



Australian Government

1. The Australian Government respectfully makes the following submission for the purposes of the Study on Extraterritorial Private Rights of Action (File No. 4-617) being conducted by the Securities and Exchange Commission (the Commission) pursuant to Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). It does so because Section 929Y of the Dodd-Frank Act invites the Commission to consider taking a step backwards in so far as accepted principles of international law and comity are concerned by recommending that significant extraterritorial scope be given to private rights of action under the antifraud provisions of the Securities Exchange Act 1934 (the Exchange Act).
2. In making this submission, the Australian Government reiterates the policy concerns that it expressed in the *amicus* brief which it submitted to the Supreme Court in *Morrison v National Australia Bank*¹. A copy of the brief is attached to this submission (and is referred to as *Australia Amicus Brief*).

Morrison v National Australia Bank

3. Section 929Y of the Dodd-Frank Act has its genesis in the decision delivered by the Supreme Court in *Morrison* on 24 June, 2010, less than 30 days before the Act went into effect.
4. *Morrison* concerned the application of Section 10(b) of the Exchange Act and Securities and Exchange Commission Rule 10b-5 to distant transactions involving foreign parties. *Morrison* was an example of what has been termed a “foreign-cubed” securities class action, because it involved foreign (Australian) plaintiffs suing a foreign (Australian) securities issuer for violations of U.S. securities law based on securities transactions that took place on a foreign (Australian) exchange. The only factual nexus with the United States was that the allegedly false and misleading statements made to the Australian shareholders concerned the financial position of the National Australia Bank’s subsidiary operating in the U.S. mortgage market and were derived from information provided by officers of the subsidiary.
5. Prior to *Morrison*, the prevalence of “foreign-cubed” securities class actions had become a source of serious concern to foreign governments engaged in regulating their own capital markets. This concern was manifest in the *amicus* briefs submitted

¹ 130 S.Ct. 2869.

to the Supreme Court in *Morrison* by Australia, the Republic of France and the United Kingdom.

6. The Australian Government submitted its *amicus* brief in *Morrison* because the case, with its very limited nexus to the United States, demonstrated how private legal actions in the United States seeking to impose liability on foreign companies for actions outside the United States that allegedly injured foreign investors risked undermining the legal and regulatory regimes established by foreign governments. The Australian legal system provides full access for persons (both Australian residents and non-residents) to pursue their rights and to recover compensation for securities law violations of the type alleged by the plaintiffs in *Morrison*. This system embodies sovereign policy choices made by successive governments with regard to the proper vindication of rights and redress of wrongs.²
7. Justice Scalia delivered the opinion for the Supreme Court in its unanimous *Morrison* decision. The Court recognised that other countries had made sovereign choices which differed to those made in the United States:

[T]he regulation of other countries *often* differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters.³

The Court referred to the concerns expressed in the *amicus* briefs of Australia, the Republic of France and the United Kingdom about “the interference with foreign securities regulation that application of § 10(b) abroad would produce”.⁴

8. Having found “no affirmative indication”⁵ that Section 10(b) of the Exchange Act applied extraterritorially, Justice Scalia stated the Court’s view that:

[T]he focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.⁶

In the Court’s view, Section 10(b) applied only to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities”.⁷ The Court considered that this “transactional test” would also meet the concerns expressed by Australia, the Republic of France and the United Kingdom, as well as other *amici*,

² See *Australia Amicus Brief*, pp 15-23.

³ 130 S.Ct. 2869, at 2885 (emphasis added).

⁴ *Ibid*, at 2886.

⁵ *Ibid*, at 2883.

⁶ *Ibid*, at 2884.

⁷ *Ibid*, at 2884.

regarding the risk of interference with foreign securities regulation posed by the extraterritorial application of Section 10(b).⁸

Dodd-Frank Act

9. In response to *Morrison*, Section 929P of the Dodd-Frank Act amended Section 27 of the Exchange Act to establish the jurisdiction of U.S. district courts over an action brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of the Exchange Act, including Section 10(b), involving:
- conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
 - conduct occurring outside the United States that has a foreseeable substantial effect within the United States.
10. Section 929Y of the Dodd-Frank Act requires the Commission to solicit public comment and conduct a study to determine whether the scope of private rights of action under the antifraud provisions of the Exchange Act should be extended to cases involving the type of conduct specified in Section 929P. Section 929Y identifies a number of matters that the Commission's study is to consider, including the implications for international comity of extending the scope of private actions to such conduct.

The Commission's Request for Comments

11. The Commission, in its Request for Comments of 25 October 2010, asked commenters to address a range of matters, including:
- If you disagree with extending the test set forth in Section 929P to private plaintiffs, what other test would you propose?⁹
 - What would be the implications on international comity and international relations of allowing private plaintiffs to pursue claims under the antifraud provisions of the Exchange Act in cases of transnational securities fraud?¹⁰
 - Discuss the costs and benefits of allowing private plaintiffs to pursue claims under the antifraud provisions of the Exchange Act in cases of transnational

⁸ Ibid, at 2886.

⁹ Request for Comments, p. 6.

¹⁰ Ibid, p. 7.

securities fraud, including the costs and benefits to domestic and international financial systems and securities markets.¹¹

- What remedies outside of the United States would be available to U.S. investors who purchase or sell shares on a foreign stock exchange, or on a non-exchange trading platform or other alternative trading system outside of the United States, if their securities fraud claims cannot be brought in U.S. courts?¹²

Comments by the Australian Government

12. The Australian Government will address the matters identified in the preceding paragraph.

Extending the Section 929P test to private plaintiffs

13. The Australian Government opposes extending the scope of private rights of action under the antifraud provisions of the Exchange Act to cases involving the type of conduct specified in Section 929P of the Dodd-Frank Act. Taking such a step would essentially reinstate the position as it was prior to *Morrison* and generate a new wave of the “foreign-cubed” securities class actions to which the Australian Government objects, as a matter of international law and comity. As noted above, the Australian Government set out its significant legal and regulatory concerns with that position in its *amicus* brief in *Morrison*.¹³

14. There are sound policy reasons, identified by the Supreme Court and reiterated in recent District Court decisions in the Second Circuit¹⁴, for avoiding such a position. For example, reintroducing the effects and conduct tests for private rights of action would risk a return to the complexity and unpredictability in the application of the tests that the Supreme Court highlighted in *Morrison*.¹⁵ District Judge Victor Marrero observed in *Cornwell et al. v. Credit Suisse Group et al.* that the Supreme Court in *Morrison*:

... sought to strike at the complexity, vagueness, inconsistency and unpredictability engendered by the conduct and effect analysis in many cases ... and [to] replace it with a new bright-line transactional rule embodying the clarity, simplicity, certainty and consistency that the tests from the Second and other circuits lacked.¹⁶

¹¹ Ibid, p. 7.

¹² Ibid, p. 7.

¹³ See *Australia Amicus Brief*, pp 23-27.

¹⁴ See *Cornwell et al. v. Credit Suisse Group et al.*, 2010 WL 3069597 (S.D.N.Y.), July 27, 2010 and *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Company et al.*, 2010 WL 3860397 (S.D.N.Y.), October 4, 2010.

¹⁵ 130 S.Ct 2869, at 2878.

¹⁶ *Cornwell*, at p. 3.

