PUBLIC OFFER OF SHARES

by

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SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

MASTER OF LAWS

FACULTY OF LAW, UNIVERSITY OF CAPE TOWN

PROMOTER : PROFESSOR M. BLACKMAN

OCTOBER, 1988.

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

".....in principle an offer or invitation to the public is one which can be accepted by anyone who becomes aware of it. This can readily be accepted .....".

per Harcourt J in S v National Board of Executors 1971(3 SA 817 (D) at 826 B

Preface

I wish to express my sincere gratitude and appreciation to my supervisor, Professor M. Blackman, for guidance and advice in the completion of this thesis.

Many thanks also to Mrs. Sue Wright for the friendly and competent manner in which she completed the typing of the manuscript.

However, all errors and shortcomings that may accompany this work are mine.

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November 1988

CAPE TOWN

ABSTRACT

The purpose of this thesis is to look into and analyse the concept 'public offer of shares'. Our present Companies Act[1] provides that no person shall offer any shares to the public otherwise than in accordance with the provisions of the Act.[2] The provisions thereof prescribe that no shares shall be offered to the public unless there is an accompanying prospectus[3] or written statement.[4]

1. Act No. 61 of 1973
2. Section 143
3. Sections 145(1) and 146(1)
4. Section 141

In order to ensure compliance with the provisions of the Act when shares are offered to the public, there must therefore be a prospectus, which is issued, which issue should be public. The scope of this paper is thus limited to an inquiry into the prospectus itself (the meaning thereof), the 'issue' of the same and those to whom it is directed called the public. The requirements of form, content and

consequences of a proper or improper prospectus fall outside the scope of this paper.

The work is divided into four chapters. The first chapter is a preliminary one dealing with introductory matters, the purpose and stages of using the prospectus as a means of bringing to the attention of the public the shares and debentures which are being offered, as well as the usage and popularity of the method.

The second chapter is devoted to the definitive elements of a prospectus as contained in the Act, with particular emphasis on the offer/invitation requirement as well as the advertisement element. While a prospectus is defined to include an advertisement, the latter is nowhere defined in the Act as a result of which a number of problems arise. For instructive guidance the statutory and judicial statements of an advertisement as a prospectus in the United Kingdom and Australia are discussed in considerable detail.

The third chapter deals with the 'issue' concept. The link between the 'issue' requirement and 'public' is given attention. It will be demonstrated that the Act itself in prohibiting the issue, distribution or publishing of a written statement in section 141 had, in fact, given indication of the probable meaning to be attached to the term. It will further be indicated the 'issue' required by the Act must be an authorised one. Finally, the 'issue' as

used in the Act will be distinguished from its usage in other areas of our law.

The fourth and final chapter of the thesis deals with the 'public' concept. It is intended to show that this is the thrust of the prospectus provisions. Hardships brought about by absence of a definition of the term will be pointed out. The paper further looks into problems created by allegations that the field of application of section 141 is as regards share hawking. It will be demonstrated that the allegations hold no truth. The South African cases dealing with the term 'public' are given a thorough treatment. Furthermore, the wide definition of 'offer to the public' in section 142 and its limitations in section 144 are studied in detail.

Due to scarcity of judicial pronouncements on the concept 'public' in our law, the decisions in America, Australia and the United Kingdom, the various approaches and tests therein laid down form the central core of this work.

In the light of the state of law in other jurisdictions and the inconclusive approach in our case law, a conclusion is reached that the law be amended by the definition of the term 'public' to be included in our section 142 and thus help alleviate the obscurity prevalent at the moment.

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CHAPTER 1

INTRODUCTION

1.1 GENERAL

The purpose of this thesis is to examine the meaning of the phrase 'public offer of shares'. The reason is that a prospectus plays a major role as a document advertising company shares and debentures and thus raising capital. A prospectus itself does not generate any capital. It is company shares or debentures when sold[1] or subscribed[2] which complete the task. A prospectus merely serves to bring to the attention of the public the securities (shares or debentures) offered.

Seen in its proper perspective the relevance of a prospectus can properly be appreciated when the term is used with reference to a closely related term called 'public'. Together the two terms constitute the central theme of this work. A further ancillary question relates to the concept called 'issue' which, because of lack of complicity, will not take anything more than passing attention.

1.2 SCOPE OF THE WORK

The Act[3] says that no person shall offer shares to the public other than in accordance with the provisions therein prescribed.[4] Shares which by definition include debentures, can only be offered to the public in two ways, namely, sale[5] or subscription.[6]

It is not the purpose of this paper to pursue analysis of the provisions as prescribed. The scope of this work is limited to investigating preliminary issues, to wit, the document by which shares are advertised to the public called 'prospectus', the stage at which such can be said to have been 'issued' and, finally, those to whom the shares are offered called the 'public'. This is so because unless shares are offered to the public, Chapter VI of the Act relating to the prospectus provisions as to the requirements of form, content and consequences does not apply at all. The first task facing the offeror of shares as to whether there has to be compliance with the prospectus provisions is therefore to ask whether the offer to be made is public or not. If not, that is the end of the matter as prospectus provisions do not apply to non-public offerings.

1.3 THE PURPOSE OF OFFERING SHARES

The purpose of offering shares is to raise funds for the company. The earliest stage at which this can be done is immediately before incorporation when the promoter seeks to raise capital for a new company to be formed. This would be the first, but subsequent offers can also be made as the need arises.

Sometimes a company may wish to go for a listing on the Johannesburg Stock Exchange. As a prerequisite for that status, the rules require that a fairly substantial amount of capital, accompanied by a good spread of shareholders be attained. To meet the requirements the offering of shares to the public would be ideal.

Not infrequently it is not the company itself that offers shares to the public but the intermediary whose position is governed by section 146. As such intermediary becomes a conduit through which shares are offered to the public, there has to be compliance with the prospectus provisions. The intermediary becomes underwriter for any shares not taken by the public.

Individual shareholders may, in terms of section 141, offer shares for sale and retain the proceeds.

1.4 POPULARITY OF THE PROSPECTUS METHOD

Though once important as a means of raising capital, the prospectus method is fast becoming diminished by the usage of the open market and private negotiations in which institutional investors are approached directly. The Registrar of Companies Annual Report* for the year ended December 1987 shows that a record number of 206 prospectuses was achieved. However, when compared with the no less than 7 000 public companies which can use this method, the number is minimal.

Another factor that affects this method of capital raising is stated by Cary and Eisenberg[10] to be :

> "One thing is clear today. The major source of funds is through retention of profits According to the Economic Report of the President (1978), out of 71,1 billion dollars of corporate profits (after tax) for 1977 ... 42 per cent were kept in the business by all ...corporations".

It should be remembered that only public companies can offer shares to the public. Private companies are not allowed to so do.[11]

Chapter 1 - Footnotes

1. A sale of shares will help raise capital only if it is by an intermediary in terms of section 146. In that case the latter having acquired shares from the company for sale to the public plays the role of underwriter for any left.
2. 'Subscribe' means taking shares from a company's authorised capital by application and allotment - U.G.M.Holdings(1942) Ch.348.
3. Companies Act No. 61 of 1973.
4. Sections 145(1) and 146(1) and 141
5. Shares can be sold by individual shareholder to whom they have been allotted (section 141) or by the intermediary (section 146)
6. 'Subscribe' means taking shares from a company's issued share capital for cash - Government stock and other securities. Investment Company v Christopher (1956) 1 All ER 490
8. The Johannesburg Stock Exchange Rules, Requirements and Procedure for Listing (1979); Riley, The Development Capital Market Sector of Johannesburg Stock Exchange (1984) at 21. The requirements for the Main Board are :-
   (i) subscribed share capital of R1 000 000
   (ii) Profit before tax R1 000 000
   (iii) Acceptable trading record of 3 years
   (iv) Minimum spread of shareholders 300

(v) Public spread of shareholding of 30% of the first million shares.

9. At 1

10. Cases and Materials on Corporations 5th.ed. (1987) 1172

11. Section 14 of the Companies Act 1973

CHAPTER 2.

PROSPECTUS.

2.1 INTRODUCTION.

Since it first appeared in old English legislation the definition of a prospectus has been taken over almost verbatim. It is virtually the same in past and present English statutes and likewise is the position in South Africa and other English modelled jurisdictions.[1]

2.2 DEFINITION

The English Companies Act of 1900, to take one example, defined a prospectus as follows :-

> "A prospectus means any prospectus, notice, circular or other invitation, offering to the public for subscription or purchase any shares or debentures of the company".[2]

The present South African Companies Act provides :-

> "Prospectus means any prospectus, notice, circular, advertisement or other invitation offering any shares of a company to the public".[3]

The only difference between the 1900 English and present South African definition is omission of 'advertisement' in the former but specific reference being made to subscription, purchase and debentures not present in South African Act. Before attending to each of the definitive elements it would seem proper to have regard to the American definition which runs thus :-

> "Prospectus means any prospectus, notice, circular, advertisement, letter or communication, written or by radio or television which offers any security for sale or confirms the sale of any security".[4]

The American definition is commended for being wider and better than South African one. Comment on the merits will be provided in due course.

The definition given by textbook writers both here and abroad appear to boil down to one cardinal point, namely: that a prospectus is some kind of a document.[5] Thus Cilliers and Benade[6] say :-

> "The document in which disclosure of the information relating to an offer to the public is made, is known as a prospectus".

Along the same lines goes that given by Lawsa[7]:

> "A prospectus is a document issued by a company describing it and its business with a view to raising funds through an offer of shares".

To the extent that the authors link up the document in issue to the issuing of shares to the public[8] and raising of funds,[9] there would seem, it is submitted, nothing to query. Moreover, as there is a governing statutory definition, the problem need not keep us waiting that long.

