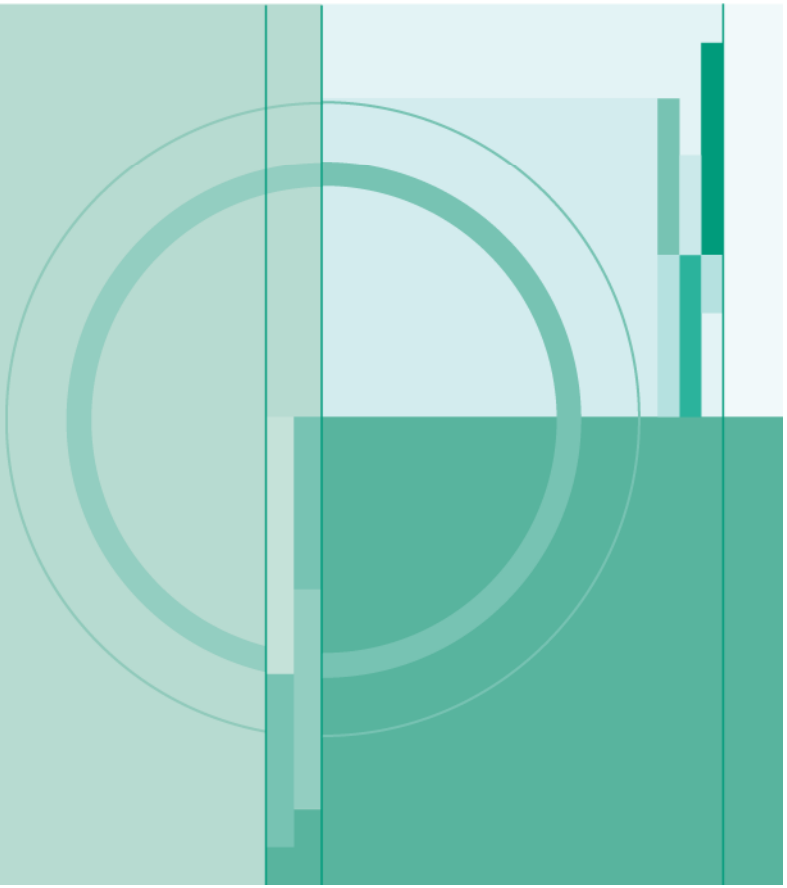
The Impact of the Supreme Court's Decision in *Morrison v. National Australia Bank Ltd.* on Global Class Actions

Presenters:
Holly Kulka, NYSE Euronext
Richard A. Martin, Orrick
Patryk J. Chudy, Orrick

July 30, 2010



I. Morrison v. National Australia Bank Ltd.

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Background: Homeside Overvaluation of Assets

In 1998, NAB acquired Homeside Lending, a major U.S. mortgage service provider.

In 2001, NAB disclosed that Homeside had overstated the value of its servicing rights, and wrote down those assets first by $450 million, then $1.75 billion.

Prices of both ordinary shares and ADRs fell in response to disclosures.

Section 10(b) Claim in District Court and Second Circuit

- Plaintiffs – initially including both Australian purchasers of NAB shares and U.S.-based purchasers of ADRs – sued NAB and Homeside in the SDNY under Section 10(b), and NAB under Section 20(a) of the 1934 Act.
- Defendants challenged subject matter jurisdiction, claiming that under the "conduct and effects" tests, the key conduct affecting the share price drop occurred in Australia, where the overstated financials of NAB were prepared and statements were made.
- Second Circuit agreed, and upheld the district court's dismissal, but rejected a "bright line" standard that F-cubed plaintiffs could not bring Section 10(b) claims in the U.S.

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Supreme Court Briefing (cont.)

