [1645], quoting *Grant-Taylor v Babcock & Brown Ltd (in liq)* (2016) 245 FCR 402, 418 [92] (emphasis added).
[146] *Myer* (n 10) 365 [1649].
[147] Ibid 365-6 [1650].

information.[148] In either case, the statute is concerned with imposing liability on the defendant for the consequences of a failure to disclose.[149] The result of a failure to disclose is that the market will be trading on an uninformed basis, leading to the likely consequence that the market price will be different to that of a fully informed market.[150] As such, investors will be consummating trades at prices different to the market price that would have prevailed.[151] Beach J held that should an investor purchase shares inflated or deflated in this way and suffer loss as a result, both the text and purpose of s 674 are consistent with imposing legal responsibility on the defendant company.[152]

Upon recognising the availability of market-based causation, Beach J identified three established causation categories. The first is direct causation, where loss is caused by the defendant inducing the plaintiff into some cause of action and which requires proof that the plaintiff relied upon the defendant's conduct.[153] This is the traditional reliance-based method of causation. The second category, which Beach J identified *Myer* fell within,[154] is active indirect causation (i.e., market-based causation), where:

> a respondent's misleading conduct induces some reaction in X, and the applicant would have acted differently but for that reaction by X. There is no additional requirement that the applicant was aware of or relied on the respondent's conduct. It is enough that X relied, and that the applicant would have acted differently but for the reliance by X.[155]

Thus, with the above hypothetical in mind, the facts of *Myer* provide the following causal chain: (i) Myer failed to disclose material information to the market in contravention of s 674 of the *Corporations Act*; (ii) this non-disclosure inflated the share price as it was relied upon by the market (comprised of thousands of investors); (iii) shareholders then purchased these shares at the inflated price and would not have done so if the initial required disclosure had been made; therefore (iv) any loss suffered by those shareholders from the

[148] Ibid.
[149] *Corporations Act* (n 3) s 1317HA; Ibid 366 [1651].
[150] *Myer* (n 10) 366 [1651].
[151] Ibid.
[152] Ibid 366 [1652].
[153] Ibid 367 [1657].
[154] Ibid 368 [1662]-[1663].
[155] Ibid 367 [1659].

subsequent correction may be said to have been caused by Myer's initial failure to disclose.[156]

Active indirect causation may also explain the failures of the plaintiffs in the *Digi-Tech* and *Ingot* cases. In *Digi-Tech*, the plaintiffs failed to show that the advisor on whom they had relied had himself relied on the misleading valuations.[157] Similarly, in *Ingot*, the plaintiffs failed to show that the board of the company had been misled.[158] Both cases failed on an evidential basis. Byrne and Legg conclude that by making this finding his Honour seems to implicitly accept the proposition in *Arrowcrest* that reliance on a misrepresentation by *someone* is necessary to prove causation in the case of misleading or deceptive conduct.[159] For the authors, this means that reliance by the market on any misconduct must be proven in order to establish market-based causation.[160] In the case of positive misrepresentations, this may be demonstrated by a change in share price.[161] However, it is difficult to conceptualise what evidence could be used to demonstrate that a market relied upon a failure to disclose. Although Byrne and Legg provide some additional potential solutions,[162] this question remains unanswered.

His Honour proceeded to identify two steps in establishing market-based causation in the context of s 674. First, it must be assessed whether there was share price inflation[163] caused by the s 674 contravention.[164] Then, it must be assessed whether the plaintiff investor purchased the shares when the share price was inflated.[165] However, the process required to satisfy these steps was left open as the applicant's failure to demonstrate loss prevented the need to go further.[166]

The third category is passive indirect causation, which does not apply to *Myer*, but does apply to the *Janssen* and *Stockland* cases. This is the scenario in which a respondent's misleading conduct induces some reaction in X and that reaction

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[156] Noting that Myer ultimately failed to demonstrate loss and therefore failed in their action.
[157] *Myer* (n 10) 367 [1659].
[158] Ibid.
[159] Byrne and Legg (n 14) 310.
[160] Ibid.
[161] Ibid.
[162] Ibid 310-1.
[163] In making this point, Beach J does not mention the slightly more peculiar instance of share price *deflation*. However, it may be assumed that in the case of shareholder loss caused by a company artificially deflating share price by withholding material favorable information, in contravention of statutory obligations, the first question to be assessed will be to ask whether there was share price *deflation*.
[164] *Myer* (n 10) 370 [1670].
[165] Ibid 370-1 [1671].
[166] Ibid.