2.3 ELEMENTS OF THE DEFINITION

2.3.1 Prospectus

The definition in the Act says that a prospectus means any prospectus. To this extent, the legislature has

surely, it is submitted, not started telling us anything. However, notwithstanding tantologous language involved, it appears from the textbook definitions[10] that to be a prospectus there must be a document or rather a prospectus is a document that offers shares to the public.

In order to constitute a document, written, other pictorial representation or some similar gesture must be made. Absent such, it would be difficult to imagine a document ever being made.[11]

Problems arise in so far as oral offers are concerned. In a situation governed by section 141, i.e. sale of shares or debentures to the public by individual shareholders, no problem arises at all, as it is expressly provided that no person shall make an offer for sale to the public, whether oral or written, unless the required statement accompanies such offer. Offers by the company or intermediary that fall under chapter VI, if public, need to be accompanied by a prospectus. Now the definition of the prospectus would seem to suggest that it is a document as textbooks and at least one decision suggest.[12] The question still remains as to what happens should the company or intermediary decide not to issue some kind of documentation but instead make oral offers.

The issue also troubles Pennington[13] who notices that the specific forms of invitation listed on the definition [prospectus, notice, circular, advertisement] are all written ones and, therefore, applying the *eiusdem generis* rule to the words 'or other invitation', it would appear that a prospectus must be in writing. An oral invitation to subscribe for securities does not, he says, seem to be a prospectus.

Wishing to give effect to the provisions of the statute and not to render them nugatory, it is submitted that the offer itself can be made in any way, whether orally or in writing; nevertheless, the accompanying prospectus must be in writing. This interpretation is supported by sections 145(1) and 146(1) which provide that an offer made to the public for the subscription or sale of shares must be accompanied by a prospectus. From these provisions it appears that there is a distinction between the offer itself and the accompanying prospectus on the other hand. It is the accompanying prospectus that must be in writing not the offer itself. However, in the majority of cases, offers are also embodied in the prospectus itself.

2.3.2 Notice and Circular

The definition says that a prospectus means a notice and circular offering any shares of the company to the

public. In this context a notice, circular only become prospectus when used to offer shares to the public. Where they are used for purposes other than offering shares they are not prospectuses.

In this regard the dictum of the American Securities and Exchange Commission in the matter of Carl M. Loeb. Rhoades & Co[14] is instructive. The Commission said in that matter :-

> "In the normal conduct of its business a corporation may continue to advertise its products and services without interruption, it may send out its customary quarterly, annual and other periodic reports to security holders, and it may publish its proxy statements, send out its dividend notices and make routine announcements to the press. This flow of normal corporate news, unrelated to a selling effort for an issue of securities, is natural, desirable and entirely consistent with the objective disclosure to the public which underlies the federal securities laws".[15]

2.3.3 Advertisement

While a prospectus by definition means an advertisement, it is interesting to note that an advertisement itself is nowhere defined in the Act. Furthermore, there is no judicial guidance on this point of South African law.

The advertisement element of the definition is never free from problems. Pennington[16] faced with the question whether an advertisement should be oral or written, holds that only a written advertisement is intended. An oral invitation to subscribe for securities does not, he says, seem to be a prospectus. He continues to hold that it is not certain whether a television or film advertisement is to be equated with an oral invitation because it is transient or with a written invitation because it appeals to the eye.

The view taken by the learned author does not seem correct. An advertisement does not need to be in writing for even an oral one is sufficient. It is submitted that the requirements of the Act would be satisfied by whatever form an advertisement takes, provided it amounts to an 'invitation' offering any shares of the company to the public'. The form, whether oral, written, pictorial or otherwise, it is submitted, is not decisive. There is no need to create a loophole by restricting advertisement to a written one only. Moreover, in ordinary parlance the term bears no writing connotation whatsoever.

Pennington's[17] restrictive interpretation of the words 'or other invitation' by application of the eiusdem generis rule limiting advertisement only to a written one does not appear to be justified at all. Moreover,

Windeyer J in a dissenting judgment in Lee v Evans[18] said that an invitation can be conveyed or communicated to the public in many ways :

> "In writing, by a notice in the press or posted in a public place conveying an invitation to any reader: orally, by an address to a public meeting or an announcement in a public place: by handing leaflets to passers-by in a public street: by circulars sent through the post: by going indiscriminately from house to house repeating the invitation. The essence of an invitation to the public is not in the manner of its communication..".[19]

The position would have been simplified if the South African Act had provisions similar to the American Code[20] which speficically refers to radio and television advertisements.

In New Zealand an advertisement is defined and advertise bears a corresponding meaning. In that jurisdiction, an advertisement means :

> any words, whether written or spoken, or any picture, drawing or figure -
>
> (a) inserted in any newspaper or other periodical publication printed or published: or
>
> (b) brought to the notice of members of the public ... in any other manner whatsoever.[21]

In England, an advertisement is not defined, but the Pharmacy and Medicines Act[22] states that an advertisement includes :

> "... any notice, circular, label, wrapper or other document, and any announcement made orally or by means of producing or transmitting light or sound".

Both the New Zealand definition and English description, because of their wide parameter, would constitute a sufficient deterrent to would-be transgressors. More important, these definitions render the Pennington stance irrelevant.

2.3.3.1 Controversy surrounding advertisements

The biggest problem with advertisements is that those making them do not, at that stage, give all the information that a prospectus does. The usual procedure is to make an advertisement giving the address to which requests for more information and particulars about shares can be directed. The question then arises as to what constitutes a prospectus that has offered shares, whether it is the advertisement in the press or further information or documents or, perhaps, all taken together.

In the New Zealand case of Telford v Shaw[23] an advertisement was made in newspapers intimating that further particulars were available on request. It was

there held that the process is complete and an advertisement is made when those promised particulars are made available to the invitee who had requested them pursuant to the advertisement. The case indicates that unless shares are offered, or invitation is made for offers to be made, either in the original advertisement alone or when read in conjunction with further documents giving information about the same, it cannot be said that a prospectus has been made.

The position in England is much more simple as demonstrated by the decision in Earp v Roberts.[24] In this case an advertisement was made in a periodical indicating that further information would be available on request. In answer to a letter asking for that further information, the appellant wrote an explanatory letter and enclosed a circular. The matter first came to the Chertsey justices who held that the advertisement in a periodical, the circular and the letter accompanying the circular together amounted to an 'advertisement'.

On appeal to the Kings Bench Division, it was held that the justices not only came to a right decision, but also to the only decision. The Court indicated that the circular itself was also an advertisement. It was further stated :

> "If it were not so, every investor ... could avoid the Act by publishing advertisements ... in which

> it is stated that further information will be given on application, and then, when, in response to the advertisement, an application is made to him for information ... sending a circular with a letter".[25]

Accordingly in English law fragmenting the advertisement into pieces would not be sufficient to escape the prospectus provisions.

The interpretation of fragmented advertisement presented considerable hardships to the High Court of Australia in Mutual Home Loans Fund of Australia Ltd. v Attorney General[26] (NSW) where the court was highly divided. The majority held that the advertisements were made but disagreed on the ratio. The facts of the case were briefly that the appellant, Mutual Home Loans Fund, made two advertisements in newspapers to which were annexed coupons, inviting members of the public to join a scheme whereby intending home owners could obtain mortgage finance on favourable terms. Further documentation was stated to be available upon forwarding a completed coupon. The documentation as forwarded indicated those interested could apply for options to take up shares in the management company of the appellant fund.

The question was whether there has been violation of section 40(1) of the Companies Act[27] which provided :

> "Every advertisement offering, or calling attention to, an offer or intended offer of shares in or debentures of a corporation ... to the public for subscription or purchase shall be deemed to be a prospectus [and the law relating thereto shall mutatis mutandis apply]".

Barwick C J in a dissenting judgment said that it was abundantly clear that neither advertisement as published in the newspapers contained nor called attention to an offer or invitation to subscribe for, or purchase, any shares in any corporation. The first advertisement he held, did not mention shares at all. The second was held to have gone further than the first towards indicating how membership of the Fund was to be obtained and gave the impression that shares in one of the companies would need to be held if the benefits of the scheme were to be secured; but, said the Chief Justice, clearly no reference was made to an offer or invitation to purchase or subscribe for any shares.

Turning to the argument raised by the Attorney-General that though the published advertisement, including the text of the coupon, may not make or call attention to an offer or invitation to purchase shares, the supplied information did so and was part of the advertisement because it was supplied in consequence of the making of the request contained in the coupon, his Lordship replied

that the statute required published advertisement to make or call attention to an offer or invitation of a particular kind.[28] If no indication was given in the published material of the nature of the information to be supplied, the Chief Justice found, he could not regard the supplied information as part of the advertisement for the purposes of the section. To advertise that if a request was made, information to the advantage of the inquirer will be given, was not as a general proposition to publish in that advertisement what the advertiser might be minded to vouchsafe to the optimistic inquisitor.[29]

His Lordship further indicated that such a course was indeed a method of bringing what is supplied to the notice of the inquirer. It might even have been regarded in an appropriate context as a means of bringing the facts contained in the supplied material to the notice of the public. Nevertheless, that was not to publish an advertisement containing that material within the meaning of the section because the offence was to publish or disseminate an advertisement, not to advertise. The offence was held not to have been satisfied by any method of bringing an offer or invitation to public attention as the offer or invitation or reference thereto should have been found in the published advertisement itself.[30]

The dissenting judgment of the Chief Justice has been referred to extensively, with greatest respect to his Lordship, to demonstrate its real danger. His Lordship surely appears, it is submitted, to have performed worse than his juniors in New Zealand and England.