Amici

- Amici supporting NAB (including NYSE Euronext, represented by Orrick) urged the Court to adopt a bright line test and only permit investors who purchase on a U.S. exchange to bring claims under Section 10(b), pointing to extensive regulatory schemes adopted by foreign governments and precedent strongly supporting such deference to foreign sovereigns (*Empagran, Microsoft*).
- Amici supporting Petitioners argued that in a global economy, parties should be allowed to bring a claim in the U.S. if significant steps in furtherance of the fraud occurred here, and urged the Court to adopt the SEC standard.

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Supreme Court Decision

Holding:

- Second Circuit's "threshold error": Application of § 10(b) is a question of merits, not subject matter jurisdiction.
- Rejection of 40 years of precedent: "conduct and effects" tests.
- "[N]o affirmative indication in the Exchange Act that § 10(b) applies extraterritorially".
- Congressional acts are presumed to apply only within the U.S.
- The U.S. should defer to foreign regulators, not interfere with them.

Supreme Court Decision (cont.)

New “Transactional” Test:

- “[I]t is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.”
- “whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange.”
- Not expressly limited to foreign plaintiffs or foreign issuers.

II. Impact of *Morrison* on Pending and Future Claims

- Private “F-cubed” claims will be barred from U.S. courts.
- Not applicable to SEC/DOJ actions.
- ADRs / Dual Listing?
- F-squared claims?

Vivendi – Pre-*Morrison*

- Certified class consisting of purchasers in U.S., France, U.K. and the Netherlands.
- Class excluded German and Austrian purchasers.
- In January 2010, jury verdict in favor of plaintiffs.
- Court of Appeals in France rejected effort to bar French citizens from participating in U.S. class.
- Post-*Morrison* briefing.

Vivendi – Plaintiffs' Post-*Morrison* Arguments

Plaintiffs' argument regarding impact of *Morrison:*

Non-Controversial

- No impact on verdict issued in favor of class members that purchased ADRs, which were sold in U.S. and were registered under the Exchange Act and listed on NYSE.

Highly Controversial

- *Morrison* does not limit U.S. purchasers, because it only addressed whether Section 10(b) provides a cause of action to *foreign* plaintiffs.
  - "domestic transactions in other securities" encompasses U.S. purchasers.
- All class members (including U.S., French, English and Dutch) are covered: "so long as the security is *listed* on an American stock exchange, purchases of the security are covered by Section 10(b), regardless of where they occur." 17 CFR 240.12d1-1.

Vivendi – Defendants' Post-*Morrison* Arguments

- Morrison established a "bright-line" test.
- Foreign transactions regulated by foreign laws.
- Forecloses claims of purchasers of Vivendi ordinary shares, which are listed only on foreign exchanges.
- Only Vivendi securities listed on an American stock exchange were Vivendi ADSs.
- Defendants request that court redefine class to persons from U.S., France, England and the Netherlands who purchased Vivendi ADSs on the New York Stock Exchange.
- Reduction of potential damages by at least 80%.

