

# Foreign securities and the new order

*The issuing of "class orders" by the Australian Securities Commission has made it easier for Australians to invest in many foreign securities which are not quoted on the Australian Stock Exchange. In varying the key fund-raising and share-hawking provisions of the Corporations Law, the class orders have brought a large part of the investment world within easier reach of the Australian investor. However, write **Kerry Bennett** and **Nicholas Miller**, although the changes made by the class orders are welcome, the ASC has retained substantial obligations which are likely to remain a disincentive for foreign corporations raising equity*

**T**he Australian Securities Commission's class-order decision gives investors access to shares, debentures and prescribed interests quoted on 14 "approved exchanges" nominated by the ASC. Futures contracts and options over unissued shares are excluded from the benefits of the class orders. Although the list of exchanges has some notable omissions — including those of Korea, Taiwan, Kuala Lumpur, Thailand, Johannesburg and Spain — the ASC says that its "approved exchanges" accounted for more than 75 per cent of the world's share transactions in 1990.

The main effect of the class orders on existing legislation is to vary two provisions of the Corporations Law: sections 1018(1) and 1078(1). Generally speaking, the s.1018 provision prohibits foreign securities which are not quoted on the ASX from being offered for sale or subscription in Australia without an Australian prospectus being lodged and registered. The s.1078 provision prevents non-ASX-quoted foreign securities from being "hawked" in Australia.

The ASC acknowledged that these



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prohibitions caused several problems, including:

- Foreign companies involved in international issues were unlikely to produce prospectuses for Australia because the size of our equity market did not warrant the trouble and expense.
- Australian licensed dealers were prevented from introducing their clients to foreign securities even when a complying Australian prospectus was available. The ASC has conceded that this may have frustrated Australian institutions and fund managers who sought to balance their portfolios with a mixture of local and offshore securities.
- Australian investors had to approach foreign dealers to obtain advice on foreign securities and licensed Australian dealers could not recommend such securities unless a complying Australian prospectus existed. A by-product of the "no approach" provision was that Australian investors could have had substantially greater difficulty seeking remedies against their advisers than if they had been able to obtain advice locally.
- Australian investors were likely to be prevented from participating in rights issues by foreign non-ASX-listed

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corporations and takeover offers where the securities offered as consideration for the takeover were not ASX-listed.

The new class orders grant the following range of relief in relation to qualifying securities:

■ Issuing corporations are granted relief in several circumstances including rights issues, foreign takeovers and schemes of arrangement, the issue of shares pursuant to the exercise of options, primary issues and the advertising and reporting provisions which the Corporations Law lays down for prospectuses.

■ Australian licensed dealers are relieved from the share-hawking prohibition, the prospectus lodgement registration, procedural and content provisions, and the various restrictions on the allotment of securities and issues generally contained in Division 3 of Part 7.12 of the Corporations Law. However, except in the case of share-hawking, the relief is applicable only to secondary trading. This relief is conditional on:

- the dealer's contact being only with "clients" (this means that the person with whom the dealer is in contact has either traded through the dealer in the previous 12 months, has signed and not revoked an acknowledgment of "client" status or has provided the dealer with written particulars of the person's investment objectives, financial situation and particular needs);
- the dealer's licence requiring annual disclosure to the ASC of particulars of its foreign securities business;
- the dealer disclosing that the offered securities are not quoted on the ASX;
- the dealer subscribing to an electronic information service providing pricing information in relation to the offered securities;
- where securities are actually offered by the dealer for subscription or purchase, the contact being client-initiated or the offer being accompanied by a recommendation of the dealer;
- the dealer being either a related body corporate of, or having an association with, a dealer in the jurisdiction of the exchange in which the foreign securities are

quoted; and

- the securities not being, so far as the dealer is aware, securities issued for the purpose of sale other than by way of an ordinary trade on the ASX.

### Rights issues

The registration, procedural and content provisions relating to prospectuses no longer apply to a pro-rata offer to existing holders of qualifying shares.

However, the offer document for the rights issue must be lodged with the ASC, with information about the Australian participation in the rights issue. The ASC retains its power to issue a stop order in relation to a rights issue.

Relief is available for renounceable

*The ASC-approved exchanges mentioned in this article are: the New York Stock Exchange, the American Stock Exchange, the NASDAQ National Market, the London Stock Exchange, the Tokyo Stock Exchange, the Frankfurt Stock Exchange, the Bourse de Paris, the Toronto Stock Exchange, the Zurich Stock Exchange, The Amsterdam Stock Exchange, the Milan Stock Exchange, The Stock Exchange of Hong Kong Limited, the Stock Exchange of Singapore Limited and the New Zealand Stock Exchange.*

and non-renounceable rights issues but is subject to Australian participation in the rights issue not exceeding 10 per cent (assuming full participation by all shareholders).

Additionally, the issuer's securities must have been quoted for at least 36 months before the rights issue and must not have been suspended for more than five days during that period.

Further, Australian shareholders must receive the same notices, documents and information at the same time as, or as soon as practicable after, their receipt by other shareholders. Where that information is not in English, translations must be provided. Additionally, the rights issue must comply with the legislative and stock-exchange requirements of the foreign

corporation's "home" jurisdiction.