In a separate concurring judgment, Stephen J held that neither of the two newspaper advertisements, viewed in isolation, was an advertisement offering shares to the public or calling attention to such offer even if 'offer' was taken to include an invitation to make offers. He further indicated that the context of the section suggested that an advertisement could not consist of a number of documents. However, his Lordship concluded, the fact that the documents were supplied in response to a request which was itself promoted and fostered by the public advertising of a printed coupon and accompanying advertising matter was sufficient to give these documents the quality of an advertisement for the purposes of the section. To advertise for applications by the general public for the supply to them of the material of that kind was as much a bringing of the material to the notice of the public as if it has been distributed in the streets and was enough to justify describing that material as advertisements.[31] The case of Telford v. Shaw[32] was duly followed.

The judgment of Stephen J is preferable to that of Barwick C J. The Chief Justice refused to follow Earp v. Roberts[33] holding that the conclusion therein reached could not be accepted as a general proposition. The case of Telford v Shaw[34] was rejected on the ground that it turned exclusively upon a statutory provision not present in the Act with which the Court in casu was concerned.

However, the most illuminating judgment of the case was delivered this time by Gibbs J who stated: "In my opinion, when an advertisement informs the reader that, on request made in a particular way, he will be sent further information, it is proper to have regard to any document sent in response to a request made in that way for the purpose of deciding whether or not the advertisement calls attention to a specific matter. In such a case the advertisement calls the attention of a person who receives the additional document to the matters stated in it, just as effectively as if the matters were sent out in the advertisement itself. The question raised by the words of section 40(1) is not what the advertisement contains but to what it does call attention. The advertisements in the present case called attention to an offer of shares to the public for subscription not by expressly referring to that offer, but by stating that on request the reader would be given further information which, when supplied, in fact

referred to the offer ... Put in another way, in deciding whether the advertisement called attention to an offer of shares, it is right to read the advertisement together with any other documents which were furnished as a result of a request which the advertisement itself suggested should be made".[35]

Gibbs J further indicated obiter that although it was immaterial to decide the question whether the newspaper advertisement or that advertisement together with the connected documents constituted the 'advertisement' within the meaning of the sections, it was, strictly speaking, the newspaper advertisement that answered that description, not because it would have done so if it had to be read in isolation but because it was designed to, and did in fact, call to the attention of the reader other documents that expressly referred to an offer of shares to the public for subscription.[36]

It is submitted that the judgments of Stephen and Gibbs JJ make sense and therefore settle the vexed question. To say that the advertisement that called attention of the reader to documents offering shares which were available on request is not to call 'attention to an offer or intended offer of shares' as Barwick C J did comes as a shock. Surely the advertisements and documents together were designed to call attention to and offer shares. This is exactly what they in fact

did. To say that they did not do what they have in fact done, despite direct link having been established, it is submitted, is untenable.

2.3.3.2 Advertisement in terms of section 157.

Section 157(1) provides that every newspaper or other advertisement whatsoever offering or calling attention to an offer or intended offer of shares of a company shall be deemed to be a prospectus issued by the person responsible for publishing or disseminating the advertisement (and all enactments and rules of law as to the contents of prospectuses and as to liability in respect of statements in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly).

If that were the end of the matter, there would not be much difficulty in arguing that regard could be had to the cases of Telford v Shaw,[37] Earp v Roberts[38] and Mutual Home Loans Fund of Australia v Attorney-General for New South Wales[39] for instructive guidance.

But alas! The section goes further to say that such advertisement is not a prospectus if it contains no more information than the following:

(a) the number and description of shares concerned,

(b) the name and date of registration of the company,

(c) the general nature of the main business or proposed main business actually carried on or to be carried on by the company,

(d) the names and addresses of the directors,

(e) the places and times during which copies of the prospectus may be obtained,

(f) where all the shares which are the subject of an offer are intended to be offered only to the members of a company or debenture holders, as the case may be, with or without the right to renounce in favour of other persons -

(i) the issue price of such shares,

(ii) the ratio in which shares will be offered to the members or debenture-holders entitled to accept the offer, and

(iii) the last day on which members or debenture-holders must register as such in order to be entitled to receive the offer,

(g) the last day for subscribing.

Sub-section (2) then provides that no statement that or to the effect that, the said advertisement is not a prospectus shall prevent the operation of the section.

The provisions of sub-sections (1)(a) to (d), it is submitted, are understandable and can be justified. In America they would fall to be classified as 'corporate news' provisions, which expression has been explained by the Securites and Exchange Commission in the matter of Carl M. Loeb, Rhoades & Co.[40] in the following way:

> "In the normal conduct of its business a corporation may continue to advertise its products and services without interruption, it may send out its customary quarterly, annual and other periodic reports to security holders, and it may publish its proxy statements, send out its dividend notices and make routine announcements to the press. This flow of normal corporate news, unrelated to a selling effort for an issue of securities, is natural, desirable and entirely consistent with the objective disclosure to the public which underlies the federal securities laws'.[41]

It is sub-section (1) paragraphs (e) to (g) that bring considerable hardships. Surely once an advertisement brings to the attention of the public a prospectus, indicating the places and times during which such may be obtained, the situation changes drastically. It should further be borne in mind that a prospectus by definition is a document offering any shares of the company to the public.[42] Furthermore, the definition of a prospectus includes an advertisement. On this basis when once

there is an advertisement directed to the public which also refers to a prospectus (bearing in mind that a prospectus is a document that offers shares of a company to the public), it is submitted that it is sufficient to find that in effect there has been a public offer of shares. The casual link between the advertisement and the prospectus is satisfied by reference in the former to the latter.

Paragraph (f) indicates in express terms that shares are clearly being offered. An offer to members or debenture-holders of the company may, in appropriate circumstances be found to be on offer to the public. Where there is a right to renounce, as the paragraph provides, there should not, it is submitted, be problems in finding that if a renunciation is to the public in general or a section thereof, an offer to the public has been made. This problem will receive attention in due course.

Paragraphs (f) and (g) taken together leave no doubt that the advertisement is one really offering shares to the public. Paragraph (f) in stating that 'shares which are the subject of an offer' and (g) which makes provision for 'the last date for subscribing' put it beyond doubt that it is no just a matter of advertising but in fact there is an offer of shares. Why the legislature still treats these clear cases of offering

shares to the public as exceptions is difficult to understand.

Henochsberg[43] submits firstly that the words 'advertisement ... offering any shares' appearing in the definition of a prospectus in section 1(1) are wide enough to cover an advertisement calling attention to an offer or an intended offer of shares and ought to be construed accordingly. This view, it is submitted, is correct. In terms of the rule in Mutual Home Loan Fund case the answer will be the same. Secondly, the learned author submits, in the light of the definition, the intention is that in order that an advertisement offering or calling attention to an offer or intended offer of shares of a company to the public should not qualify as a prospectus issued by the publisher or disseminator it must contain at least all the information envisaged by sub-section (1), paragraphs (a) to (g); if it contains only some of such information it will in any event qualify as a prospectus with all that this implies.

It is submitted that the second view of the learned author holds true but cannot be accepted as it stands. The present writer is of the view that the crucial paragraphs are (e) to (g). When once an advertisement contains information provided for in paragraphs (e) to (g), it is submitted, there is an offer to the public

and it makes no difference that other paragraphs are complied with or not.

In interpreting similar provisions, the Securities and Exchange Commission in the matter of Carl M. Loeb, Rhoades & Company[44] held that an offeror who is a party to or collaborates in initiating or securing publicity of securities must be regarded as participating directly or indirectly in an offer to sell or solicitation of an offer to buy as prohibited by the Act.[45] This view, it is submitted, ought to be considered as good law and therefore should be considered in South African law.

2.3.3.3 Advertisement calling attention to an intended offer.

Section 157(1) further provides that an advertisement calling attention to an intended offer of shares of a company to the public shall not be deemed to be a prospectus if it contains no more information than provided for in paragraphs (a) to (g). In this regard it should be noted that shares are not actually being offered as the offer is due in future. In South African law the Act says this is lawful but in contrast the law in America is that such advance advertisement is unlawful.

When shares are not yet offered but publicity about them is made, in America the practice is known as 'gun-jumping' which the law does not allow. In this connection the Securities and Exchange Commission in Carl M. Loeb, Rhoades & Co.[45] matter further said:

> "Publicity prior to the filing of a registration statement by means of public media or communication, with respect to an issuer [offeror] or its securities ... for a public offering of securities of such issuer, must be presumed to set in motion or to be part of the distribution process and therefore to involve an offer to sell or a solicitation of an offer to buy such securities in violation of the section".[46]

The same view was again taken by the Second Circuit Court in Chris-Craft Industries v Bangor Punta Corporation[47] which stated:

> "When it is announced that securities will be sold at some date in future and in addition, an attractive description of these securities and of the issuer is furnished, it seems clear that such an announcement provides much the same kind of information as that contained in a prospectus. Moreover it is reasonable to conclude that the assigning of a value to offered shares constitutes an offer to sell".

The Second Circuit continued to spell out one evil of such premature offers:

> "One of the evils of a premature offer is its tendency to encourage by the formation by the offence of an opinion of the value of securities before a registration statement and prospectus are filed".[48]

It is submitted that section 157(1), excluding the exceptions in paragraphs (e) to (g) is good law and should be interpreted in the light of the decisions in Earp v Roberts,[47] Telford v Shaw[50] and Mutual Home Loan Fund of Australia v Attorney-General[51] to hold that every advertisement is indeed a prospectus. It is further submitted that paragraphs (a) to (d) of sub-section (1) provide for 'corporate news' against which there is no objection. However, paragraphs (e) to (g), it is submitted, are contrary to the spirit of the section as a whole and should be interpreted in the light of the decisions in Carl M. Loeb, Rhoades & Co.[52] and Chris-Craft Industries v Bangor Punto Corporation[53]. To give the section a technical operation as Henochsberg[54] suggests, i.e. that an advertisement is not a prospectus if it contains all the information required in paragraphs (a) to (g) of sub-section (1) but that it becomes a prospectus if it contains only part the information therein required is only one way of expressing dissatisfaction with the

whole concept. To avoid uncertainty, confusion and wishing to have clarity, it is submitted that paragraphs (e) to (g) of section 157(1) should be scrapped.