15. The Australian Government considers that the Supreme Court's transactional test laid down in *Morrison* is soundly based, adapted for consistent application and provides certainty for both foreign firms and investors, as well as lower U.S. federal courts. It ensures that Section 10(b) of the Exchange Act is not applied expansively for private actions, which brings the attendant risk of interference with securities regulation and compensation rules in other countries such as Australia.
16. Of particular concern to the Australian Government is that extraterritorial actions by private plaintiffs would almost always be actions for money damages that would necessarily be subject to a jury trial, even though they involved complex business facts that occurred in a distant locale where the jurors had no personal experience. By contrast, extraterritorial civil actions authorised under Section 929P of the Dodd-Frank Act would often be brought by the Commission seeking an injunction, or an injunction coupled with the ancillary equitable remedy of disgorgement; and, as such, these equitable cases would be tried only by a Federal Judge.¹⁷

Implications for international comity

17. The Australian Government respectfully urges that the Commission give appropriate weight to the fundamental principle of international law that each state is equally entitled to prescribe laws and to adjudicate claims regarding persons within its territory. Where jurisdiction is claimed by more than one state, any state exercising extraterritorial jurisdiction should act in a way that is compatible with the exercise of jurisdiction by other states. Overly broad assertions of extraterritorial jurisdiction may infringe upon the rights of another state to regulate matters that take place within its territory. International law recognizes that the various grounds on which jurisdiction may be asserted are:

... parts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states.¹⁸

18. The broad concept of antifraud securities legislation originated in the United States in 1933-34, but has gradually become an important part of the public law in numerous other jurisdictions. Some of the earlier cases on the application of Section

¹⁷ This representation is based on the advice that the Australian Government has received from its U.S. counsel of the applicability of the 7th Amendment to the U.S. Constitution. A jury trial would only occur where the Commission also seeks in addition, as it sometimes does, the imposition of a civil penalty or fine. See, e.g., *S.E.C. v. Kopsky*, 537 F.Supp.2d 1023 (E.D. Mo. 2008). The Australian Government assumes that the Commission, if exercising its Section 929P jurisdiction in a *Morrison*-like case, would be less likely to seek a civil penalty or fine where a foreign regulator (such as ASIC) was also exercising its jurisdiction against the foreign party for the same transaction. See paragraph 23.

¹⁸ Sir Robert Jennings & Sir Arthur Watts, eds, *Oppenheim's International Law*, at 457-8 (9th ed. 1992).

10(b) of the Exchange Act apparently assumed that foreign securities fraud laws were weak and, as such, there would be no conflict or comity concerns flowing from such enforcement in the United States.¹⁹ In delivering the judgment of the Second Circuit Court of Appeals in *IIT, an International Investment Trust v Cornfeld*, Judge Friendly stated:

The primary interest of Luxembourg is in the righting of a wrong done to an entity created by it. If our anti-fraud laws are stricter than Luxembourg's, that country will surely not be offended by their application.²⁰

19. Judge Friendly's statement in 1980 made an assumption about the position of Luxembourg on comity, which may or may not have been correct at the time he made it. However, as the *amicus* briefs of Australia, the Republic of France and the United Kingdom in *Morrison* demonstrated, such an assumption cannot be made today. Comity must require that the sovereign choices made by other countries are respected. Many countries, including Australia, have enacted comprehensive securities regulatory regimes that provide legal remedies for parties injured by securities fraud.
20. The Australian Government also emphasises that the application of the principle of comity is not limited to the substantive regulatory regimes of other countries. Comity also requires recognition that other countries have put in place legal systems that deliberately differ in important respects to the system adopted in the United States, which offers advantages to plaintiffs that are not generally available in other countries. One such advantage is the rule on litigation costs in the United States, which requires each side to bear its own costs—rather than requiring the losing party to reimburse some or all of the successful party's litigation costs. Another advantage is that punitive damages are available in the United States, but not elsewhere. Also, while the United States guarantees jury trials for damage claims even in complex business cases, other jurisdictions (including Australia) generally provide that such cases are to be tried by judges alone. Further, the “opt out” class action provided for in the United States has not been favoured by other countries (although, as explained in paragraph 36, it has been adopted by Australia, but with a “loser pays” litigation cost rule).

¹⁹ During this same earlier era, the Third Circuit Court of Appeals suggested that Congress would not have wanted the United States “to become a ‘Barbary Coast’ as it were, harboring international securities ‘pirates’”. *S.E.C v Kasser* (1977) 548 F.2d 109 at 116. Thirty years later in *Morrison*, Justice Scalia obliquely recalled this “Barbary Coast” concern, stating that:

While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets. 130 S.Ct. 2869, at 2886

²⁰ 619 F.2d 909 at 921.

21. The Australian Government considers that the principle of comity should preclude the Commission from recommending a return to the position that existed prior to *Morrison* in relation to private actions based on an expansive application of Section 10(b) of the Exchange Act.
22. The Australian Government also underlines the importance of another development in the decades following Judge Friendly’s statement: close international cooperation between securities regulators. The Australian Securities and Investments Commission (ASIC) recognises the importance of such cooperation. It has put in place and is continuing to develop effective bilateral and multilateral arrangements for enhanced enforcement and comprehensive supervisory cooperation. ASIC and the Commission have forged a strong bilateral relationship, which has been formalised in various arrangements that have facilitated regular exchanges of information and successful enforcement outcomes.²¹
23. The Australian Government acknowledges that the Dodd-Frank Act amended the antifraud provisions of the Exchange Act to allow the Commission to bring actions which involve the application of either a “conduct” or an “effects” test. The Australian Government is confident that, in considering whether to bring any such action, the Commission will give full weight to comity. The Commission is well-placed to do so given its collaboration with foreign regulators, including ASIC.²² History makes clear that considerations of comity have not prevented foreign private plaintiffs from bringing the kinds of “foreign-cubed” actions to which the Australian Government objects.²³

²¹ Memorandum of understanding concerning consultation, cooperation and the exchange of information related to the enforcement of securities laws (August 2008); Memorandum of understanding concerning consultation, cooperation and the exchange of information related to market oversight and the supervision of financial services firms (August 2008); Mutual recognition arrangement between the United States Securities and Exchange Commission and the Australian Securities and Investments Commission, together with the Australian Minister for Superannuation and Corporate Law (August 2008); Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws (October 1993).

²² See *Australia Amicus Brief*, pp 10-11.

²³ The Supreme Court recognised in *Credit Suisse Sec. (USA) LLC v Billing* [127 S. Ct. 2383 (2007)] that private litigation in different forums under different bodies of law can have a potentially disruptive effect on a detailed system of securities regulation. *Credit Suisse* concerned the issue of whether private plaintiffs were to be permitted to bring antitrust class actions challenging conduct by the defendants that was subject to detailed regulation by the SEC. In delivering the opinion of the Court, Justice Breyer emphasized the risk of uncertainty and conflict between (i) the “nuanced” regulatory judgments required under the securities statutes and (ii) the judgments by “different nonexpert judges and . . . juries” in antitrust actions in many different courts. [127 S. Ct. 2383, at 2395] While Justice Breyer was dealing with potential domestic conflicts involving private antitrust cases, his point applies perhaps even more strongly where the risk of uncertainty and conflict would be between (i) the application of Australian securities laws by ASIC and Australian

Costs of expanding the scope of private rights of action

24. If private plaintiffs are permitted to pursue claims under the antifraud provisions of the Exchange Act in cases of alleged transnational securities fraud in the same circumstances as the Commission is currently allowed under Section 929P of the Dodd-Frank Act, this will inevitably lead to higher compliance costs for Australian firms with even a minimal nexus that might establish personal jurisdiction in the United States. These firms would need to make provision for the risk of litigation arising in the United States in relation to matters that, without the extraterritorial extension of the Exchange Act under discussion in this consultation, would be subject to foreign regulation and compliance, but without the additional cost and uncertainty of expensive private litigation before U.S. courts.
25. Practical litigation risks for these firms would be increased by virtue of the plaintiff-favouring rules that other jurisdictions have declined to adopt—including the rule on litigation costs and the availability of punitive damages in the United States (see paragraph 20). Defending litigation of the type contemplated in Section 929Y before U.S. courts would necessarily impose very substantial additional costs on foreign firms and require the commitment of significant staff resources in terms of:
- the additional cost of instructing U.S. lawyers;
 - the very extensive costs related to discovery under the U.S. Federal Rules of Civil Procedure (including especially document searches and depositions);
 - travel costs for personnel to the United States to meet with lawyers, to participate in discovery or mediation proceedings, or to give evidence in court; and
 - the opportunity-cost represented by senior staff of a firm having to spend time discussing factual matters with lawyers, agreeing litigation strategy, preparing for and giving depositions, and preparing for proceedings.
26. There is also the possibility of proceedings in the foreign forum in respect of the same factual matrix running in parallel with proceedings in the United States based on the extraterritorial extension of the Exchange Act. Such a circumstance would maximise legal uncertainty and necessarily generate greatly increased legal costs.
27. From a practical perspective, it is also likely that the location of the securities transaction in question that produces the alleged loss will be the place where

judges and (ii) damages actions brought under U.S. law by Australian investors before U.S. judges and juries sitting thousands of miles away. See *Australia Amicus Brief*, pp 36-37.

witnesses and other evidence of the transaction are most readily available at the least cost for the parties.