by X *itself* causes loss to the plaintiff.[167] For instance, assume Alpha and Beta, two competing mining companies. Alpha produces an advertising campaign of which misrepresents that Beta employs slave labor on their mine sites. As a result, Beta's client, Dominic, transfers his business to Alpha. Here, Beta in no way relies on the misrepresentations made by Alpha. However, Dominic relied upon the misrepresentations and this reliance caused loss on the part of Beta. Although Beta formed no link in the causal chain, they may claim against Alpha. So, under passive indirect causation, a plaintiff may succeed in an action for damages by demonstrating that *someone else* had relied upon the misconduct, thus causing the plaintiff loss.

3 Myer *and Fraud on the market*

Beach J proceeded to distinguish the fraud on the market doctrine from market-based causation, primarily due to the differing role that reliance plays in each approach under the respective statutory provisions.[168] In *Basic*, the US Supreme Court established a rebuttable presumption of reliance in order to ensure that individual issues do not swamp common issues and thus provide access to class certification under the *Federal Rules of Civil Procedure*.[169] Roberts CJ in *Halliburton Co v Erica P John Fund Inc* ('*Halliburton*')[170] elucidated two constituent presumptions within *Basic*:

> First, if a plaintiff shows that the defendant's misrepresentation was public and material, and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price. Second, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock *in reliance on the defendant's representation*.[171]

Alongside demonstrating that the effect of *Basic* was the production of the rebuttable presumption, Roberts CJ provides that each member of the class must still establish reliance as it remains an element of the cause of action.[172] Conversely, Australian statutory tests do not necessitate reliance. Accordingly, unlike the fraud on the market doctrine, market-based causation does not

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[167] Ibid 367-8 [1660].
[168] Ibid 338-9 [1532]-[1535].
[169] *Federal Rules of Civil Procedure*, s 23(b)(3).
[170] *Halilburton* (n 71).
[171] Ibid 2413-4 (emphasis added).
[172] *Myer* (n 10) 362 [1626].

incorporate plaintiff reliance at all.[173] Moreover, satisfaction of s 33C of the *FCA* automatically advances a class action proceeding.[174] On this basis, Beach J dismissed the fraud on the market doctrine as 'irrelevant'.[175]

Notwithstanding this disjuncture, the EMH remains relevant to both causal mechanisms, albeit in differing capacities. Although Beach J found that the EMH did not provide a safe foundation for the adoption of the rebuttable presumption into Australian jurisprudence, it's utility to market-based causation is maintained as a forensic tool used in demonstrating loss;[176] should a market not be efficient in a given case, then *factually* market-based causation in *that* case may fail.[177] But this has no effect on the availability of market-based causation in Australia as a matter of law. Conversely, the EMH underpins the fraud on the market doctrine, which may be described as a presumption of law *grounded* in the EMH.[178] Watson and Varghese further demonstrate this point by elucidating how market-based causation can be accepted even if the EMH is not. The authors argue that in a non-efficient market, losses to investors through over-payments may still be the natural consequence of misinforming the market;[179] it is one thing to show that a market falls short of efficiency and another to demonstrate that it is wholly inefficient to the extent that information about the company has no bearing on its price or value whatsoever.[180] If a plaintiff can show that, as a matter of fact, the misinformation had an inflationary effect on the actual price of the security, they will have established market-based causation.[181] This is so notwithstanding the relevant market falling short of efficiency. Conversely, the fraud on the market doctrine will provide a rebuttable presumption of reliance only where the plaintiffs purchased shares where the market in question was efficient. Beach J clearly identifies the extent of the utility offered by the EMH to market-based causation, stating that:

> In invoking market-based causation in the present context, I do not need to adopt any part of the legal reasoning in *Basic Inc*. Further, whatever misconceived views have been expressed elsewhere denying the robustness of the efficient capital market

[173] Ibid 332 [1500].
[174] *FCA* (n 96) s 33C.
[175] *Myer* (n 10) 339 [1535].
[176] For a comprehensive discussion regarding loss in *Myer* see Byrne and Legg (n 14).
[177] Ibid.
[178] Duffy (n 79) 631.
[179] Watson and Varghese (n 5) 962.
[180] Ibid.
[181] Ibid.