2.3.4 Invitation and Offering

The Act also defines a prospectus as 'other invitation offering shares' to the public. The question as to what constitutes an offer or invitatikon and further as to who is invitor/invitee or offeror/offeree and, on the other hand, the acceptance of that offer is one essentially governed by the general principles of the law of contract and not company law. Nevertheless problems do arise in particular situations.

While the Act nowhere defines an invitation, the offer is defined as follows:

> "In relation to shares, means any offer made in any way, including by provisional allotment or allocation, for the subscription for or sale of any shares, and includes an invitation to subscribe for or purchase any shares".[55]

The definition itself envisages two situations namely; firstly, where in the circumstances it can properly be said that an offer has been made which can be accepted by the offeree and, secondly, where only an invitation is made.[56] The provisions relating to subscription apply mutatis mutandis to purchasing of shares.[57]

In the normal course of events it is the company that usually invites the public to make offers which it will either accept or reject. A classic example is the publication of a prospectus in the press. In this situation only an invitation is made, the public being invited to make offers which the company will accept by issuing share certificates to those who are successful. The Act further enjoins any person making an invitation to annex an application form to the prospectus.[58] Once again the company is only making invitations on the basis of which the public will make offers by completing the application forms and sending them back to the company.

The case of Gaydon v du Preez[59] illustrates the operation of invitation or offering principles. In this case the plaintiff was desirous of disposing of his shares and communicated this to the defendant who was his acquaintance. However, the defendant wrote him a letter proposing to buy the shares. The court held that it was the defendant and not the plaintiff who had made the offer.

In the case of rights offers, i.e. offers to shareholders and debenture-holders of the company, usually in proportion to their holding, it is an offer and not invitation that is made.[60] Such offers will be either renouncable or not. If they so choose, the offerees, instead of accepting the offers themselves, can renounce in favour of others.[61]

An offer may take the form of provisional allotment or allocation. This usually happens when the shares are offered to an intermediary who in turn issues them to the public, normally at a higher price.

In this regard the position is neatly summarised by Henochsberg[62] who says:

> "Any offer in relation to shares is an offer for the purposes of Chapter VI [dealing with prospectus] irrespective of how it is made, and more particularly where the method adopted is the company's provisional allotment of shares, or the provisional allocation of rights or interests in it or to any of its shares ... if it is one for the subscription for or purchase of shares; and it includes an invitation to subscribe for, or to purchase, shares".[63]

What the learned author is in fact saying is that it does not matter whether it is an offer or invitation that is made. All that counts is that if as a result of whatever it is, shares are subscribed for or purchased, an offer as defined in the Act is satisfied. As Palmer[64] puts it; whether it is an offer or invitation that is made is irrelevant. This approach is submitted to be correct.

The High Court of Australia also emphasised that the essence of an invitation to the public is not in the manner of its communication or in the number of persons to whom it is communicated. The South African Act says an offer is "an offer made in any way".[45] For this reason the court in Lee v Evans[46] said that an invitation can be made in many ways: in writing, by notice in the press or posted in a public place conveying an invitation to any reader; orally, by an address to a public meeting or an announcement in a public place; by handing leaflets to passers-by in a public street; by circulars sent through the post; by going indiscriminately from house to house repeating the invitation.

2.3.5 A form of application

The definition of a prospectus in section 1 does not make provision for an application form as a prospectus. However, the use in the section of the words "or other invitation offering any shares" is indicative of an extended interpretation to be given to it. It is on the basis of this extended meaning that a form of application, it is submitted, will also amount to a prospectus.[47]

A form of application[48] is customarily used as a document issued by the offeror for completion by the offeree giving his particulars and the number of shares

to be taken. A cheque will usually be included. The Act in section 147 further prohibits the taking of such a step unless the form of application is attached to a prospectus. An exception is allowed where the offeree is proved to have seen a prospectus.

There is authority for the view that a form of application will, in proper circumstances, also amount to a prospectus. In re Shotland Flat Gold-Mining Company[69] the promoters had issued the following documents inviting the public to subscribe for shares namely: a form of application, 'particulars' and a report. Faced with liability relating to the issue of a prospectus, the contention was raised that, taking the documents jointly or separately, no prospectus was issued. This argument was dismissed.
The court per Williams J said:[70]
"This form [of application] is in my opinion a 'prospectus' within the definition of the term prospectus ...Anyone reading it would conclude that it was an invitation offering to the public shares for subscription".

His Lordship continued:[71]
"It was contended, however, that although the application form (with or without the document that accompanied it) might be a prospectus,... it was not a prospectus as it did not comply with sections 74 and

75Z and that the prospectus mentioned in section 95(4) referred only to a prospectus which fulfilled the conditions mentioned in these sections. I see no reason to take that view".

In a concurring judgment, Edwards J also found contention untenable, holding that the 'particulars' and 'application form', either together or separately, were a prospectus as the shares had in any event been offered in that way.

2.3.6 Shares and Debentures

The definition of a share in section 1 says: "In relationship to a company, means a share in the share capital of that company and includes stock: and in relation to an offer of shares for subscription or sale, includes a share and a debenture of a company, whether a company within the meaning of this Act or not, and any rights or interests (by whatever name called) in a company or in or to any such share or debenture".

By definition a share includes a debenture which in turn is defined as:
"includes debenture stock, debenture bonds, any other securities of a company, whether constituting a charge on the assets of the company ornot".

Furthermore a share includes a 'unit' which expression is defined as meaning any right or interest (by whatever name called) in a share.[73]

By defining a share in sections 1 and 141(10) as including any interest or right in a share, the legislature has in effect suggested fragmentation of a share. While it is doubtful if in practice any offeror would ever take the pain of bringing to the attention of the public anything less than a full share, nevertheless the possibility still exists that other rights or interest in a share, as well as other rights in a company,[74] can be commercially exploited. The dictum of Greene MR in re V.G.M.Holdings[75] is appropriate in this connection. His Lordship explained in this case that:

A share is a chose in action. A chose in action implies the existence of some person entitled to the rights in possession".

It is interesting to note that things are much complicated in America where the issue is not just shares and debentures but something far more widely defined called 'security'. The term security means "Any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organisation

certificate on subscription, transferable share, investment contracts, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, or, in general, any interest or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase any of the foregoing'.[76]

The American definition of security is an indication that things are more complicated in some parts of the world than in others.

2.3.7 Subscribe and Purchase

A prospectus is a document that offers shares and debentures for subscription or purchase. Shares are subscribed when the company issues from its issued share capital, for the first time, shares which have not been allotted before. To purchase shares means to acquire them from existing holder and thus refer to shares which have been allotted by the company. On this analysis therefore, only the company can 'issue' and only shareholders or intermediary can 'sell' shares. The word 'purchase' cannot with propriety be applied to a legal transaction under which a person, by the machinery of application and allotment, becomes a shareholder in the company. This is subscription.[77] Lord Green MR said in V.G.M.Holdings[78] that the

difference between the issue of a share to a subscriber and the purchase of a share from an existing shareholder is the difference between the creation and the transfer of a chase in action. A share, it was held, is a chose in action.

A problem arises with the use of intermediary to whom the company 'issues' shares with a view not to retain them but instead offer them to the public for 'sale'.[79] Actual allotment to the intermediary is unnecessary at this stage as he fulfils the role of an underwriter, only taking those shares which the public fail to purchase. If the circuitous procedure of actual allotment to the intermediary is dispensed with, it would seem that the shares are still those of the company and therefore 'issued' and not 'sold' the time the intermediary disposes of them seeing that he stands in no other capacity than as a conduit. It is in this regard that the definition of a share in section 1(1) which in relation to an offer to or interest in any shares applies. In terms of the section the right or interest in a share that the intermediary has and can offer for sale to the public in terms of section 146 is such right or interest which the intermediary has against the company for delivery, i.e. allotment of the shares.[80]

To subscribe for shares means taking, or agreeing to take, them for cash. To purchase them means (buying) taking them directly or indirectly from an existing holder, also for cash. An offer of shares in exchange for other shares is not an offer for purchase.[81]

If the decision in Government Stock and Other Securities Investment Co. Ltd. v Christopher[82] that to subscribe for shares means taking them for cash is indeed true as is accepted by textbooks[83] without question, then subscription for the purposes of Chapter VI should be clearly distinguished from that for the purposes of Chapter IV dealing with subscription to the memorandum of association. Subscription for the latter purpose does not need cash to the exclusion of any other consideration.

That the decision in Christopher's[84] could correctly reflect the law gets support from a reference, in section 165 dealing with minimum subscription, to money only.[85]

The decision in Christopher's case has been queried and rejected by the Supreme Court of Victoria in Broken Hill Proprietary Co. Ltd. v Bell Resources Ltd.[86] In this case Hampel J sitting alone as a judge of first instance refused to follow Christopher's case on the grounds that, firstly, the authorities relied upon in that case

did not support a conclusion that the word 'subscription' in the definition of a 'prospectus' means 'taking or agreeing to take shares for cash'. Secondly, his Lordship held there was no reason why the provisions of the Code should be interpreted so as to deprive people who subscribe for shares in consideration for other cash of the protection. It was further reasoned that even greater protection is necessary in those circumstances.[68]

The cases relied upon in Christopher's case which Mr. Justice Hampel found did not support the conclusion therein reached are Arnison v Smith,[69] Chicago Railway Terminal Elevator Co. v. IRC[70] and Brown v IRC.[71] Apart from these three decisions the court, in Christopher's case also referred to Murray's Oxford Dictionary where one of the meaning attributed to subscription is:

> "A promise over one's signature to pay a sum of money for shares in an undertaking".