28. In light of these arguments, the Australian Government considers that private disputes over foreign securities purchases or sales should be resolved by the courts of the most relevant foreign jurisdiction (i.e. the jurisdiction where the securities transaction took place) under its own law.

Availability of remedies in other countries for U.S. investors

29. The Commission has asked about the availability of remedies for U.S. investors, who purchase or sell shares on foreign exchanges, if their security fraud claims relating to that activity could not be brought in U.S. courts under U.S. law. The Australian Government believes that this question involves fundamental issues of comity, and that such suits should be brought in the courts of the country where the transaction occurred, under the laws of that country. Therefore, the Australian Government welcomes the opportunity to outline below the remedies that would be available in Australia to U.S. investors who had been injured as a result of buying or selling shares on an Australian exchange.
30. Australian governments have long recognized that fair and efficient capital markets are important to the economy and to the confidence of Australian companies and investors in particular. To this end, these governments have accorded a high priority to maintaining robust regulatory regimes. Australia's current regulatory regime is based on the Corporations Act 2001 (the Corporations Act) and the Australian Securities and Investments Commission Act 2001 (the ASIC Act).
31. Part 7.10 of the Corporations Act contains prohibitions relating to insider trading, market manipulations and various other types of fraudulent and misleading conduct. Prohibited conduct includes:
- market manipulation (s.1041A);
 - false trading and market rigging (creating a false or misleading appearance of active trading etc) (s.1041B);
 - artificially maintaining etc trading price (s.1041C);
 - dissemination of information about illegal transactions (s.1041D);
 - false or misleading statements (s.1041E);
 - inducing persons to deal (s.1041F);

- dishonest conduct (s.1042G); and
 - misleading or deceptive conduct (s.1041H).
32. With the exception of misleading or deceptive conduct (s.1041H), for which there is civil liability only, these types of conduct are all criminal offences and breaches are subject to both criminal prosecutions and civil actions.
33. The Corporations Act also provides statutory backing for the continuous disclosure requirements imposed on listed entities by securities markets (s.674); and enables courts to order compensation in relation to breaches (s.1317HA).
34. ASIC has the power to investigate infringements, and institute criminal prosecutions for violations, of the Corporations Act and the ASIC Act.²⁴ It can approach the court to obtain a wide range of civil remedies.²⁵ Importantly, ASIC has the right to institute civil proceedings on behalf of victims of a securities fraud.²⁶ To date, ASIC has brought at least ten securities class actions on behalf of victims.
35. Moreover, regardless of whether ASIC acts, private class actions are available in Australia. The Australian Government observes that class actions have been provided for by statute in Australia for almost 20 years and a robust securities class action practice has evolved. This development has been facilitated by the creation of independent funding organizations that enable class plaintiffs to deal with the “loser pays” cost rules that exist in Australia. The statutory basis for class actions was provided with the 1992 enactment of Part IVA (Representative proceedings) of the Federal Court of Australia Act 1976.
36. As in the United States, the class action regime is an “opt out” system. Unlike the U.S. system, no initial class certification is required in Australia. The burden is thus placed on the respondent to show that it is not appropriate for the claims of the plaintiffs to be pursued by way of the class action.²⁷ Another difference is that, although Rule 23(b)(3) of the U.S. Federal Rules of Civil Procedure requires that the issues common to the class must “predominate” over the individual issues, the Australian statute requires only that there exist a “substantial common issue of law or fact”.²⁸ Class actions are subject to the normal Australian rule that the losing party must pay the winning party’s reasonable litigation costs.

²⁴ ASIC Act, s. 49; Corporations Act, s. 1315.

²⁵ Corporations Act, s. 1043L(6) and s. 1325.

²⁶ ASIC Act, s. 50.

²⁷ Federal Court of Australia Act 1976 (Federal Court Act), s.33N. The absence of initial classification in Australia is balanced by the presence of a “loser pays” cost rule.

²⁸ Federal Court Act, s. 33C(1).

37. The Australian Government regards the issues that are raised by the Commission's study as very important not only for Australia, but also for those raising capital in international markets outside the United States. Therefore, the Australian Government would be very glad to respond to inquiries from the Commission on its submission.

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No. 08-1191

IN THE
Supreme Court of the United States

ROBERT MORRISON, *et al.*,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

**BRIEF OF THE GOVERNMENT OF
THE COMMONWEALTH OF AUSTRALIA
AS *AMICUS CURIAE* IN SUPPORT OF THE
DEFENDANTS-APPELLEES**

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QUESTION PRESENTED

Whether, under the principles of international law and comity previously determined by this Court, a class of foreign investors is permitted to maintain claims for recovery of damages under a judicially-created implied right of action based on § 10(b) of the Securities Exchange Act of 1934, when the challenged disclosures were made by the foreign issuer in the foreign market where (i) most of the class members resided and (ii) the foreign government applied detailed disclosure rules to issuers and their agents.

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tion can interfere with national sovereignty and result in legal uncertainty and costs for actors involved in global trading and investment.

The Australian Government believes that those who commit securities fraud should be held accountable. Australia provides full access to an independent judiciary as the means for its nationals and others subject to its jurisdiction to pursue their legal rights and to recover compensation for securities law violations and other legal wrongs.

The Australian Government believes that the broad assertion of jurisdiction to provide civil remedies in national courts for violations allegedly perpetrated by foreign issuers of securities against foreign investors in foreign places is inconsistent with international law and may interfere with the regimes that Australia and other nations have established to regulate companies and protect investors in their markets. The Australian Government is concerned that an expansive exercise of jurisdiction by one nation can undermine the policy choices made by other sovereign nations with regard to the proper vindication of rights and redress of wrongs.

This case provides the Court with an opportunity to address the use of § 10(b) of the Securities Exchange Act of 1934 and Securities Exchange Commission (“SEC”) Rule 10b-5 for private actions seeking to impose liability on foreign companies for actions outside the United States that allegedly injured foreign plaintiff-investors, so as to minimize potential conflicts with other nations. As capital markets expand globally and more nations establish detailed regulatory systems (as Australia has done), the need to place appropriate limits on such “foreign-

cubed” actions in the U.S. courts has become more evident.

The issues here reflect a broader and recurring concern of the Australian Government and other governments about overly broad exercises of extra-territorial jurisdiction sometimes undertaken by U.S. courts.²

SUMMARY OF ARGUMENT

This is a case brought in New York against an Australian company by Australian investors who acquired securities in that company on an Australian securities exchange (and not any U.S. market) based on allegedly false and misleading statements made by that company in Australia. The allegations in the case fail to establish factually the minimum nexus that international law requires to exist between a state and the matter over which it seeks to exercise jurisdiction.

The statements by the National Australia Bank (“NAB”) in Australia were made under a detailed securities regulatory regime prescribed by the Australian Parliament and enforced by the Australian Securities and Investments Commission (“ASIC”).

² See Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner in *Jose Francisco Sosa v. Humberto Alvarez-Machain*, No-03-339 (also including the representations of the Government of South Africa printed in the Appendix to this brief); and Brief of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents in the present case No. 08-1191. The Government of Australia has also filed amicus curiae briefs in the U.S. Courts of Appeals in recent years on issues concerning the overly broad exercise of extraterritorial jurisdiction.

That regulatory regime includes a number of specific provisions authorizing private civil actions in federal and state courts for misleading disclosures and other infringements of the securities laws. Australia, unlike most countries outside of North America, has authorized opt-out class actions by statute and a significant number of class actions alleging infringements of the securities laws have been brought.

The present case is one of many in which foreign plaintiffs seek to bring essentially foreign disputes before U.S. courts in order to be able to utilize procedures and rules that tend to favor plaintiffs. Such a case gave rise to this Court's decision in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) ("*Empagran*"). This Court has repeatedly recognized the risk of jurisdictional conflicts among sovereign nations flowing from extraterritorial litigation brought in U.S. courts, and emphasized the importance of international comity as a way of minimizing such conflicts. It has also mandated that a U.S. statute will not be construed so as to violate international law, if any other construction is possible. If these considerations normally control when a court is construing a statute, they must also control when a court is construing a judicially-created right of action that has been implied from a statute.

