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.

The 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 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 securities.

Kerry Bennett is a partner in the corporate section of Clayton Utz’s Sydney office and is active in funds management and securitisation. He heads a group in Clayton Utz which specialises in transactions between Australian and Korean companies. Nicholas Miller is a solicitor in the Sydney office of Clayton Utz.
corporations and takeover offers where
the securities offered as consideration
for the takeover were not ASX-listed.

The new class orders grant the fol-
lowing range of relief in relation to
qualifying securities:

- Issuing corporations are granted
  relief in several circumstances includ-
  ing rights issues, foreign takeovers and
  schemes of arrangement, the issue of
  shares pursuant to the exercise of op-
  tions, primary issues and the adver-
  ising and reporting provisions which
  the Corporations Law lays down for
  prospectuses.
- Australian licensed dealers are re-
  lieved from the share-hawking prohi-
  bition, the prospectus lodgement reg-
  istration, procedural and content pro-
  visions, 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" sta-
      tus 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 pro-
      viding pricing information in rela-
      tion to the offered securities;
    - where securities are actually
      offered by the dealer for subscrip-
      tion or purchase, the contact being
      client-initiated or the offer being
      accompanied by a recommendation
      of the dealer;
    - the dealer being either a re-
      lated 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 prospec-
tuses 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
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 pe-
riod.

Further, Australian shareholders
must receive the same notices, docu-
ments and information at the same
time as, or as soon as practicable after,
their receipt by other shareholders.
Where that information is not in Eng-
lish, 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 for-
eign takeovers or schemes of arrange-
ment, prospectuses will still have to be
lodged but will not need to be regis-
tered — and some of the content pro-
visions will not apply.

However, the prospectus must con-
tain "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' in-
terests 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 corpora-
tion's "home" jurisdiction — also apply
to foreign takeovers and schemes of
arrangement.

Exercise of options
The lodgement, registration, pro-
cedural 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 for-
eign corporation must supply option-
holders with monthly pricing infor-
mation about the underlying shares
during the option exercise period. Any
issuer obtaining this relief must com-
ply with all applicable foreign legisla-
tive and stock-exchange requirements.

Primary issues
Relief from some of the more pe-
dant prospectus content and presen-
tation obligations — and the registra-
tion, but not the lodgement require-
ment — 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 ap-
proved "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

From page 17

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.

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<th>Exchange rate $A/$US</th>
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<tr>
<td>Time of cashflow (year)</td>
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