As far as Chicago Railway Terminal Elevator Co. v. IRC[72] is concerned, Hempel J was right in saying that it doeds not support Christopher's case. All that was said in that case is:

> "In our opinion the bond was not offered for subscription in the UK. It was not offered for subscription at all. The words 'offered for

subscription' are not, we think, apt words to describe the transaction in this case".

There was no mention of cash in relation to subscription. The second, Arnison v Smith[93] again does not in express words say that 'subscribe' means taking shares for cash. The furthest that the court could go was to quote with approval Kekewick J's dictum in the court a quo who had said:

> "Regarded by itself I should have thought that there was no doubt about the meaning of the word... I should have thought that it meant an agreement to take shares by means of application or otherwise; but at any rate, an agreement under which there would be liability to pay".

The court in Arnison's case further indicated that the word 'subscribe' ought not to be construed standing alone as regard must be had to the context and surrounding circumstances. The court held that it was a misrepresentation to say that shares have been subscribed when they were in fact only allotted as fully paid-up shares to the contractor.

Although the court in Arnison's case did not expressly say so, the context and circumstances of the case indicate that 'liability to pay', to use the phraseology of the case, referred to payment in money. Whether

without clear indication from the context and circumstances of each case 'liability to pay' will in each and every case mean payment will be in cash to the exclusion of any other consideration is open to doubt. However, in its proper context, the Arnison case goes a way towards lending support to the Christopher case while standing opposite to Broken Hill Proprietary Co. Ltd.v Bell Resources Ltd..[74]

In Brown's case, which Hampel J said is one of the trio not supporting Wynn-Parry J's dictum in Governments Stock and Other Securities and Investment Co. v. Christopher[75] that 'subscribe' means to take shares for cash, Smith MR said:

> "It seems to me that the phrase 'bonds offered for subscription'... has a well-known and well-understood meaning and is perfectly intelligible... it means, if bonds are issued abroad and afterwards 'offered for subscription' in this country, i.e. by being placed upon the market or introduced in some other way here, so that persons willing to subscribe thereto may do so, then those shares are offered for subscription".

His Lordship then concluded:

"The giving up of old bonds in exchange for the new is not subscribing to the new bonds...".

This ruling is precisely what the court made in Christopher's case, i.e. the giving up of shares in exchange for other shares is not subscription thereto. It therefore comes as a surprise that Hampel J in Bell Resources could still be heard saying:

> "There is no reason, in my view, why the provision of the Code should be interpreted so as to deprive people who subscribe in shares in consideration for other shares of the protection".[96]

It is submitted that two of the three earlier decisions, i.e. Arnison v Smith[97] and Brown v IRC[98] support Christopher's case. It is further submitted, with respect to the learned Judge, that Hampel J in Bell Resources was wrong in saying that they do not. Bell resources has, furthermore, other objectionable features, namely:

(i) It is a single judge decision of first instance. On the authority of Burgess v Purchase & Sons (Farms) Ltd.[99] the function of a judge of first instance is to apply the law as it stands. If the law is declared in earlier decisions at first instance he ought to follow them unless he is satisfied that they are wrong.[100] The law as it was at that time was according to Christopher's case. Hampel J who was duly referred to the Burgess case which he declined to follow, ought to

have followed both cases, i.e. Christopher and Burgess. Nevertheless, he did not. The decision not to follow authorities is itself wrong.

(ii) Hampel J also held that shareholders of a company are members of the public. To this controversy we revert in due course.

It is submitted that the decision of Hampel J in Bell Resources is wrong and that Wynn-Parry in Christopher's case was right. With reference to the prospectus provisions, there is nothing consistent with thenotion that subscription can be in something other than cash. South African section 165, which prohibits allotment of shares unless a minimum subscription has been received, only mentions payment in cheque. In sub-section (3) of the section it is expressly stated that the amount so stated as the minimum subscription shall be reckoned exclusively of any amount payable otherwise than in cash. From these provisions it appears that only cash is contemplated and not exchange of shares or contribution of other property.

Now section 165, like the rest of the sections of the South African Act, in fact the Act as a whole, is a replica of old English legislation. With reference to minimum subscription, the section says' subscription' means taking for cash, exclusive of other

consideration. In England, according to Christopher's case, to 'subscribe' means take for cash. In Australia where the origin of their company legislation is also English, should the approach be different? If essentially similar provisions mean different things in different parts of the world, that is our main regret.

'Subscribe' when used for the purposes of prospectus provisions in Chapter VI should not, because of the context and circumstances, including the provisions thereof, be confused with 'subscribe' for the purposes of Chapter IV dealing with subscription to the memorandum of association. For the purposes of subscribing to the memorandum of association, 'subscribe' only means being a signatory to the memorandum. It does not mean taking shares for cash.

The case of Akerhielm v De Mare[101] clarifies the point. In this case there was a statement that 'one-third of the capital was subscribed'. The argument raised was that it was false to say the stated amount of capital was subscribed when in fact 'capital subscribed' included shares issued for considerations other than cash. The case of Arnison v Smith[102] was referred to. The Court of Appeal held that 'subscribed' did not mean 'subscribe for cash'. This view was affirmed by the Privy Council as Lord Jenkins said:

"It seems to them [their Lordships] impossible to maintain that the defendants ... could not, consistently with the representation, pay (for example) the formation expenses by allotting fully paid up shares of the appropriate nominal amount to the persons to whom the expenses were payable instead of issuing shares to a like nominal amount for cash and paying the cash so raised to those persons, or by allotting fully paid shares to the appropriate nominal amounts ... in respect of the patent rights".[103]

Chapter 2 - Footnotes

1. e.g Companies Act 1961 (New South Wales); Companies Act (Western Australia)
2. Section 30
3. Section 1(1)
4. Securities Act 1933 section 2(10)
5. e.g. Charlesworth and Cain on Company law 12th ed. by Morse at 129 where the term 'document' appears six times at one page. The learned authors explain 'prospectus' in the following words : "When the public is asked to subscribe for shares or debentures in a company, the invitation involves the issue of a document. This document is called a prospectus".
6. Company Law. 3rd ed. at 233
7. Vol. 4, para 65 at p.93
8. See Cilliers and Benade supra; Charlesworth and Cain op cit at 289
9. Lawsa, op cit
10. Ibid
11. The dictionary meaning of 'document' also includes the written requirement. However, document also includes, proof, evidence, etc.
12. Rousell v Burnham (1900) 1 Ch.127 at 130
13. Company Law 3rd ed. 214
14. 38 S.E.C.843 (1949)
15. Also quoted by Cary and Eisenberg Cases and Materials on Corporations, 5th ed. at 1214
16. at 214

17. Supra

18. (1964) 112 C.L. p.276

19. At 292

20. Securities Act 1933 section 2(10)

21. Medical Advertisement Act (N.Z).1942, section 14

22. Act of 1941, section 17

23. (1944) NZLR 481

24. (1947) 1 All E.R. 136

25. At 137

26. (1973) 130 C.L.R. 103

27. 1961 (New South Wales)

28. At 109 of the report

29. At 109

30. Ibid

31. At 122-3

32. (1944) NZLR 481

33. (1947) 1 All E.R. 136

34. Supra

35. At 118-937. Supra

36. At 119

37. supra

38. Supra

39. Supra

40. (1959) 38 S.E.C. 943

41. Also reproduced in Cary and Eisenberg at 1215

42. Definition of a prospectus in section 1(1)

43. On the Companies Act, 4th ed. Vol.1 at 232

44. 38. S.E.C. 843 (1959)

45. Supra

46. Section 5 of the Securities Act 1933

47. 426 F 2nd 569 (2nd Cir 1970)

48. Also reproduced by Cary and Eisenberg at 1217

49. Supra

50. Supra

51. Supra

52. Supra

53. Supra

54. Op cit

55. Section 142

56. Charlesworth and Cain on Company Law 12th ed. at 130

57. See section 142 which provides for both subscription and purchase.

58. Section 147

59. 1946 WLD 198 at 202

60. Charlesworth and Cain loc cit

61. Definition of 'rights offer' says with or without right to renounce.

62. On Companies Act 4th ed. 251

63. Ibid

64. Palmer's Company law 23rd ed

65. Definition of an offer in section 1

66. (1946) 112 C.L.R.276 at 292

67. Henochsberg supra; Gower Modern Company Law 4th ed. at 352

68. The terminology used in section 147

69. (1910) 29 NZLR 931

70. At 947

71. At 948

72. Of New Zealand Companies Act 1908

73. Section 141(10)

74. Section 1(1) definition of share

75. (1942) Ch. 235

76. Section 2(1) of the Securities Act 1933

77. In re V.G.M.Holdings(1942) Ch. 235

78. Supra

79. Section 146

80. Henochberg 218

81. Government Stock and Other Securities Investment Co. v Christopher (1956) 1 All E.R. 490. Ge pante Lovell(1938) 38 SR(NSW) 153

82. Supra

83. Henochsberg 4th ed. 210. Gower Modern Company Law 4th ed. 352

84. Supra

85. Also Calvert v McKenzie (1937) NZLR 966

86. (1984) 9 ACLR 609

87. Companies Act 1961 (Victoria) section 96

88. At 617 of the report

89. (1889) 41 Ch 348

90. (1896) 75 LT 157

91. (1900) 84 LT 71

92. Supra

93. Supra

94. (1984) 9 ACLR 609

95. Supra

96. At 617

97. Supra

98. Supra

99. (1983) i Ch.216

100. Supra at 223

101. (1959) AC 789 (P.C)

102. Supra

103. At 804

CHAPTER 3

ISSUE

3.1 INTRODUCTION

Sections 145 and 146 prohibit the making of any offer to the public for the subscription and purchase of shares unless there is an accompanying prospectus which complies with the requirement of the Act.