Regardless of whether this case is resolved as a matter of "subject matter jurisdiction" or the "plaintiff's entitlement to relief" test employed by this Court in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and advocated by the Solicitor General in this case,³

³ Amicus Brief for the United States on Petition for Writ of Certiorari, *Robert Morrison, et al, v. Nat'l Australia Bank Ltd.*, No. 08-1191 (2009) ("*U.S. Brief*") at 8-9.

the result is the same: the alleged facts do not provide a sufficient basis to support a private suit under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 because disclosure (or non-disclosure) of information occurred in a regulated foreign market where the foreign issuer's securities were bought by the foreign investor-plaintiffs.

This brief deals with private suits under § 10(b) and Rule 10b-5 and does not address issues relating to enforcement action by the SEC under those provisions.

ARGUMENT

I. AUSTRALIA'S COMPREHENSIVE SYSTEM OF SECURITIES MARKET REGULATION REFLECTS THE PUBLIC POLICY CHOICES MADE BY AUSTRALIAN GOVERNMENTS

A. Current System Founded On a Robust Legislative Regime Contained In the Corporations Act 2001 and the Australian Securities and Investments Commission Act 2001

Australian governments have long recognized that fair and efficient capital markets are important to the economy and to Australian companies and investors in particular. To this end, they have accorded a high priority to maintaining robust regulatory regimes.

In the early 1980's, cooperative arrangements were established by the federal government with the states and territories for the regulation of companies and securities. Under those arrangements, state and territory agencies acted as delegates of a national agency in administering uniform state and territory

laws which included information disclosure and investor protection rules. The arrangements were reconfigured in the early 1990's so that a single federal agency, the Australian Securities Commission, assumed responsibility for administration of such laws.⁴ It was renamed the Australian Securities and Investments Commission ("ASIC") in 1998, when its responsibilities were extended to include consumer protection in relation to financial services generally.

In 2001, the regulatory regime was placed on a new legislative footing when the Australian Parliament enacted the Corporations Act 2001⁵ and the Australian Securities and Investments Commission Act 2001 ("ASIC Act").⁶ The Corporations Act included provisions regulating companies and securities markets in similar terms to the former state and territory laws which it replaced.

Chapter 7 of the Corporations Act begins with a broad mandate to make markets transparent and fair to investors.⁷ This mandate is implemented by detailed provisions regulating: (i) financial markets; (ii) clearance and settlement facilities; (iii) providers

⁴ Established under the Australian Securities Commission Act 1989. Act No. 90 of 1989.

⁵ Act No. 50 of 2001.

⁶ Act No. 51 of 2001. As a result, corporate creation and governance are a federal function in Australia, unlike the position in the United States. This has been achieved through an extended constitutional dialogue between the Australian federal government and the governments of the states and territories that comprise the Commonwealth of Australia. The states also have the constitutional ability to regulate certain corporations: see *NSW v. The Commonwealth* (1990) 169 CLR 482. (Austl.)

⁷ Chapter 7, § 760A.

of financial services; and (iv) the issue, sale and purchase of financial products.⁸

Part 7.10 contains prohibitions relating to insider trading, market manipulations and various other types of fraudulent and misleading conduct. Prohibited conduct includes:

- Market manipulation (§1041A);
- False trading and market rigging (creating a false or misleading appearance of active trading etc (§1041B); artificially maintaining etc trading price (§1041C));
- Dissemination of information about illegal transactions (§1041D);
- False or misleading statements (§1041E);
- Inducing persons to deal (§1041F);
- Dishonest conduct (§1042G); and
- Misleading or deceptive conduct (§1041H).

With the exception of misleading or deceptive conduct (§1041H), for which there is civil liability only, these are all criminal offenses and breaches are subject to both criminal prosecutions and civil actions.

The civil actions and their availability to plaintiffs of the kind represented in this case are discussed in Section III of this Brief.

⁸ Chapter 7, Parts 7.2, 7.3, 7.6, 7.7 and 7.9. Disclosure in relation to offers of securities is dealt with in Chapter 6D.

B. Effective Regulatory Oversight and Enforcement Is Provided by the Australian Securities and Investments Commission

The ASIC Act imposes on ASIC a number of broad duties, including to “promote the confident and informed participation of investors and consumers in the financial system...”.⁹

ASIC has the power to compel production of evidence, undertake non-public oral examinations, apply for court orders to compel production, and conduct a range of administrative proceedings.

ASIC’s remedial powers are broad and diverse. For example, it can change the conditions of those holding securities licenses, give directions to the operators of licensed markets, and issue orders stopping offers of securities and other financial products.¹⁰ It can go to court to obtain a wide range of civil remedies.¹¹ ASIC also has the power to investigate infringements, and institute criminal prosecutions for violations, of the Corporations Act and the ASIC Act.¹² About 20% of ASIC’s 1817 employees are engaged in enforcement activities.

Finally, under § 50 of the ASIC Act, ASIC has the important right to institute civil proceedings on behalf of victims of a securities fraud. As a former ASIC Deputy Chairman has explained, “Where ASIC exercises its powers under §50, shareholders reap the advantages from the representation of a single, spe-

⁹ ASIC Act, §1(2).

¹⁰ Corporations Act, §§ 914A, 794D, 1020E and 739.

¹¹ Corporations Act, §§ 1043L(6) and 1325.

¹² ASIC Act, §49; Corporations Act, §1315.

cialized body, with economies of scale and vast experience in securities fraud.”¹³

C. Australia Cooperates Internationally in the Regulation of Securities Markets, Both Multilaterally and Bilaterally

ASIC has long recognized the importance of close cooperation with securities regulators in other countries. It has put in place and is continuing to develop effective bilateral and multilateral arrangements for enhanced enforcement and comprehensive supervisory cooperation.

ASIC has extensive information gathering and information sharing powers (including with overseas regulators). ASIC can and has conducted surveillance with an overseas regulator where both regulators are dealing with breaches of their own laws. ASIC is a participant in the International Organization of Securities Commissions (“IOSCO”) and a signatory of the IOSCO 2002 Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.¹⁴ It has a strong commitment to, and a strong record of, timely and effective agency-to-agency cooperation.

¹³ Jeremy Cooper, “Corporate wrongdoing: ASIC’s enforcement role,” Melbourne, December 2, 2005, at 10, *available at* [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ICAC2005_speech_021205.pdf/\\$file/ICAC2005_speech_021205.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ICAC2005_speech_021205.pdf/$file/ICAC2005_speech_021205.pdf).

¹⁴ *Available at* www.sec.gov/about/offices/oia/oia_bilateral/iosco.pdf.

D. There Is a Strong Cooperative Relationship Between ASIC and the SEC in Information Exchange and Enforcement

ASIC has had a sustained commitment to bilateral cooperation with the United States. The SEC has acknowledged that it and ASIC “have developed a close partnership on enforcement and regulatory issues.”¹⁵ This cooperative relationship has been formalized in various arrangements since 1993, which have facilitated regular exchanges of information and successful enforcement outcomes. By way of example, a successful action was taken recently in Australia against a U.S.-based entity (which operated in Australia) for misleading and deceptive conduct.¹⁶

In August 2008, the SEC and ASIC entered into a Mutual Recognition Arrangement which provides a framework for considering regulatory exemptions that would permit U.S. and Australian stock exchanges and broker-dealers to operate in both jurisdictions, without the need to be separately regulated by those jurisdictions in all respects.¹⁷ It is under-

¹⁵ Press Release, *SEC Chairman Cox, Prime Minister Rudd Meet Amid U.S.-Mutual Recognition Talks*, (March 29, 2008) at <http://www.sec.gov/news/press/2008/2008-52.htm>

¹⁶ See Press Release, Australian Securities and Investments Commission, *Supreme Court Issues Final Order on Cyclone Magnetic Engines*, (August 4, 2009), at <http://www.asic.gov.au/asic/asic.nsf/byheadline/09-134AD+Supreme+Court+issues+final+orders+on+Cyclone+Magnetic+Engines?openDocument>.

¹⁷ Press Release, SEC, *Australian Authorities Sign Mutual Recognition Agreement*, (August 25, 2008), at <http://www.sec.gov/news/press/2008/2008-182.htm>

pinned by mutual recognition of the significant investor protection provided under both Australian and U.S. laws, and enhanced enforcement and supervisory cooperation arrangements.