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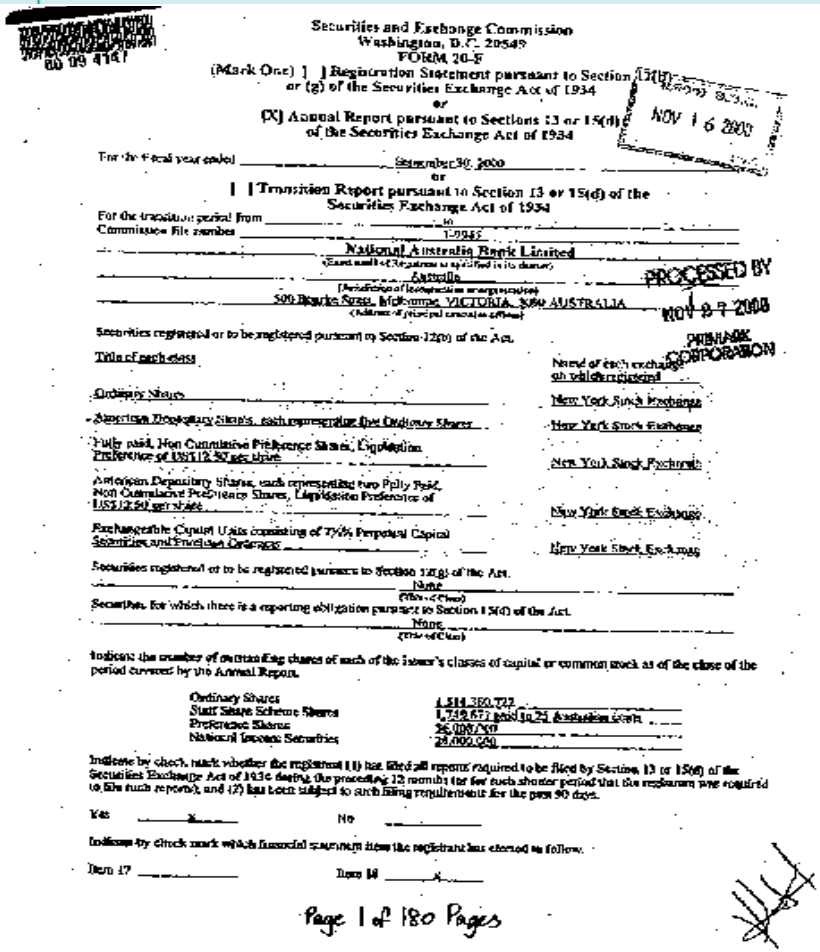
Vivendi – Post-*Morrison*



Securities and Exchange Commission
Washington, D.C. 20549
FORM 20-F

(Mark One) [ ] Registration Statement pursuant to Section 12(b) or (g) of the Securities Exchange Act of 1934
or
[X] Annual Report pursuant to Sections 13 or 15(d) of the Securities Exchange Act of 1934

NOV 16 2000

For the fiscal year ended September 30, 2000
or
[ ] Transition Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

For the transition period from ____ to ____
Commission file number 1-9345

National Australia Bank Limited
(Exact name of Registrant as specified in its charter)

Australia
(Jurisdiction of incorporation or organization)

500 Bourke Street, Melbourne, VICTORIA, 3000 AUSTRALIA
(Address of principal executive offices)

PROCESSED BY
NOV 27 2000
THOMSON
FINANCIAL
CORPORATION

Securities registered or to be registered pursuant to Section 12(b) of the Act.

Title of each class	Name of each exchange on which registered
Ordinary Shares	New York Stock Exchange
American Depositary Shares, each representing five Ordinary Shares	New York Stock Exchange
Fully paid, Non Cumulative Preference Shares, Liquidation Preference of US$12.50 per share	New York Stock Exchange
American Depositary Shares, each representing two Fully Paid, Non Cumulative Preference Shares, Liquidation Preference of US$12.50 per share	New York Stock Exchange
Exchangeable Capital Units consisting of 7¼% Perpetual Capital Securities and Purchase Contracts	New York Stock Exchange

Securities registered or to be registered pursuant to Section 12(g) of the Act.
None
(Title of Class)

Securities for which there is a reporting obligation pursuant to Section 15(d) of the Act.
None
(Title of Class)

Indicate the number of outstanding shares of each of the issuer's classes of capital or common stock as of the close of the period covered by the Annual Report.

Ordinary Shares	1,514,380,722
Staff Share Scheme Shares	1,749,677 paid to 25 Australian cents
Preference Shares	26,000,000
National Income Securities	24,000,000

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirement for the past 90 days.

Yes X No ____

Indicate by check mark which financial statement item the registrant has elected to follow.

Item 17 ____ Item 18 X

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Pending and Recent Decisions

- *In re UBS AG Sec. Litig*. – Briefing scheduled regarding the impact of *Morrison.*
- *Tradex Global Master Fund SPC Ltd. v. Inder Rieden* – denied leave to amend complaint to add Section 10(b) claim.
- *Cornwell v. Credit Suisse Group* – Judge Marrero dismissed claims of F-squared plaintiff (i.e., domestic purchasers of foreign shares on a foreign exchange).
- *Stackhouse v. Toyota Motor Co.* – court selected purchaser of ADSs as lead plaintiff over U.S. resident who purchased stock on a foreign exchange.