> hypothesis, they hardly matter to the *availability*, as distinct from proof in an individual case, of market-based causation under Australian law.[182]

In this way, the EMH remains domestically relevant as a forensic tool in determining market-based causation on a case-by-case basis; sufficient evidence at trial demonstrating that the relevant market was not efficient therefore constitutes one avenue through which defendants may break the chain of causation. By contrast, under the fraud on the market doctrine the EMH forms the *foundation* on which the rebuttable presumption is made available as a matter of law.

4 *Breaking the chain of causation*

Beach J adopts four possible ways in which causation may be disproven.[183] First, as mentioned, the defendant may endeavor to show that the assumption of the EMH applying to the relevant shares was not made good.[184] Second, the defendant may demonstrate that the relevant non-disclosure did not affect the market price.[185] This was successfully demonstrated in *Myer*, as the market price for Myer's shares had already factored in an expected FY15 NPAT significantly less than the forecast made in the 2014 representation. Therefore, any corrective statement that should have been made under s 674 was likely to have had no material effect on the price of Myer's shares.[186] Third, the defendant may demonstrate that the individual applicant or group member would still have purchased the shares at the same price if they had been aware of the information which had not been disclosed.[187]

Fourth, the defendant may demonstrate that the individual applicant or group member actually knew the information which was not disclosed.[188] This avenue stands as the primary argument for the rejection of market-based causation. As seen in *Digi-Tech*[189] and *Ingot*,[190] courts have sought to prevent claims from

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[182] *Myer* (n 10) 363 [1630].
[183] *Myer* (n 10) 369-70 [1668]; Duffy (n 15) 854.
[184] *Myer* (n 10) 369-70 [1668].
[185] Ibid.
[186] Ibid 5 [20]. The significant fall in share price upon Myer's eventual 2015 correction was deemed to be a result of the fact that the 2015 correction was below *market consensus*, not because the value was below the 2014 representation.
[187] Ibid 369-70 [1668].
[188] Ibid.
[189] *Digi-Tech* (n 7) [159]-[160].
[190] *Ingot* (n 7) [618].

investors who knew or were indifferent to the true position of the company.[191] The ostensible solution was that any such knowledge or indifference from an investor would break the chain of causation as a *novus actus interveniens*.[192] However, in *Masters v Lombe*,[193] Foster J expresses his dissatisfaction with this solution, stating that:

> [H]is Honour [Brereton J in *HIH*] imported into the relevant enquiry the *novus actus* concept from tort, where as a matter of principle, the courts have placed the onus of proof on the defendant. Because he imported into the relevant inquiry the *novus actus* concept, Brereton J concluded that the onus of proving that there was a relevant break in the causal chain for the purposes of market-based causation theory was on the defendant.[194]

Beach J suggests that group members may demonstrate through a 'simple statutory declaration' or by 'ticking boxes in a verified questionnaire post judgment' that but for the contravention the investor would not have purchased the shares.[195] However, his Honour states that this exercise may be viewed as 'one part of an individual causal proof',[196] and as such it is not determinative on the matter, leaving Foster J's criticism unresolved. Byrne and Legg consider this lack of authoritative resolution significant.[197] The authors argue that a requirement on all shareholders to satisfy an evidentiary burden and provide evidence of their state of mind when purchasing shares may undermine the efficiencies that plaintiff firms and funders had hoped to obtain through market-based causation.[198]

Respectfully, this paper submits that such a requirement ought not to materially frustrate the efficiencies provided by market-based causation. The primary efficiency afforded by market-based causation, as Byrne and Legg accept, is to transform the issue of causation from an individual issue to a common issue without the need to show individual reliance on the misinformation.[199] Requiring group members to adduce some evidence as to their knowledge, whether in the form of a statutory declaration or otherwise, will

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[191] *HIH* (n 6) [72].
[192] Ibid; *Myer* (n 10) 338 [1529].
[193] *Masters* (n 22).
[194] Ibid [390].
[195] *Myer* (n 10) 370-1 [1671].
[196] Ibid.
[197] Byrne and Legg (n 14) 312.
[198] Ibid 312-3.
[199] Ibid 317.

not materially impede this efficacy and may instead operate to encourage counsel for the plaintiffs to engage in a more selective process when determining class members. Moreover, should the individual claimant retain this onus, Beach J provided that 'it would hardly be onerous or challenged in the vast majority of cases'[200] and does not negate the availability of market-based causation as a matter of law.[201]