E. The Extraterritorial Jurisdictional Scope of Australia’s Legislative Regime Is Expressly Provided For

The market misconduct provisions in Part 7.10 of the Corporations Act apply to certain acts or omissions outside of Australia, but only when they are tied to conduct and effects in Australia. These include:

- manipulating a financial market *in Australia*;
- false trading on a financial market *in Australia*;
- dissemination of information about illegal transactions on a financial market *in Australia*; and
- making materially false or misleading statements that are likely to have the effect of increasing, reducing or maintaining the prices on a financial market *in Australia*.¹⁸

The ASIC Act also has provisions that reflect an Australia-focused approach to extraterritoriality. Section 12AC(1) extends various of the Act’s prohibitions to conduct engaged in outside of Australia by: “(a) bodies corporate incorporated or carrying on business within Australia; or (b) Australian citizens; or (c) persons ordinarily resident within Australia.”

Thus, the Corporations Act and the ASIC Act differ from the approach taken by the U.S. Congress in the

¹⁸ See Corporations Act, §§1041B, 1041C, 1041D, 1041E; see especially §1041E(1)(b)(iii).

Securities Exchange Act of 1934, which was silent on the issue of extraterritorial application.

F. The Differences that Exist Between Australia and the United States on Securities Regulation Issues Generally Represent Public Policy Choices on Which Different Sovereigns May Reasonably Differ

When Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934, it was engaged in a pioneering exercise in market regulation at a time when securities markets were far less global than they are today. Congress spelled out general principles and prohibitions, while leaving detailed determinations to be made by the SEC and the federal courts.

Later in the century, Australia established a comprehensive and highly detailed legislative regime reflecting a series of different sovereign choices. By way of example, the Australian Parliament has enacted criminal prohibitions for a wide range of specific wrongs, while the United States has tended to rely on broad antifraud provisions to prosecute the narrower range of securities misconduct that would sometimes be treated as criminal. Australia's legislation also specifies when injured parties are permitted to bring civil actions, while the U.S. approach (exemplified by § 10(b)) has been to permit such policy decisions to be fashioned by the courts.

II. THE NATIONAL AUSTRALIA BANK IS SUBJECT TO AUSTRALIA'S COMPREHENSIVE SYSTEM OF SECURITIES MARKET REGULATION, WHICH IS BASED UPON A SECURITIES ISSUER HAVING AN APPROPRIATE NEXUS TO AUSTRALIA

A. The National Australia Bank Is Regulated Under the Corporations Act and the ASIC Act

As an Australian company issuing securities in Australia, NAB is fully subject to regulation by ASIC under the regime described in Section I of this Brief. It is required to file annual and semiannual financial reports with ASIC under the Corporations Act.¹⁹ It is also required by the Corporations Act to meet a continuous disclosure obligation in relation to the Australian Securities Exchange, where its shares are traded.²⁰

B. Actions and Statements of the National Australia Bank

On July 5, 2001, NAB announced a write-down of \$A888 million of the balance sheet value of the mortgage servicing rights ("MSRs") held by its U.S. subsidiary HomeSide Lending Inc ("HomeSide").²¹ NAB attributed the write-down to: unprecedented refinancing of mortgages; interest rate volatility; and

¹⁹ See, e.g., §§285, 292, 295, 302, 319-320.

²⁰ See §674.

²¹ In July 2001, \$A888 million was equivalent to US\$450 million.

market changes caused by issuance of new accounting standards.²²

A second, larger write-down of approximately \$A3.05 billion was announced on September 3, 2001.²³ In its media release, NAB attributed the write-down to three causes—the recently discovered mistaken interest rate assumption used by HomeSide in valuing MSRs (\$A755 million); continuing unprecedented uncertainty and turbulence in the U.S. mortgage servicing market (\$A1.436 billion); and write-off of goodwill (\$A858 million).²⁴

These and other subsequent public announcements were made in Australia. They attracted a great deal of attention in Australia because NAB is one of the country's largest publicly traded corporations and a high proportion of its shares are owned by Australians.

C. Public Statements From the ASIC Chairman on the National Australia Bank's Prompt Response to the Decline in HomeSide's Financial Position

Two days after NAB had issued its September 3, 2001 media release announcing the further write-

²² Press Release, *National Announces HomeSide Provision*, NAB media release (July 5, 2001), at <http://www.nabgroup.com/0,,33523,00.html>.

²³ Press Release, *National Foreshadows Homeside Provision*, NAB media release (September 3, 2001), available at <http://www.nabgroup.com/0,,33529,00.html>.

²⁴ In September 2001, \$A755 million was equivalent to US\$400 million and \$A1.436 billion was equivalent to US\$760 million. \$A858 million was equivalent to US\$590 million at the historical exchange rate applicable at the time HomeSide was acquired by NAB.

down, the then ASIC Chairman, David Knott, made comments (reported in *The Australian Financial Review*) that NAB had responded promptly in disclosing the consequences of the decline in HomeSide's financial position to the market.²⁵ It is clear from Mr. Knott's comments that ASIC was satisfied with how NAB was handling the situation.

While ASIC did not take action vis-a-vis the NAB write-downs, shortly thereafter it successfully brought two civil penalty actions against other entities for breaches of the continuous disclosure obligations under the Corporations Act, where inadequate disclosure to the market had resulted in a significant fall in the market value of the shares of the relevant entities.²⁶

III. AUSTRALIA PROVIDES APPROPRIATE CIVIL REMEDIES FOR PLAINTIFFS THAT HAVE SUFFERED LOSS OR DAMAGE FROM VIOLATIONS OF SECURITIES LAWS UNDER SPECIFIC PROVISIONS OF THE CORPORATIONS ACT AND THE ASIC ACT

A. There Is a Clear Statutory Basis for Private Actions in Australia Relating to Securities Violations

As noted, Chapter 7 of the Corporations Act provides a considerable range of civil remedies for

²⁵ J. Breusch and M. Mellish, "ASIC praises NAB for quick disclosure" *The Australian Financial Review*, September 5, 2001 at 40.

²⁶ *ASIC v Southcorp* [2003] FCA 1369, (2003) 130 FCR 406; *ASIC v Chemeq Ltd* [2006] FCA 936, (2006) 234 ALR 511. (Austl.)

investors injured by particular infringements caused by issuers, licensed participants and others. Civil remedies that may apply to a claim of the type alleged in this case are found in Part 7.10. In that Part, §1041I makes available private civil actions for those injured by: (i) false and misleading conduct (§ 1041E); (ii) improperly inducing someone to deal (§ 1041F); (iii) dishonest conduct (§1041G); or (iv) misleading or deceptive conduct (§1041H).

A contravention of the continuous disclosure requirements in Chapter 6CA of the Corporations Act that are applicable to listed entities may also give rise to civil damages. By §674, such entities are required to comply with the continuous disclosure requirements in the listing rules of the financial markets on which their securities are traded (in NAB's case the Australian Securities Exchange). Section 1317HA empowers a court to order the payment of compensation for damages suffered as a result of a contravention of § 674.

The ASIC Act also provides a private civil action in § 12GF for those injured by: (i) unconscionable conduct (§§ 12CA-CC); (ii) misleading or deceptive conduct (§ 12DA); or (iii) false or misleading representations (§ 12DB).

Civil actions under the Corporations Act and the ASIC Act can be brought in a federal court or the courts of an Australian state or territory having jurisdiction over the defendant(s). Appellate review is available in each jurisdiction.

B. Class Actions Are Available in Australia and Such Actions Have Been Brought by Shareholders

Class actions have been provided for by statute in Australia for almost 20 years and a robust securities class action practice has evolved. The practical importance of securities class actions was emphasized in a paper presented at the 2009 Annual Legal Convention of the Law Council of Australia:

Australia is one of the few (but increasing number of) jurisdictions outside of the United States to adopt a legislative regime for the grouping of claims... *Class actions have been described as something of a hallmark of the Australian litigation landscape.*²⁷

The statutory basis for class actions in Australia was provided with the 1992 enactment of Part IVA (Representative proceedings) of the Federal Court of Australia Act 1976.²⁸ In Parliament, the then Attorney-General explained the purposes of the class action regime in the following terms:

[To] give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action....

[T]o deal efficiently with the situation where the damages sought by each claimant are large

²⁷ D. Grave and R. Maloney, “Securities Law Class Actions: Recent Developments in Australia and the United States” (September 18, 2009) (“Grave & Maloney”) § 2.1 (emphasis added) (footnote omitted).

