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ARTICLES

CAUSATION IN AUSTRALIAN SECURITIES CLASS ACTIONS: SEARCHING FOR AN EFFICIENT BUT BALANCED APPROACH

Michael Duffy

The correct analysis of proof of causation of loss in securities market nondisclosure class actions (referred to as “shareholder class actions”) is hotly disputed. As well as being a matter of doctrinal significance, it has substantial relevance to the practicalities and costs of prosecuting these actions and to the related issue of court efficiency and case management. Traditionally, reliance-based causation is required but market-based causation was considered arguable at an interlocutory stage by the Full Federal Court in a class action. It has also been accepted by the NSW Supreme Court in a non-class action. It is suggested that final judicial acceptance of market-based causation in a class action at trial could be balanced by safeguards that would allow rebuttal of causation in some situations and some limiting of the class. This may allay somewhat the fears of those who see market based causation as contrary to policy and principle. 833

THINKING MACHINES AND SMILEY FACES

Justice Stephen Estcourt AM and Ms Karen Marr

The reality of autonomous thinking machines for use in judicial decision-making is already upon us. The potential exists now for artificial intelligence tools to be provided to the judiciary to aid in the setting of parole periods, the granting or refusing of bail and in sentencing decisions. However, algorithms are designed by humans, and they reflect the biases of those who develop them, as well as the biases buried deep in the data on which they are built. Society needs to make decisions now as to what outcomes it wants algorithms to prioritise. Educating the public to be sceptical about algorithm results, ensuring transparency and auditing algorithms for bias, as well as establishing regulatory frameworks by legislation, will all go towards ensuring that some legal outcomes can be as fairly determined by a machine as by a judge. But will that simply give us another competent judge? 855

THE NATURE OF RECAPTION

James O’Hara

Recaption is a remedy empowering individuals to vindicate their possessory rights in property, and obtain redress without recourse to a court. The remedy touches closely to the everyday person’s conception of their fundamental rights. There are everyday applications. The puppy escapes into a neighbour’s backyard. A child has their bicycle taken by the school bully. An art collector has their irreplaceable masterpieces stolen. A backyard game of football results in the ball being inadvertently kicked over the neighbour’s fence. In each of those situations, the ordinary person would vehemently defend their respective rights to recapture the property. But the state of the law is unclear. This article aims to bring some clarity to the nature of recaption, the precise preconditions necessary for its exercise, and some commercial applications of the remedy. 866

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