Legislative Responses: Extraterritorial Application in Actions by SEC and U.S.

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law. Among other reforms:

- In actions brought by the SEC or the United States, § 929P amends the Securities Act, the Securities Exchange Act and the Investment Advisers Act as follows:

> *Extraterritorial Jurisdiction - The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation . . . involving –*
>
> *(1) 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*
>
> *(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.*

Note: One commentator has suggested this does not overcome *Morrison* because while jurisdiction exists, it is a question of merits.

Legislative Responses: Extraterritorial Application in Private Rights of Action

Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act directs the SEC to:

…conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Securities and Exchange Act of 1934 . . . should be extended to cover—

(1) conduct within the United States that constitutes a significant step in the furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; and

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

Legislative Proposals – Contents of SEC Study

(b) CONTENTS.—The study shall consider and analyze, among other things—

(1) the scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise;

(2) what implications such a private right of action would have on international comity;

(3) the economic costs and benefits of extending a private right of action for transnational securities frauds; and

(4) whether a narrower extraterritorial standard should be adopted.

(c) REPORT.—A report of the study shall be submitted and recommendations made to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House not later than 18 months after the date of enactment of this Act.

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Foreign Whistleblower

Potential award for foreign whistleblower if SEC brings successful enforcement action, assuming "conduct" or "effects" tests met:

(b) Awards-

- *(1) IN GENERAL- In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to--*
  - *(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and*
  - *(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.*

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III. Resolving Transnational Securities Claims

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Where Does *Morrison* Leave Us?

- Pre-*Morrison* – Fight to limit class under then-existing "conduct" and "effects" tests and challenge to recognition of U.S. class judgment.
- But, when settled or resolved, parties seek to expand class to bar global claims:
  - *Parmalat* – Court found against f-cubed purchasers of Parmalat securities. U.S. settlement used as basis for global settlements – 2 approaches.
  - *Royal Dutch Shell* – U.S. Court found Dutch purchasers *could* sue in U.S. Shell used Dutch class settlement law as basis for settlement there, and U.S. court reversed its finding.

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Ahold - A Model Solution

- U.S. class action settlement for $1.1 billion, approved by U.S. District Court for the District of Maryland in 2006.
- In 2008, Dutch investors (who did not opt out of U.S. settlement) sued Ahold's former CEO, CFO and Deloitte in Amsterdam District Court, claiming they were not bound by U.S. judgment.
- June 23, 2010, one day before *Morrison* was decided, Dutch court gave recognition to the class action settlement overseen by U.S. court, barring any class members who did not opt out from bringing claims against the defendants anywhere in the world.
- Former CEO and CFO could invoke bar against claims, and Deloitte could invoke judgment reduction credit.
- Presumptive recognition in EU.

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Post-*Morrison*

- Post-*Morrison:*
  - Element of U.S. global class eliminated.
  - Country by country approach.

- Other countries have class action-type procedures– most are opt-in.
- Increase in global class resolutions in Netherlands, Canada?

Imax

- Imax allegedly made materially false statements regarding its financials by recognizing revenue in 2005 for theatre systems that were not fully installed until 2006.
- Misrepresentations were allegedly contained in two 2006 press releases and Imax's Form 10-K filed with the Securities and Exchange Commission.
- Certified statutory and common law claims for negligent and fraudulent misrepresentation.
- Certified worldwide class, although only approximately 10-15% of the proposed class members were Canadian residents and competing U.S. class action was pending.
- Canada more attractive to plaintiffs in light of *Morrison*.

Recognition of Foreign Global Class Judgments in the U.S.? Or Other Countries?