²⁸ The amendment was provided for by the Federal Court of Australia Amendment Act 1991. Act No. 181 of 1991.

enough to justify individual actions and a large number of persons wish to sue the respondent.²⁹

As in the United States, the class action regime is an “opt out” system³⁰—which “generally increases the size of class actions by placing the onus of withdrawal on the individual members so that those who are inactive or not aware of the proceedings are included”.³¹

Senior ASIC officials have also welcomed the creation of this type of action. In 2005, ASIC’s Deputy Chairman explained that “[t]he increase in shareholder vigilance, coupled with the emergence of shareholder class actions, means that ASIC is better able to focus on its surveillance and enforcement functions while shareholders play a proactive role in protecting their interests....”³²

The Australian class action process differs from the U.S. model in certain significant ways. *First*, no initial class certification is required in Australia. The burden is thus placed on the respondent to show that it is not appropriate for the claims of the plaintiffs to be pursued by way of the class action.³³ *Secondly*, Rule 23(b)(3) of the U.S. Federal Rules of Civil Proce-

²⁹ Michael Duffy MP, Att’y Gen., Fed. Ct. of Austl. Amend. B. 1991, Second Reading Speech, quoted in the Hansard of the House of Representatives (November 14, 1991).

³⁰ Federal Court Act, §33J.

³¹ M.J. Lecky, *Shareholder Class Actions in Australia—The Perfect Storm?* 31 UNSW LAW J. 669 at 693-694 (2008).

³² Jeremy Cooper, “Corporate Wrongdoing: ASIC’s Enforcement Role” (supra n.13 at 11, 15).

³³ Federal Court Act, §33N. But the absence of initial classification in Australia is balanced by the presence of a “loser pays” cost rule.

dures requires that the issues common to the class must “predominate” over the individual issues, while the Australian statute requires only that there exist a “substantial common issue of law or fact.”³⁴ *Thirdly*, unlike the position in the United States,³⁵ there is no doctrine of “fraud on the market” accepted in Australian law. Each shareholder plaintiff must be able to demonstrate a link between the conduct complained of, and the loss suffered, before a right to compensation will arise. *Fourthly*, external funding support is very important because Australia, like most other countries outside the United States, has the so-called “English” (or “loser pays”) litigation costs rule.³⁶

In 2006, the High Court of Australia affirmed that external funding is legally permissible in Australia.³⁷ External funding organizations may fund all or part of the plaintiffs’ litigation costs in return for a share of any judgment or settlement. The availability of external funding appears to have contributed to the growth of securities class actions in recent years.³⁸

³⁴ Section 33C(1) of the Federal Court Act and §33C(1) of the Supreme Court Act 1986 (Vict.) (Austl.); *see also* Grave & Maloney (*supra* n [26] at 2.1(b)).

³⁵ *Basic Inc v. Levinson*, 485 U.S. 224 at 244 (1988).

³⁶ *Milne v. Att’y Gen. (Tas)*, (1956) 95 CLR 460 (Austl.); *Oshlack v Richmond River Council* (1998) 193 CLR 72 (Austl.)

³⁷ *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386 (Austl.)

³⁸ *See* Charles River Associates, “Recent Trends in Australian Securities Class Actions” (Dec 2009) *available at* http://www.crai.com/uploadedFiles/Publications/FinancialMarkets_Insights_1209.pdf. According to this report, one securities class action case was filed each year in 1999-2002 and 2005, and two cases were filed each year in 2003 and 2004. Thereafter, three cases

Two commentators writing in 2008 saw this as part of a broader trend:

While plaintiffs were, at least initially, slow to adopt the new procedure, class actions are now a prominent feature of both the Australian legal landscape and the Australian psyche. Indeed, it is now said that Australia is the place outside North America where a corporation will most likely find itself defending a class action.³⁹

Finally, ASIC, using its statutory power to institute civil actions on behalf of injured investors,⁴⁰ has brought class actions in circumstances where it believed that the victims lacked the financial resources to pursue the case themselves.⁴¹ To date, ASIC has brought at least nine securities class actions on behalf of victims.⁴² In the still-pending Westpoint-related financial products cases, ASIC has already

were filed in 2006, five were filed in 2007, eight were filed in 2008, and at least nine were filed in 2009.

³⁹ S. Clark and C. Harris, *The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?* 32 MELB. U.L. REV. 775 at 777 (2008).

⁴⁰ See discussion in Section I.B of this Brief.

⁴¹ Letter from Tony D'Aloisio, Chariman, Australian Securities and Investments Commission, to Westpoint Investors (December 21, 2009) (summarizing ASIC's ongoing litigation efforts on their behalf), *available at* [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Westpoint-letter-december-2009.pdf/\\$file/Westpoint-letter-december-2009.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Westpoint-letter-december-2009.pdf/$file/Westpoint-letter-december-2009.pdf) and Press Release, Australian Securities and Investments Commission, ASIC commences investor protection class action (November 5, 1999), *available at* [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/99-405.pdf/\\$file/99-405.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/99-405.pdf/$file/99-405.pdf)

⁴² A. Boxsell, "Vic Takes the Lead in Class Actions" *The Australian Financial Review* (December 4, 2009), at 46.

recovered for investors some \$A100 million of the \$A388 million invested.⁴³

C. A Class Action Could Have Been Brought in Australia Under the Corporations Act in Relation to the Type of Conduct Alleged in this Case

At the time NAB first wrote down the value of its HomeSide subsidiary early in July 2001, §995(2) of the Corporations Law (the legislation preceding the Corporations Act) contained a prohibition against misleading or deceptive conduct in connection with the publication of securities notices. In addition, §999 of the Corporations Law prohibited false or misleading statements likely to induce the sale or purchase of securities. Section 1005 of the Corporations Law provided a civil action for violation of these provisions.

Sections 995(2) and 999 of the Corporations Law have since been replaced with the current §§1041H and 1041E of the Corporations Act. Any claim that the Petitioners or any other NAB shareholders had under the original Corporations Law would have survived.⁴⁴ As noted, class action rights under the Federal Court of Australia Act have been available since 1992.

Thus, the Petitioners were not obliged to initiate an action in the United States to seek compensation

⁴³ Press Release, *Steps taken by ASIC to recover funds for the benefit of Westpoint investors* (February 19, 2009), available at <https://westpoint.asic.gov.au/>.

⁴⁴ Corporations Act 2001, §1400. *See also* Acts Interpretation Act 1901, §8, Act No. 2 of 1901. Section 8 provides that the repeal of an Act does not affect any right, privilege, obligation or liability which accrued under that Act.

for the damage they claim to have suffered. That course of action was open to them in Australia.

D. Significant Procedural Differences Between Civil Actions That Can Be Brought in Australia and the United States Reflect Public Policy Choices

The present case is one of many in which foreign plaintiffs seek to bring an essentially foreign dispute before U.S. courts, as they did in the case giving rise to this Court's *Empagran* decision. The attractiveness of the United States as a forum for foreign plaintiffs can in part be traced to plaintiffs receiving some advantages in the U.S. legal system that are generally not available in other countries.

There are a number of such advantages. *First*, the so-called “American rule” on litigation costs requires each side to bear its own costs—rather than requiring the losing plaintiff to reimburse some or all of the successful defendant’s costs;⁴⁵ and generally broader discovery available to plaintiffs in the United States will tend to drive up the non-reimbursable litigation costs that defendants will have to bear. *Secondly*, the right to a jury trial in a civil case, guaranteed by the Seventh Amendment to the U.S. Constitution, is generally not available elsewhere. *Thirdly*, the “opt out” class action provided for in the United States has not been favored by other countries (although it has been adopted by Australia). *Fourthly*, punitive damages are available in the United States, but generally not elsewhere.

The different approaches on these matters reflect choices made by the United States, Australia and

⁴⁵ See *Alyesha Pipeline Service Co. v. Wilderness Society*, 421 U.S. 252 (1975).

other countries. Adopting appropriate legal processes is a basic sovereign function on which reasonable sovereigns can differ.

The Australian Government respectfully asks that this Court apply the considerations of comity that it emphasized six years ago in *Empagran* and respect Australia's sovereign judgments on civil procedures, especially when the litigation concerns Australian citizens suing an Australian corporation over conduct that occurred in Australia.