It has been noted earlier that s145 governs offers for subscription by the company, while section 146 governs offers for sale by the intermediary in circumstances therein provided for. The section applies when the company has allotted or agreed to allot the shares to the intermediary with a view to all or any of them being offered to the public, or it is the intention of the company to apply for the listing on a stock exchange.[1]

Where it is a shareholder who wishes to dispose of his shares the matter is governed by s141. It provides that no person shall either orally or in writing (including any newspaper advertisement) make an offer to shares for sale to the public or issue, distribute or publish any

material which in its form or context is calculated to be understood as an offer aforesaid unless it is accomplished by a written statement complying with the requirements of the section. There are exceptions to this section in sub-section (2) which need not concern us for the purposes of this work.[2]

Crucial to an understanding of the operation, effect and purpose of sections 145, 146 and 141 is the determination of the meaning of the words "issue" and "public". Only when it has been ascertained what exactly "issue" is intended to mean, will reference to the term "public" be appropriate. A common feature of the three sections is that they all prohibit the making of offers to the public for the purchase or subscription of shares unless there is an accompanying prospectus or statement in the case of s141. This making public of the prospectus is the "issue" thereof.

Furthermore, the three sections have no application at all unless an element of publicity of the offer is involved. For in the case of entirely private share sales or offers, there is no prospectus/written statement requirement.

3.2. ISSUE

The question as to whether there has been 'issue' [fully quoted] of a prospectus will in the majority of case

arise when shares are offered to the public by the company or intermediarys. In the case of offers by shareholders which are governed by section 141 it would appear that the "issue" problem will not be so pertinent. The reason is that if the section really regulates "share hawking", the hawker will as a rule not publish the statement but rather only have it in possession if the least step to insure compliance was to be taken. However, it will in due course be contended that section 141 is not so limited to "share hawking".

A written statement or prospectus is required to be registered with the Registrar of Companies before it can be issued, distributed or published.[4] Such date of registration is, unless the contrary is proved, taken as the date of the issue of a prospectus.[5]

Registration of a prospectus or statement is not itself, and without more, the issue thereof. The provision as it stands, applies when it cannot be proved that there has in fact been issue. Mere registration alone cannot amount to issue.[6]

In an earlier decision of R v Akoob and Another[7] it was said that "if a prospectus is issued it means it has been used in order to obtain subscription for shares". This is the technical meaning of the terms and a proper one in this context.

The word "issue" is in the Act, used in conjunction with the terms "circulate" or distribute" giving a clear indication of what the term means. It is submitted that in order to get a better meaning of the terms, it must be understood eiusdem genenis of circulate or distribute. The indication would then be that the issue of a prospectus must at least be a semi-public publication.[8]

It was held in R v Akoob and Another[9] where a prospectus was never used, never published and nobody ever having been asked to subscribe for shares under it, that it was never issued. The law therefore, according to this decision is that a prospectus is issued when it is made public.[10] There must be an element of distribution of the prospectus.

The view taken in Akoob's case that publication alone is not enough, but a prospectus must be issued with a view that the public use it as a basis for subscription for shares derives support from the old English case of Twyeross v Grant[11] where Lord Cockburn CJ, with reference to the term issue said:

> "I think it must be taken to mean the making at a prospectus public... with a view to inviting persons to take shares and become members of the co...".

The term "issue" goes hand in glove with "public" and together with the requirement that the public be invited to subscribe shares on the basis of a prospectus thus issued give meaning to the technical use of the term.

The House of Lords in Nash v Lynde[12] brought clarity to the meaning of the term, holding per Lord Hailsham LC that:

> "In my judgment it is sufficient in order to bring s81[13] into operation that the prospectus in question should be proved to have been shown to any person as a member of the public and as an invitation to that person to take some of the shares referred to in the prospectus...".[14]

His Lordship continued to say"

> "There was no issue of a prospectus to the respondent. The documents were shown not for the purpose of inviting subscription but to afford him information in case respondent should wish to negotiate employment with the company.[15]

A prospectus is also published for the purposes of "issue" if it is shown to offerees. This was the view of the court a quo in Lynde v Nash[16] where Scrutton J in a dissenting judgment stated:

> "In my opinion, a document couched in such general terms that if issued to the public it would be an

invitation to take shares, does not become a document issued to the public if it is never shown at all".[17]

What his Lordship, although couched in negative language is saying is that if a document [prospectus] is shown to the public inviting them to take shares, then it is issued. The correctness of the dictum stands, it is submitted, beyond doubt.

The Scottish case of Sleigh v The Glasgow and Transvaal Options Ltd[18] also supports the view that a document will only amount to a prospectus if it is issued to the public and furthermore, invites them to take shares. In this case, the facts were that before the formation of a company the plaintiff received from one 'D' to whom he was personnaly known, a document relating to the proposed company. Accompanying the document was a letter advising him to apply for shares. About forty of the documents were similarly distributed to business friends by provisional directors. Those friends of theirs were further requested to place copies before their friends and clients. The document contained no information to take shares, stating the proposed company was to be private. It was held on those facts that the document was no a prospectus within the meaning of the statutory provisions because:

(i) it was not issued to the public generally, and

(i) it did not contain an invitation to take shares.

There was also a further ground to which reference need not be made at this stage.

3.3 ISSUE MUST BE AUTHORISED.

To be an issue for the purposes of Chapter VI and s141 there must be authority to publish the prospectus or statement. With regard to the operation of section 141 one can easily visualise the situation where the offer/offeree will wish to deny his agent's authority to issue. The absence of authority becomes a real one with the application of sections 145 and 146. It does happen that directors issue a prospectus which the company challenges for want of due authorisation.

Lord Cockburn CJ in the old English case of Twycross v. Grant[19] said, with reference to "issue" that"

> "I think it must be taken to mean the making of a prospectus after its adoption... It must refer to official publication, authorised by those who at the time have the government of the company. It would otherwise not be a prospectus of the company".[20]

The case of Baty v Keswick[21] raises interesting points on the factual and legal scenario. In March, a draft propsectus was shown to a would-be underwriter who,

without reading it, agreed to underwrite certain shares. However the company could not be incorporated until May. The underwriter's liability was denied on two grounds, the court holding that there was never an issue of a prospectus because: firstly, the prospectus was shown to friends or speculators, not as members of the public but in order to induce them to co-operate with the promoters in placing shares with the public and secondly, the copies shown were not authorised.

Then came the case of Clark and Others v Urquhart[22] where the Court of Appeal had to decide the question of liability for untrue statements contained in a prospectus. It was there held that no liability was incurred inasmuch as the prospectus was not issued by or on behalf of the company.

Authority to issue a prospectus does not necessarily refer to existing authority. It is sufficient if a prospectus issued without requisite authority is subsequently adopted. This is ratification of the hitherto unauthorised issue. In Sleigh v The Glasgow and Transvaal Options Ltd[23] a document was forwarded to the plaintiff advising him to apply for shares. At that time, however, the company was not yet formed. It was not proved that the company after its formation had adopted or issued copies of the documents. The court held that the company, not having adopted the document, was not responsible for its contents.

3.4 SPECIAL MEANING OF ISSUE

Apart from the meaning of the term "issue" addressed to above, the courts have in earlier decisions given the term another meaning. It is submitted that this other meaning of "issue" when used in the context of negotiable instruments, does not apply to the offering of shares by way of a prospectus or written statement. The position becomes clearer when regard is had to the present definition of "issue" in the Bills of Exchange Act.[24] For the purposes of this Act, "issue" means the first delivery of an instrument [bill, cheque or promissory note] complete in form to a person who takes it as a holder.[25] It should further be borne in mind that the Act governs private negotiations between contracting parties, not public offers or invitations of shares.

The first of the earlier decisions is Chicago Railway Terminal Elevator Company v Commissioner of Inland Revenue[26] where, in order to effect a reconstruction scheme, a London company had its debts and liabilities taken over by a new company in Chicago. Old debenture holders were required to surrender their debentures in exchange for new ones in Chicago company. Accordingly, new debentures were delivered to the trustee in Chicago who acted on behalf of the London holders. The Revenue taxed the debentures on the grounds that they were "issued", "transferred" or "offered for subscription" in the United Kingdom. On appeal to the Queens Bench

Division the Revenue decision was reversed.

In reaching this conclusion, the court per Pollock and Price JJ said:

> "The instrument in question was certainly not "made" in the United Kingdom, and we do not think that it can be said to have been issued there. It seems that it was issued in Chicago. If the [London] company ad sent the old debenture by an agent or their own to be exchanged for the new mortgage bond in Chicago, we cannot entertain a doubt that the delivery of the bond to him at Chicago would have been an issue at the bond, and we think it makes no difference that the person who acted as the agents of the [London] company were the offices of the appellant."[27]

Their Lordships continued:

> "in our opinion the bond was not offered for subscription in the United Kingdom. It was not offered for subscription at all. The words "offered for subscription" are not, we think, apt to describe the transaction in this case."[28]

From the above extract it becomes clear that the court did suceed in distinguishing "issue" for the purpose of negotiable instruments and "issue" for the purpose of offering a prospectus. It was accordingly held in that

case that the title of the company to the land bonded was complete and the moment it was delivered by the trustee of the appellant company in Chicago. This is in line with the Bills of Exchange Act[29] envisages by defining "isue" as the first delivery of an instrument, complete in form, to a person who takes as holder.[30] In

holder's representative trustee.

The second case is Brown v Inland Revenue Commissioners[31] the facts of which were similar to those in the Chicago case. The court per Smith MR stated:

> "I cannot see, when the new compnay in the present case delivered the new bonds to the committee... why there is not an issuing of the new bonds to the committee in the fullest sense of the term, though there may have been a trust or obligation to apply the new bonds or their proceeds in a particular way. But this does not make the issuing any less an issuing of bonds".[32]

That the "issue" in this case was one relating to negotiable instruments cannot be stated with any clearer precision than his Lordship Collins LJ did in saying:

> "I think that there cannot be an issue in point of the law of negotiable instruments unless and until it comes into the hands of some person entitled to treat it as security availbale in law".[33]

"Issue" in the context of the law of negotiable instruments differs and should clearly be distinguished from "issue" for the purposes of prospectus provisions of the Companies Act. The special meaning of issue i.e. the first delivery of an instrument, complete in form, to a person who takes it as holders, does not apply for the purposes of s141 and Chapter VI of the Companies Act.