- The Netherlands says EU will recognize class settlements approved under Dutch law, and that Switzerland, Iceland and Norway should as well.
- Take non-U.S. class claims there?
- Canada also has global, opt-out class procedure.
- Will their judgments fare any better in opt-in jurisdictions than U.S. judgments?
- Will the U.S. recognize a class judgment/settlement from Canada or The Netherlands?

Questions?

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Presenter Biographies

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Holly K. Kulka

Head of Litigation/Antitrust
SVP NYSE Euronext
(212) 656-3000
hkulka@nyse.com

Holly Kulka is Senior Vice President in the Legal and Government Affairs Office of NYSE Euronext, where she is head of litigation and antitrust. Prior to moving in house, she was a shareholder of Heller Ehrman specializing in parallel litigations (criminal, regulatory and civil). While at Heller Ehrman, she chaired the New York Hiring Committee and co-chaired the firm wide Diversity Committee.

Earlier in her career, Ms. Kulka was an AUSA in the District of New Jersey where she tried more than a dozen cases and before that a special assistant to the Under Secretary of Treasury (Enforcement). She graduated from the University of Chicago Law School in 1991 and clerked for the Honorable Phyllis A. Kravitch on the 11th Circuit Court of Appeals.

Ms. Kulka serves on the Board of the New York Lawyers for Public Interest and has been involved in pro bono activities since early in her career.

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Richard A. Martin

Education

- A.B., *Magna Cum Laude*, Phi Beta Kappa, Honors, Brown University, 1971
- J.D., Associate Editor, New York University Law Review, New York University School of Law, 1974

Admitted In

- New York

Partner, Securities Litigation
New York
(212) 506-5135
rmartin@orrick.com

Mr. Martin's practice focuses on securities and commercial litigation, as well as arbitration and international and domestic white-collar criminal law in state and federal courts. His practice has concentrated on international and domestic litigation and arbitration involving securities, accounting and financial services and corporate governance. He also regularly provides advice and assistance in international criminal and civil law matters.

From June 1987 to July 1990, Mr. Martin served as Special Representative of the Attorney General, located at the United States Embassy in Rome, Italy. There, he represented the Department of Justice in Europe and handled extradition and mutual assistance matters. In August 1990, Mr. Martin's achievements were recognized when he was named "Commendatore al Merito della Repubblica Italiana," the Italian Legion of Honor.

Prior to transferring to Rome, Mr. Martin served as an Assistant United States Attorney for the Southern District of New York, from January 1980 to June 1987. Mr. Martin received numerous commendations for his work in the United States Attorney's Office, including the Distinguished Service Award from the Department of Justice.

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Patryk J. Chudy

Education

- J.D., *cum laude*, Cornell Law School, 2000
- B.A., *magna cum laude*, Montclair State University, 1997

Admitted In

- New York
- New Jersey

Of Counsel, Securities Litigation
New York
(212) 506-3718
pchudy@orrick.com

Mr. Chudy represents audit firms in connection with hedge fund and subprime litigation. Prior to joining Orrick, Mr. Chudy was a litigator at Heller Ehrman LLP and Debevoise & Plimpton LLP.

His representative engagements include:

Deloitte & Touche S.p.A. in connection with the Parmalat consolidated MDL proceedings (In re Parmalat Sec. Litig., 04 MD 1653) (S.D.N.Y.), including the related action brought by Parmalat's trustee (*Bondi v. Grant Thornton Int'l., Inc*., 04 Civ. 9771) (S.D.N.Y.).

Ernst & Young Cayman Islands in Beacon Hill hedge fund litigation. *Bullmore v.* Ernst & Young Cayman Islands, et. al., Index No. 104314/05 (N.Y. Sup. Ct.).

Ernst & Young LLP in connection with In re Computer Associates International, Inc. Derivative Litigation, 04 Civ. 2697 (E.D.N.Y).

Represented a U.N. contractor in defense of civil RICO and unfair competition claims stemming from alleged bid-rigging scheme involving former U.N. employee implicated in Oil-for-Food investigation.

Represented financial institution in federal, state and regulatory investigations relating to market timing and late trading practices.

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