IV. PRINCIPLES OF INTERNATIONAL LAW AND COMITY, ADOPTED BY THIS COURT IN OTHER CONTEXTS, SHOULD BE APPLIED IN ORDER TO AVOID UNNECESSARY CONFLICTS OF SOVEREIGNTY AND RESULTING BURDENS ON THE U.S. COURTS

A. Basic International Law Principles of Jurisdiction

“[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains,” is what Chief Justice Marshall wrote for this Court in 1804. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“*The Charming Betsy*”). This core principle of American jurisprudence has been regularly reaffirmed by this Court. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

The Australian High Court has also repeatedly affirmed that “a statute... is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.” *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384. (Austl.)

It is a fundamental principle of international law that each state is equally entitled to prescribe laws and to adjudicate claims regarding those persons within its territory. Where jurisdiction is claimed by more than one state, any state exercising extraterritorial jurisdiction should act in a way that is compatible with the exercise of jurisdiction by other states. Overly broad assertions of extraterritorial jurisdiction may infringe upon the rights of another state to regulate matters that take place within its territory.

International law recognizes that the various grounds on which jurisdiction may be asserted are “parts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states.” Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim’s International Law*, at 457-8 (9th ed. 1992).

The primary basis for jurisdiction under international law is territorial: each state may regulate activity that occurs in its own territory (the “territorial principle”). States may also extend the application of their laws to their citizens, wherever located (the “nationality principle”). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (“RESTATEMENT”) §402(1) (1987); *see also American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

The sometimes controversial “effects doctrine” may allow a state to assert prescriptive jurisdiction over events that have a clear effect in its territory, even if

all planning and execution took place elsewhere. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *see generally* RESTATEMENT §§ 402(1)(c), 403(2).

B. The Modern Decisions of This Court Recognizing Comity

In 2004, this Court decided two cases in which aliens asserted claims against other aliens for injuries suffered outside the United States: *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (“*Sosa*”) and *Empagran*. On both occasions, the Court made clear that U.S. law is to be interpreted to minimize conflicts of jurisdiction. In *Sosa*, the majority opinion noted the need for caution by U.S. courts when considering rules that went “so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.” 542 U.S. at 727. In *Empagran*, the Court (citing *The Charming Betsy* and a string of later decisions) unanimously said, “[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations....This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow.” 542 U.S. at 165.

Sosa and *Empagran* reinforce this Court’s earlier decisions that had long held that unless Congress clearly expresses a contrary intent, courts must presume that U.S. law is “primarily concerned with domestic conditions.” *E.E.O.C v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“*Aramco*”). This rule of comity is underscored by a point which the Court made in *Aramco* that is particularly relevant to the present case:

If petitioners are correct..., a French employer of a United States citizen in France would be subject to Title VII—a result at which even petitioners balk...Without clearer evidence of congressional intent to do so..., we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce.

Id. at 255.

Comity concerns more than mere politeness. “If other nations believe that American policy unfairly disadvantages their citizens... they are apt to resist enforcement efforts and perhaps to retaliate with countermeasures of their own.” Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1321 (1985). In the past, other nations (including Australia) have enacted measures to restrain efforts to enforce U.S. law extraterritorially; the clearest examples were the “blocking” statutes that Australia and other countries enacted in the 1980's in response to what were regarded as overly broad jurisdictional claims being made under U.S. antitrust laws in cases involving the uranium industry.⁴⁶ See Warren Pengilley, *Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View From “Down Under,”* 16 VAND. J. TRANSNAT'L L. 833, 871-72 (1983).

⁴⁶ See, e.g., U.K. Protection of Trading Interests Act, §6 (1980); Australia's Foreign Proceedings (Excess of Jurisdiction) Act 1984. Act No. 3 of 1984. See also *Predictability and Comity*, *supra*, 98 HARV. L. REV. at 1311 n.6 (describing the “main categories” of retaliatory legislation).

C. Principles of International Law and Comity Should be Applied in Construing a Judicially Created Right of Action

From *The Charming Betsy* onward, this Court's decisions have focused on how to construe statutes with due regard for international law and considerations of international comity. The Australian Government respectfully submits that, if these considerations normally control when a court is construing a statute, they must also control when a court is construing a judicially-created right of action that has been implied from a statute. Surely there is every reason for this Court to affirm that U.S. federal judges, when creating and applying an implied right of action under a federal statute, should be equally required to take account of the legitimate sovereign interests of other nations.

Some of the earlier decisions under Rule 10b-5 apparently assumed that foreign securities fraud laws were weak or non-existent and, as such, there would be no conflict or comity concerns flowing from U.S. enforcement.⁴⁷ This is clearly not the case today—Australia and many other countries have enacted comprehensive securities regulatory regimes that provide legal remedies for parties injured by securities fraud.

⁴⁷ See, e.g., *Morrison*, 547 F.3d. at 175 quoting Judge Friendly's opinion in *IIT, Int'l. Inv. Trust v. Cornfield*, 619 F.2d 909, 921 (2d Cir. 1980) ("The primary interest of [a foreign state] is in the righting of a wrong done to an entity created by it. If our anti-fraud laws are stricter than [a foreign state's], that country will surely not be offended by their application.").

V. ASSERTION OF JURISDICTION BY U.S. COURTS UNDER § 10(b) IN CASES LACKING SUFFICIENT U.S. NEXUS RISKS UNDERMINING THE EFFECTIVENESS OF SECURITIES MARKET REGULATION IN COUNTRIES SUCH AS AUSTRALIA

A. The Lower Courts Correctly Found That the Nexus to the United States Is Insufficient in this Case

This case falls within an increasingly common category of private class actions which have become known as “foreign-cubed” cases. The Court of Appeals noted that the *Morrison* case fits the category because it involves “a set of (1) *foreign* plaintiffs ... suing (2) a *foreign* issuer in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries.” 547 F.3d at 172 (emphasis in original).

This Court has recognized that principles of international law and comity require a sufficient nexus to exist between a state and the matter over which it seeks to exercise jurisdiction. In the present case, the strength of the nexus to Australia both as to nationality and territory is evident. This nexus brings the matter within the proper scope of Australia’s legal and regulatory regimes in relation to securities.

The Australian Government respectfully submits that the facts of this case as alleged in the complaint and found by the lower courts do not give rise to a sufficient nexus for the exercise of jurisdiction by U.S. courts. There is not an accepted legal basis for allowing Australian shareholders to bring a claim in

a U.S. court under U.S. law for conduct of an Australian issuer that occurred in Australia and is subject to regulation by the Australian securities regulator (ASIC) under Australian law, as outlined in Sections I-III of this Brief.

Both the District Court and the Court of Appeals found that the conduct of HomeSide, while it occurred in the United States, did not provide a proximate cause or a sufficient nexus to support a Rule 10b-5 action by Australian plaintiffs against an Australian issuer of securities for information distributed to them in Australia. Although the Australian Government would not necessarily endorse all of the reasoning of the lower courts, the Government does consider the courts were essentially correct in dealing with factual allegations in the case and therefore granting the Respondents' motion to dismiss the Petitioners' action.

B. The U.S. Courts of Appeals Have Applied a “Conduct” Test and an “Effects” Test to Determine Whether There Is Subject Matter Jurisdiction Under § 10(b)

The Second Circuit Court of Appeals identified the challenge that the lower courts have faced in dealing with securities law claims with an international component under § 10(b), stating that, “[w]hen Congress wrote the Securities Exchange Act...it omitted any discussion of its application to transactions taking place outside of the United States”. *Morrison*, 547 F.3d at 170.

The Seventh Circuit Court of Appeals summarized the practical consequences of this situation when it said:

Identification of those circumstances that warrant such regulation has produced a disparity in approach, to some degree doctrinal and to some degree attitudinal, as the courts have striven to implement, in Judge Friendly's words, "what Congress would have wished if these problems had occurred to it".

Kauther SDN v. Sternberg, 149 F.3d 659 (7th Cir. 1998) (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.1975)).

In trying to bring order to this situation, the Courts of Appeals—particularly the Second Circuit—have gradually developed two tests to determine the extra-territorial reach of § 10(b); these are the "effects" test and the "conduct" test. The former involves an analysis of whether "wrongful conduct had a substantial effect in the United States or upon U.S. citizens" and the latter "whether wrongful conduct occurred in the United States". *Morrison* 547 F.3d at 171.