Alternatively, the reasoning of Bant and Paterson may provide a novel solution to this problem. In the law of torts, causation is a term used to cover two distinct enquiries: factual causation and the scope of liability. Factual causation asks whether the misconduct bears an explanatory relation to the existence of an outcome that occurred,[202] usefully defined by Stapleton as a form of 'historical involvement'.[203] Superimposed on this inquiry is the scope of liability; should the defendant be held liable for the loss caused?[204] Although the defendant may have factually caused the harm, the extent of their responsibility is a separate question.[205] Here, the focus is on circumstances where the plaintiff was aware of the undisclosed information and which party should bear the onus of identifying this. The relevant question is not whether the defendant's misconduct, as a matter of history, led to the loss that occurred. That much is evident. Rather, it is an inquiry into whether there exist other reasons why the plaintiff should fail. This is a normative question, distinct from the 'logically anterior' question of factual causation.[206] Bant and Paterson argue that in cases of statutory liability such normative concepts should be determined through analysis of the language and purpose of the relevant statute, and should not be dictated by common law principles without proper justification.[207] The purpose of the continuous disclosure provisions is to produce a well-informed market, leading to greater investor confidence.[208] It is a remedial or protective legislation, encouraging a construction which gives the fullest relief to the investing public.[209] Therefore, to

[200] *Myer* (n 10) 370-1 [1671].
[201] Ibid.
[202] Bant and Paterson (n 4) 7.
[203] See, eg, Jane Stapleton, Cause-in-fact and Scope of Liability for Consequences' (2003) 119 *Law Quarterly Review* 388.
[204] Bant and Paterson (n 4) 7. See also Bant and Paterson (n 144) 165.
[205] Bant (n 144) 4.
[206] Bant and Paterson (n 4) 27.
[207] Ibid 27-8. See also *Caason* (n 9) 426-30 [159]-[182]. See further Henry Cooney, 'Misleading Conduct, Reliance and Market-Based Causation' (2021) 48(2) *University of Western Australia Law Review* 431.
[208] *Grant-Taylor* (n 145) 418 [92].
[209] Ibid [93].

promote this statutory purpose, it is arguable that the onus of proving actual knowledge on the part of the plaintiff should rest on the defendant, as is the case under the US fraud on the market approach.[210] Nevertheless, this issue remains open for judicial determination.

VI CONCLUSION

This paper has sought to clarify the availability of market-based causation, its operation within the relevant statutory framework[211] and its differences from other traditional causal mechanisms. In *Myer*, Beach J accepted that market-based causation is available within the statutory language of ss 674 and 1041H of the *Corporations Act* and elucidated its effect within the shareholder class action framework. Primarily, market-based causation allows for questions of causation to be a common issue determinable for a class of individuals, creating a more fertile ground for plaintiff investors to bring class actions as a result of company misconduct without needing to demonstrate direct reliance. Further, Beach J defines the traditional reliance mechanism of causation as a sufficient but not necessary condition to establish causation. Although no loss was identified, meaning that Beach J's comments regarding market-based causation are obiter, it is unlikely that a court would depart form this reasoning at first instance.[212]

Byrne and Legg identify two primary questions left unresolved by *Myer*. First, how may it be proven that the market relied on undisclosed information?[213] Second, whether the claimant will bear the onus of proving group members' knowledge and in such case, what will constitute sufficient evidentiary proof?[214] Subsequent courts will determine these issues. Nevertheless, the decision in *Myer* bolsters the ability for shareholders to obtain justice and restitution through the shareholder class action framework. The ability for shareholders to establish causation when company misconduct has distorted the share price and without needing to demonstrate direct reliance provides improved access to statutory remedies and should further deter corporate wrongdoing. In establishing this

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[210] The operation of the rebuttable presumption requires the defendant company to produce evidence that the shareholders knew of the misconduct or undisclosed information: See *Basic* (n 69). See also Byrne and Legg (n 14) 312.

[211] *Corporations Act* (n 3) ss 674, 1041H.

[212] Byrne and Legg (n 14) 309. This is because the obiter dicta may be classified as 'seriously considered': at 309, citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [134]; *Narain v Euroasia (Pacific) Pty Ltd* (2009) 26 VR 387, [44].

[213] Byrne and Legg (n 14) 310.

[214] Ibid 313.

causal mechanism, Beach J adds much needed clarity to the basic causal requirements for statutory liability in the context of the *Corporations Act*, albeit limited by the failure in this case to identify any loss suffered by the applicants. Nonetheless, the perfect should not stand in the way of the good; *Myer* has cleared the important first hurdle of providing market-based causation as a matter of law. Answers to other outstanding questions must be deferred to another day.