

# COMPANY AND SECURITIES LAW JOURNAL

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## ARTICLES

### **Causation, loss and damage: Challenges for the new shareholder class action** – *Damian Grave, Leah Watterson and Helen Mould*

Although the number of shareholder class actions on foot in Australia has proliferated in recent years, none has proceeded to judgment as yet. It remains uncertain what tests Australian courts will apply in determining the questions of causation, loss and damage arising in these claims. Two issues in particular loom large. First, how are shareholders to prove that the corporation's contravening conduct caused loss and damage? Secondly, how are shareholders to establish the type of loss and damage suffered and then calculate it? This article examines differing theories about the appropriate test for causation, reviews the measures of loss and damage typically claimed and explores how expert evidence may be called upon to assist courts in assessing issues of quantification of loss. .... 483

### **Theory and reality in insolvency law: Some contradictions in Australia** – *Helen Anderson*

Insolvency law in Australia provides a bundle of diverse entitlements for different cohorts of creditors. In this article, the Commissioner of Taxation, unsecured trade creditors and employees are chosen for examination. It is arguable that the allocation of these entitlements does not correspond with the needs of the creditors in question for legislative protection. The article begins by looking at the theoretical explanations of three forms of ex post creditor protection mechanisms – the collective recovery regime, lifting of the corporate veil on directors, and encouragement towards corporate reorganisation. This section includes a discussion of Jackson's creditors' bargain model, which seeks to explain the collective bargaining regime by asking what creditors would have agreed to accept in insolvency had they been asked at the time of making their contracts. It then examines the reality of the three forms of ex post legislative protection which play an important role in safeguarding the entitlements of the unsecured creditor cohorts chosen. Finally, the article analyses the reality against the theory and asks: what would each of these creditor groups have bargained for if they were given a chance, prior to their dealings with the company, and what legislative scheme would maximise the welfare of each creditor group as a whole? ..... 506

### **Corporate sector whistleblowing in Australia: Ethics and corporate culture** – *Janine Pascoe*

Whistleblowing provisions were introduced into the *Corporations Act 2001* (Cth) to protect officers, employees and company contractors who make disclosures regarding contraventions or possible contraventions of the Corporations Act. The implementation of whistleblowing programs has also become accepted as an aspect of good corporate governance. The ASX Corporate Governance Council's revised *Good Corporate Governance Principles and Recommendations*, issued in August 2007, recommend that

listed companies have a code of conduct and suggest that codes identify measures that companies can take to encourage the reporting of unlawful or unethical behaviour, including how they protect whistleblowers. To be effective, legal and regulatory initiatives require a shift in corporate culture and ethical values. There are many obstacles to be overcome in developing a corporate mindset that is conducive to disclosure of wrongdoing within the company. There is little empirical evidence in Australia about corporate sector whistleblowing; much of what is known comes from the public sector. The few cases which have received prominence indicate that adverse treatment of whistleblowers is an ongoing and systemic problem. The research literature on business ethics and legal compliance in the United States post *Sarbanes-Oxley* helps explain the difficulties in encouraging companies to develop an ethical culture conducive to whistleblowing. .... 524

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    - <sup>2</sup> Hayton, n 1, p 286.
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