The present case only concerns the application of the "conduct" test. As developed principally in the Second Circuit Court of Appeals, the "conduct" test rests on the view that Congress did not intend "to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners." *IIT v. Vencap, Ltd.* 519 F.2d 1001, 1017 (2d. Cir. 1975). Therefore, "this basis for jurisdiction is limited to *the perpetration of fraudulent acts themselves* and does not extend to mere preparatory activities." *Id.* at 1018 (emphasis added). The same point was made in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d. Cir. 1975) (holding "the anti-fraud provisions of the federal securities laws...[d]o not apply to losses from

securities to foreigners outside the United States unless action (or culpable failures to act) within the United States *directly caused* such losses”) (emphasis added).

Thus, for U.S. jurisdiction to be exercised under the “conduct” test, activities in the United States must rise beyond the level of mere preparation for an alleged fraud. *Morrison*, 547 F.3d at 171; *see also Alfadda v. Fenn*, 935 F.2d 475, 478 (2d. Cir 1991); *Bersch*, 519 F.2d at 986.

C. The “Conduct” Test Can Lead to a Complex Factual Analysis That Sometimes Results in (i) Individual Cases Being Decided on “Very Fine Distinctions” and (ii) Actions With an Insufficient Nexus to the United States Being Allowed to Proceed

The various formulations of the “conduct” test have invited detailed (and sometimes diverse) judicial inquiries into the factual circumstances of individual cases. The difficulty with the “conduct” test may, at least in part, result from the complexity of the analysis where conduct occurring in the United States is weighed to determine exactly what role it played in the chain of causation that led to an alleged securities fraud. As such, cases may be decided on “very fine distinctions”, leading to “unpredictability...in jurisdictional analysis”, as described by Professor Buxbaum in her widely cited article *Multi-national Class Actions under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNATIONAL L. 14, 67 (2007).

The Australian Government respectfully suggests that this Court use this opportunity to mandate a

more structured (and hence predictable) approach in such cases. The Australian Government believes that the complexity of the analysis may be reduced if attention is focused on where the alleged wrongful disclosure (or non-disclosure) occurred that induced a foreign investor to engage in a purchase or sale transaction involving securities on a foreign exchange. Where such disclosure (or non-disclosure) was made by a foreign issuer in its own market, a sufficient nexus to the United States would not exist to justify a Rule 10b-5 action in the U.S. federal courts. See *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987) (no Rule 10b-5 liability for a U.S. accounting firm that gave allegedly inaccurate information to a German accounting firm that included the information in a public report distributed to the German plaintiffs). In these circumstances, no elaborate inquiry into whatever prior conduct occurred in the United States would normally be required.

D. The Present Case Lacks the Factual Nexus Between the United States and the Petitioners' Alleged Injury that Is Necessary to Provide Jurisdiction in a U.S. Court

1. The U.S. Nexus Is Legally Insufficient Where the Information Relied Upon by Foreign Investors in a Foreign Company Was Distributed to Them in Their Home Market by the Issuing Company

The Court of Appeals ultimately identified the controlling facts that the Australian Government respectfully suggests should be allowed to govern (and hence simplify) the jurisdictional analysis in

“foreign-cubed” securities cases. The Court focused on those responsible for issuing the information that allegedly induced the Australian Plaintiffs to purchase shares in NAB on an Australian stock exchange:

NAB, not HomeSide, is the publicly traded company, and its executives—assisted by lawyers, accountants, and bankers—take primary responsibility for the corporation’s public filings, for its relations with investors, and for its statements to the outside world...

NAB’s executives possess the responsibility to present accurate information to the investing public and to the holders of its ordinary shares in accordance with a host of accounting, legal and regulatory standards. *When a statement or public filing fails to meet these standards, the responsibility, as a practical matter, lies in Australia, not Florida.*

547 F.3d at 176 (emphasis added). These facts alone should be determinative. The Australian Government respectfully submits that, whenever allegations turn on the disclosure (or non-disclosure) of information by a foreign issuer to a foreign exchange on which the foreign issuer’s securities were bought or sold by the foreign investor-plaintiffs, a motion to dismiss or a summary judgment motion should be granted.

2. The Result in This Case Should Be the Same Whether This Is Treated as a “Subject Matter Jurisdiction” Rule or a “Scope of the Offense” Rule

Uniformly, when addressing the issue of the transnational reach of § 10(b), the Courts of Appeals have

found that the issue is one of subject matter jurisdiction. *See, e.g., SEC v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003); *Continental Grain (Austl.) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979) (Continental Grain); *S.E.C. v. Kasser*, 548 F.2d 109, 116 (3d Cir.), cert. denied, 431 U.S. 938 (1977); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 984 (2d Cir.), cert. denied, 423 U.S. 1018 (1975).

However, the Solicitor General's Brief at the *certiorari* stage of this case questioned this approach, arguing that, in *Arbaugh*, 546 U.S. at 516, this Court established that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *U.S. Brief, supra* Note 3, at 8-9. The Solicitor General went on to argue that "in cases involving transnational fraud, the private plaintiff should be required to demonstrate a direct causal link between his injury and the component of the scheme that occurred in the United States." *Id.* at 10.

Irrespective of whether the issue is best categorized as a question of "subject matter jurisdiction" or a non-jurisdictional question of the "plaintiffs' entitlement to relief", the result is the same in this case: the alleged facts do not provide a sufficient basis to support a private suit under § 10(b) and Rule 10b-5 because information was disclosed (or not disclosed) to a foreign exchange on which the foreign issuer's securities were bought by the foreign investor-plaintiffs.

E. The Type of Proximity-Based Rules That This Court Has Developed in Recent Years to Deal With Foreign Claims Should Resolve This Case

In *Empagran*, this Court had to “focus upon anti-competitive price-fixing activity that is in significant part foreign, that causes some domestic injury, and that independently causes separate foreign injury.” 542 U.S. at 158. This Court unanimously held that the foreign purchasers’ actions could not be maintained under the Sherman Act. In the present case, the Court is asked to focus upon *allegedly improper disclosures that were entirely foreign and caused no alleged domestic injury*.

In *Empagran*, having noted that “this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,” *id.* at 164, the Court went on to ask the question which is central to this case:

But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim?....* Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anti-competitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?....

We thus repeat the basic question: Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign*

harm alone gives rise to the plaintiff's claim? We can find no good answer to the question.

Id. at 175 (emphasis in the original).

If this Court “can find no good answer” when dealing with a statute long recognized to have some significant extraterritorial effect, then the Australian Government respectfully submits that there would be no “good answer” permitting foreign claimants to bring U.S. securities law claims in relation to foreign conduct under a judge-made legal doctrine when the only alleged damage was suffered outside the United States.

Empagran is not an isolated landmark. In the same Term, the Court decided *Sosa*, in which it was cautious about construing the scope of a statute that specifically authorizes suits by aliens for some internationally-based wrongs, noting that:

The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to *permit enforcement without the check imposed by prosecutorial discretion.*

542 U.S. at 727 (emphasis added).

The reality that private litigation in different forums under different bodies of law can have a potentially disruptive effect on a detailed system of securities regulation was a central rationale for this Court’s 2007 decision in *Credit Suisse Sec. (USA) LLC v. Billings*, 551 U.S. 264 (2007). That was an antitrust case in which the legal issue was whether private plaintiffs were to be permitted to bring class actions challenging conduct by the defendants that

had been subject to detailed regulation by the SEC. The Court reached the conclusion that “to permit antitrust actions such as the present one... [risks] serious securities-related harm”. *Id.* at 279. In reaching this conclusion, the Court emphasized that private “plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible [under the securities regulations], it will prove difficult for those many different courts to reach consistent results.”⁴⁸ *Id.* at 281.

The Australian Government respectfully submits that the present case is analogous in that conflict may arise between different bodies of law in different jurisdictions, should the plaintiffs be permitted to bring a suit in a U.S. court under U.S. law concerning conduct in Australia that was subject to detailed regulation by ASIC under Australian law.

CONCLUSION

The Australian Government respectfully requests that this Court affirm the lower courts' dismissal of the case, and in doing so affirm the applicability of its prior jurisprudence on international law and comity to "foreign-cubed" securities cases.

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