### Foreign takeovers and schemes of arrangement

Where qualifying securities are being offered as consideration for foreign takeovers or schemes of arrangement, prospectuses will still have to be lodged but will not need to be registered — and some of the content provisions will not apply.

However, the prospectus must contain "all such information as investors and their professional advisers would reasonably require and expect to find" for the purpose of making an informed assessment of the offer. Directors' interests must be disclosed.

The requirements applying to rights issues — notices, information, translation to English and compliance with legislative and stock-exchange regulations of the foreign corporation's home jurisdiction — also apply to foreign takeovers and schemes of arrangement.

### Exercise of options

The lodgement, registration, procedural and content provisions do not apply to qualifying shares issued on the exercise of options where:

- the application for options is made on a form of the kind attached to the relevant prospectus; or
- the shares concerned are of a class listed on an approved exchange at the time the options were granted and at the time they are exercised.

To qualify for this relief, the foreign corporation must supply option-holders with monthly pricing information about the underlying shares during the option exercise period. Any issuer obtaining this relief must comply with all applicable foreign legislative and stock-exchange requirements.

### Primary issues

Relief from some of the more pedantic prospectus content and presentation obligations — and the registration, but not the lodgement requirement — is available to primary issues of qualifying securities, subject to two provisos.

First, the offer being made must also be made to investors in the approved "home" jurisdiction. Second, the prospectus lodged with the regu-

latory authority in that jurisdiction must comply with the requirements of the approved exchange. It must also state that the issuer submits to the jurisdiction of Australian courts. The ASC will permit multi-document prospectuses and has indicated its willingness to consider applications for further obligation-specific relief.

Additional relief would depend on the ASC being satisfied that the issuer had complied with a comparable obligation in its home jurisdiction, that the absence of relief creates practical difficulties and that investor protection would not be prejudiced if the relief were granted.

### Advertising and reporting provisions

These provisions no longer apply to:

- Notices or reports in newspapers or periodicals printed outside Australia which draw attention to or invite offers to subscribe for foreign securities. The requirement is that the publications' circulation must be substantially non-Australian.

- An Australian-published report that constitutes either information provided to an approved exchange by a corporation listed on that exchange, proceedings of a general meeting of

the corporation or a news report of such a report or meeting.

Notices or reports in foreign publications must comply with applicable legislative or stock-exchange requirements in the jurisdiction in which the newspaper or periodical is printed.

Further, the notice or report must not be distributed in Australia at the instigation of — or by arrangement with — the author, must make it clear that it cannot be acted on by Australian residents or must be published in a newspaper or periodical that is not advertised in Australia.

### Liability provisions

None of the relief granted by the ASC diminishes liability for criminal offences specified in the Corporations Law. These include those relating to false or misleading statements in or omissions from a prospectus, stockmarket manipulation, false trading, insider trading and market rigging. Nor does the relief diminish the civil liability of corporations — and their directors and advisers — where a misleading prospectus is issued or where conduct is misleading or deceptive.

### Further reform

The ASC has recommended three

further reforms:

- **Share hawking:** Section 1078(3) of the Corporations Law should be amended so that Australian dealers can offer any securities (including Australian and unquoted foreign securities) for which they are licensed to deal.

The provisos would be that the dealers disclose whether the securities are quoted on the ASX and that the prospectus lodgement, content and registration provisions are not contravened.

- **Licensing provisions:** The Corporations Law's licensing provisions should oblige a licensed dealer to notify the ASC within seven days of first providing a client with advice about the securities of a foreign, non-ASX-listed corporation, and to include in its annual return information about the advice provided to clients or information about its involvement in transactions on a client's behalf.

- **Prospectus provisions:** Offers made outside Australia should be excluded from the so-called "20 offers in 12 months" exemption. This will remove the present anomalous situation in which such offers count towards the "20 offers in 12 months" concession. ■

## OPTIONS AND FX

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ture illustrated here are:

- large corporate borrowers who can obtain keenly priced option quotes; and
- financial institutions which can use their own treasury operations to obtain favourable option prices.

As well as using this structure for their own funding, financial institutions could simplify the process for borrowers by offering a domestic loan package with repayments tied to a foreign currency, rather than asking the borrower to deal directly in the options involved. At the very least, this should simplify the borrower's tax considerations. If banks will not quote or deal in the required options, then it may be possible to create the options synthetically by trading appropriately in the forward FX market. ■

Table 4

Time of cashflow (year)	Exchange rate \$A/\$US	\$A net cashflow
0	0.75	+ 5,000,000.00
0.5	0.80	- 137,579.58
1.0	0.70	- 146,751.55
1.5	0.85	- 129,486.66
2.0	0.90	- 122,292.96
2.5	0.85	- 129,486.66
3.0	0.85	- 5,062,311.86
<b>IRR</b>		<b>4.89% p.a.</b>

Table 5

At each payment date \$A1 = \$US0.90

Time of cashflow (year)	\$A net cashflow
0	+ 5,000,000.00
0.5	- 122,292.96
1.0	- 122,292.96
1.5	- 122,292.96
2.0	- 122,292.96
2.5	- 122,292.96
3.0	- 4,781,072.31
<b>IRR</b>	<b>2.69% p.a.</b>