Footnotes - Chapter 3

1. Section 146(1) (a) and (b)
2. Exceptions in s141(2) are: sales of listed shares; offers: by sharedealer, to a sharedealer, of the company; to executors of deceased estates; trustee; sale in execution; by public auction; and where a prospectus is made.
3. Henochsberg 205, Cilliers and Benade; Gayton v Du Preez 1946 WLD 198
4. Sections 141(7) (written statement), 141(1) and 146(1) (prospectus).
5. Section 154(5)
6. Henochsberg 223; R v Akoob and Another 1951 (4) SA 683 (T)
7. Supra
8. R v Akoob supra at 697
9. Supra
10. At 697 D
11. 2 CP Div. 540
12. (1929) AC 158 (H.L)
13. Of the Companies Act (Consolidation) 1908
14. At 164
15. At 165
16. (1928) 2 K.B. 99 (CA)
17. At 101
18. (1904) 6 F. 420
19. 2 CP Div 540
20. Also quoted by Farwell J in Baty v Keswick (1901)

85 LT 18

21. (1901) 85 LT 18

22. (1930) AC 28

23. (1904) 6 F 420

24. Act No 34 of 1964

25. Section 1

26. (1896) 75 LT 157

27. At 157

28. Ibid

29. Act No 34. of 1964

30. Section 1

31. (1900) 84 L.T. 71

32. At 79 of the report

33. Ibid

CHAPTER 4

THE PUBLIC

4.9.1 The offer is not public if it can properly be regarded, in all the circumstances, as not being calculated to result, directly or indirectly, in the shares becoming available to persons other than those to whom it was made.

4.9.2 An offer is not made to the public if it is an offer for subscription to the members or debenture holders of the company without the right to renounce any right to take up shares in favour of other persons.

4.9.3 An offer is not public if it can properly be regarded in all the circumstances, as being a domestic concern of the persons making and receiving it.

4.9.4 An offer is not an offer to the public if it is a rights offer.

4.10 CONSIDERATION OF THE TERM 'PUBLIC'

4.10.1 General

4.10.2 Public and "Parys Diamante" cases

4.10.3 The third Rossouw dispensation

4.10.4 The position following the third Rossouw

4.10.5 Problems of the present approach

4.10.6 Post Rossouw cases

4.10.7 The Harcourt Court

4.11 ANOTHER APPROACH OF HANDLING THE CONCEPT 'public'

4.11.1 General

4.1 INTRODUCTION

Having therefore passed through the slippery grounds of a 'prospectus' and the 'issue' thereof, we can now venture into the troubled waters of those to whom a

prospectus is directed called the 'public' with a hope that we might get an answer or a near one for that matter. The question as to what the public is or is not is a vexed one to which no easy solution can be presented.

The Courts, on many occasions, being unable to lay down broad framework within which to attend to the problem, have simply said that the term public is a question of fact that depends on the circumstances of each case.[1]

The Court in S v National Board of Executors Ltd[2] has attempted to lay down certain principles for guidance, but a closer look at them shows their limit. More so when the facts of that case are borne in mind, in particular the wording on the outcover of the brochure involved. Anyway the court in this case was concerned with an exception to the 'public' concept.

Faced with scarcity of judicial pronouncements on the point in South African law, it is rewarding to have a look at the development in other jurisdictions. There is much to learn and borrow from abroad where various tests and approaches have been formulated, although this is not to suggest that a simple answer is hidden somewhere only to be picked up.

In dealing with the question of the public, the legislature in the Companies Act has omitted to define the term.[3] It is only in a few given circumstances that there is specification of what the term does not mean, i.e. exceptions to the concept of public offer of shares and debentures.[4]

4.2 REASONS BEHIND THE PUBLIC YARDSTICK

Before considering the possible meaning of the word 'public', and the various tests that have been used to decide it, it appears proper to have regard to the basis of, and the reasons behind, the application of the public yardstick as a front-runner to the operation of the prospectus and written statement provisions.

The basis of South African company law, an understanding of the ratio behind the application of the prospectus and written statement provisions, and the use therein of the public yardstick as the test is not forthcoming unless regard is had to the inner logic of this branch of the law. In this regard there is a very instructive dictum of Coetzee, DJP which highlights the philosophy of South African company law. In ex parte NBSA Centre Ltd.[4] his Lordship explained:

> "Company law is much more than the current statute which applies at any particular point in time. Like every other statute which regulates comprehensively some field of human activity, it

has its own inner logic which requires to be identified and mastered. In addition it has developed a number of areas that might be termed, for want of more suitable expression, its inner common law which is not to be found in any specifically identifiable provision. There are a number of such areas ... one should view its underlying principles in their historic and economic context rather than as a collection of statutory provisions".

4.2.1 The inner logic of South African Company Law

According to Cilliers and Benade[5] if there is any one key word which more than any other sums up the underlying principles of South African company law, then it is disclosure. The doctrine of disclosure, which is a term adopted from English law, is fundamental to the companies legislation of England and, as a consequence, of South Africa. The essence of the doctrine embraces both the requirement that specified information be disclosed as safeguard for the benefit of certain interested parties as well as the element that disclosure takes place of detailed provisions regulating or restricting company conduct.[6]

A direct consequence of the disclosure doctrine is the resulting publicity. Publicity which is the main feature of South African company law takes a number of

forms. Firstly, there are provisions that a company itself, on meeting certain requirements, is public.[7] Secondly, the most important documents of such a company become public.[8] Thirdly, another important document of a public company called a prospectus or written statement (in appropriate circumstances) is required to be public.[9] Lastly, when such a document (prospectus or written statement) is circulated or distributed, should such be general, those to whom it is so distributed are called the public.

From this series of interrelated concepts and practices, rooted in the inner logic of our company law, there arose, with reference to the prospectus and written statement provisions, the public yardstick. However, the inner logic, coming as it were from English law, is not the only reason.

4.2.2 Other reasons for the use of the public yardstick

4.2.2.1 Historic

As the Deputy Judge President indicated in Ex parte NBSA Centre Ltd[10] one should view the principles underlying South African company law in their historic context. As the learned author's Cilliers and Benade[11] point out (and South African company lawyers should know), our company law is founded on English legislation and common law. Thus the present

law and practice including the use of the 'public' test with reference to the prospectus and written statement provisions are all limitations of English law and practice.

4.2.2.2 Economic

If a company wishes to raise capital for its business, one way of achieving this objective is by issuing shares from its authorised share capital to the public. This method was frequently resorted to in the past in England. One of the main factors in the evolution of the company as a form of business enterprise is its propensity to serve as a vehicle for mobilising substantial amounts of capital from a large number of investors for business ventures. When the investors concerned are all and sundry, they are the public or at least members thereof. Because in their historical context the English public were the main target for raising capital for the companies, this fact had an influence on the development of company law and the protection to be afforded the investor. The prospectus provisions were thus aimed at the protection of the main investor, the public.

4.2.3 Investor Protection

Professor Gower[13] has it that while the prospectus provisions are extremely confusing, largely because they have grown up haphazardly as new safeguards have

been added to meet dangers revealed by experience, nevertheless the general aim is clear, namely, to ensure that the company give to the public the essential minimum of information about its position when it is launched into the world, and that whenever it offers its securities to the public it fully and fairly discloses the relevant facts so that the risk of the investment can be assessed.

Our writers Cilliers and Benade[14] also confirm the theory of investor protection. They explain that over the years many abuses occurred where shares in companies were offered to the investing public, both in regard to the raising of capital for companies and the sale of existing share investments. These abuses have enjoyed the attention of the legislature from time to time and have resulted in the offering of shares in a company to the investing public being strictly regulated by legislation. The basis of this regulation in the Act is the disclosure doctrine which functions on the assumption that if publicity is given to adequate information relating to the matter concerned, the investing public will be able to look after their own interests by making an informed judgment on the merits of the matter.[15]

In the context of the offering of shares, which are incorporeal property, and which cannot be subjected to a

physical evaluation by a potential investor, the Act requires the disclosure of sufficient reliable information concerning the company, as issuer of those shares, to the potential investor to enable him to value the shares and assess the merits of the investment he is being invited to make. The authors[16] therefore hold that the Act is primarily concerned with the extent of information[17] which must be disclosed to potential investors and the circumstances in which such disclosure is necessary while an attempt is made to secure the accuracy of the information which is disclosed by the imposition of statutory civil and criminal liability on those supplying it.[18]

In Central Railway Company of Venezuela v Kirsch[19] the court again confirmed the theory, saying that although in its introduction to the public some high colouring, and even exaggeration in the despiction of the advantages which are likely to be enjoyed by the subscribers to an undertaking may be expected, yet no misstatement or concealment of any material fact or circumstnce ought to be permitted. The Lord Chancellor summarised the position as follows:

> "In my opinion, the public who are invited by a prospectus to join in any new adventure ought to have the same opportunity of judging at everything which has a material bearing on its true character as the promotors themselves possess".[20]

The golden legacy[21] of investor protection was stated in New Brunswick and Canada Railway and Land Company v. Muggeridge[22] in these words:

> "Those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy and not only to abstain from stating as facts that which is not so, but to omit no one fact, within their knowledge, the existence of which might in any degree affect the nature, or extent or quality, of the privileges and advantages which the prospectus holds out as inducements to take shares".[23]

It is submitted that counsel for the accused in S v National Board of Executors Ltd and Others[24] correctly spelled out the issue when raising the contention that shares, being incorporeals and a complex of rights and obligations which cannot be physically inspected, this requires the application of the "permeating philosophy" of the Act, namely, full disclosure to the public of all information necessary to enable the public rationally and accurately to evaluate the investment offered. Unfortunately, the argument, said the Court, was question begging as it must first be decided whether

there is an offer to the public before any duty of full disclosure can apply.

4.2.4 Mischief rule

One other reason why our law uses the public yardstick in the operation of the prospectus and written statement provisions is because of the mischief inherent in a transaction where one party, by virtue of his position or relationship to the company, or where shares are offered by the company itself, by virtue of its better position in knowing its affairs has, and the other does not, information which affects or may affect the value of shares being offered.

This problem was alluded to in Vlakspruit Landgoed (Edms) Bpk v J Mentz (Edms) Bpk[25] where, with reference to section 141, the court indicated that the object of the legislature was to combat peddling of shares in worthless companies. It may only be added that in given circumstances, while the company itself might be worthwhile, nevertheless for good reasons, the shares offered might not.[26]

4.2.5. Miscellaneous

A number of other reasons can be advanced to show cause for the applicationss of the public test before the operation of the prospectus provisions. It is not in any way intimated that there is an exhaustive list of such reasons.

Not infrequently, because of the number of shares involved and the nature of the offer or invitation being such that it is directed to all and sundry, that element of personal contact or direct dealing between the offeror and offeree is missing. The result is that the offeree is not in a position to find out more about the shares from the offeror. It would appear that in such a case, there can be nothing more equitable than that the offeror, making as it were an offer to the public in general, should make full disclosure.

4.3 WEAKNESS OF THE PUBLIC TEST

The inner logic of our company law on the offering of shares and the issue of a prospectus with its use of the "public" test as the starting point for the operation of the prospectus and written statement provisions has a number of drawbacks. Firstly it proceeds on the assumption that shares are offered to the public. According to this approach, shares are either offered to the public, in which case the theory of investor protection dominates, or they are only offered privately thus rendering the prospectus and written statement provisions inapplicable. While the prospectus provisions are made applicable if shares are offered to the public, no explanation is given as regards the selection of the public as the criterion in the first place.

Secondly, the application of the public yardstick does not account for the case where although shares are offered to the public, nevertheless, the protection theory is rendered inapplicable because the offeree does not need to be protected e.g. being an expert on shares. Conversely, even in a true private offering situation, the offeree may, by virtue of his weaker bargaining position, still need protection. Regretably, the law as it is at the moment keeps such an offeree or invitee well beyond the reach of statutory disclosure provisions.

A further point is that the concept "public" is not defined and thus still remain difficult to understand. It is interesting to note that our courts have not considered why the public test has been resorted to in the first place. They only proceed on the understanding that it is the test. Meanwhile our legislature has done nothing more than reproduce English legislation.

4.4 ALTERNATIVE APPROACH : THE AMERICAN POSITION

Absent sufficient space, it does not seem expedient to go deep into American law, except only that some highlights will be given. The only purpose of referring to that law at this stage is merely to show that there is another way of doing things.

According to section 4(2)[27] and Rule 146[28] registration and prospectus provisions do not apply to any class of securities which the Securities and Exchange Commission finds the enforcement of the provisions with respect to such is not necessary in the public interest and for the protection of investors by reason of the small amount[29] involved or the limited character of the public offering.

Registration and prospectus provisions again do not apply where the offeree is accredited,[30], sophisticated[31] or because of the availability of, or access to, information, he is able to fend for himself.[32] To each of these exceptions we now turn.

4.4.1 Sophisticated investor

A sophisticated investor is one who has such knowledge or experience that he is capable of evaluating the merits and risks of the proposed investment or that he can bear the risk of the investment. In addition, immediately prior to a sale, the issuer and any person acting on its behalf, after making intelligent inquiry, shall have reasonable grounds to believe and shall believe either that the offeree himself has the requisite knowledge and experience, or that the offeree and his representative have such knowledge and experience and that the offeree himself is capable of bearing the economic risk of the investment.[34]

While it could be assumed that certain persons, such as lawyers, accountants and businessmen, are 'sophisticated' investors who do not need the protection afforded by registration and prospectus provisions, the Court in the United States v Cutter Channel Wing Corporation[35] took the view that sophistication is not a substitute for access to the same type of information that registration would provide, and that a person's financial resources or sophistication are not, without more, sufficient to establish the availability of the exemption. Therefore, over and above 'sophistication', there should be access.

4.4.2 Accredited investor

Section 2(15) defines an accredited investor as, (apart from including institutional investors)[36] any person who, on the basis of such factors as financial sophistication, net worth, knowledge and experience in financial matters or amount of assets under his management, qualifies as an accredited investor under the rules and regulations which the Commission shall prescribe. Included in the definition is any director, executive officer or general partner of the issuer (offeror) of the securities. Regrettably, the Commission defines accredited person in terms of wealth.[37] Such an accredited investor does not need the protection of registration and prospectus provisions, i.e. is exempted from their operation.[38]

4.4.3 Access to information

According to Rule 146, in determining whether an offeree needs the protection afforded by registration, it is essential to consider whether he has access to, or has been furnished with, the same kind of information that registration would disclose as well as an opportunity to acquire additional information necessary to verify disclosure thus putting the offeree in a position to fend for himself.[39]

The Securities and Exchange Commission takes the view that an offeree need not be an insider, an officer or director of the issuer (offeror) in order to have access to information. Access can only exist by reason of an offeree's position with respect to the issuer. Position means employment or family relationship or economic bargaining power enables the offeree to obtain information from the issuer in order to evaluate the merits and risks of the investment as distinguished from situations where such position does not exist and the issuer voluntarily offers to provide or provides such information.[40]

4.5 WEAKNESS OF THE AMERICAN DISPENSATION

Firstly, to the extent that American law defines accredited and sophisticated investors in terms of wealth, it is submitted the mark has been missed. Seeing that the primary purpose of registration, and

therefore, disclosure provisions, is investor protection, there appears to be no need to distinguish between the wealthy and impecunious. Secondly, the definitions overlap with another concept, namely, the availability of, or access to, information. The Commission has even taken the matter further by expressly stating that 'sophistication' alone is not enough, there must be access to information.[41]

4.6 THE AMERICAN DISPENSATION STILL BETTER

In view of the expense involved in the usage of the prospectus method of raising capital, both in terms of time and money, and the difficulty of defining the term public, it would be better if our law and practice were to change in the direction of the American dispensation. Whether such a change is possible now or in the future is difficult to tell. More so because for a drastic change like that to take place, the issues involved are to some extent no longer mere company law development but hinge on political considerations, trigger legal chauvinism while also seriously affecting established institutions, perceptions, tradition and practice.

Against this background one can only envisage a continuation of the present approach as characterised by the Court's continued effort to grabble with a difficult concept called the "public".

4.7 BROAD OVERVIEW OF THE APPLICABLE PROVISIONS

The Act in three section closes down all known methods of making shares available to the public unless certain requirements are met. The sections concerned are 141 which is available to individual shareholders, s145 which is available to the company for offering unissued shares for subscription and section 146 governing the position of intermediary to whom shares have been allotted with a view to their sale to the public or where they are intended for a listing on the Stock Exchange.

In terms of the three sections an offer to the public is outlawed unless there is an accompanying written statement or prospectus complying with the requirements of the Act, one of which is registration.

While the public is not defined, an "offer" and an "offer to the public" are. Because an offer was considered in the second chapter of this work, at this stage only an "offer to the public" merits consideration. The Act says:

> "An offer to the public an any reference to offering of shares to the public mean any offer to the public and include an offer of shares to any section of the public, whether selected as members

or debenture holders of the company concerned or as clients of the person issuing the prospectus concerned or in any other manner."[42]

Briefly stated the Act says that an offer to the public is one made to the public, to a section thereof, to clients of the offeror or its members/debenture holders or in any other manner.

As regards the definitions of "offer" and "offer to the public" the learned authors Cilliers and Benade[43] have this to say:

"These definitions are clearly intended to have an extended effect and the inclusion of the words "in any other manner" in the latter definition have been said to give the provision an almost unlimited measuring to include such activities as rights, conversion or bonus issues which are frequently regarded as other than public in character."[44]

A similar provision in the English legislation has been noted to extend the meaning of an "offer to the public" beyond the popular meaning of the phrase.[45] The author further remarks:

"Indeed the definition is so wide that unless some limitation were imposed, it would be impossible for any company ever to issue any shares or debentures

without making a public issue and as a result no company could be a private one."[46]

It would appear, with respect, that sometimes these remarks and outcry are not fully justified. There appears to be some measure of exaggeration. If it is remembered that "issue" of a prospectus means there has to be some measure of publicity, circulation or distribution, one fails to appreciate how an offer made privately and directly to the offer, not having been published, circulated or distributed can be said to be public. It should appear a pure matter of private negotiation. It is therefore difficult to agree with Professor Gower that absent limitations in what in our Act is s144, it would be impossible for any company ever to issue any shares or debentures without making a public offer as a result of which no company would ever be public. The answer would seem to be that anyone not wishing to be caught by the definition of offer to the public should not "issue" a prospectus in the first place but instead privately negotiate the offer.

While the act says that an offer made in "any other manner" is still an offer to the public, it is submitted that to avoid giving an unnecessarily wide and improper meaning to the definition of the phrase "offer to the public" the words "in any other manner" should be interpreted eiusdem genenis of the preceeding phrases.

Before going to each of the constituent elements of an offer to the public regard must first be had to a remark by Henochsberg[47] who says that with reference to an offer made to a section of the public, where the offer is made to a particular group of persons only, it is a question of fact whether it qualifies as one made to a section of the public within the meaning of the definition. The learned author continues to state that where it does it may nevertheless be deprived of its character as an offer to the public for the purposes of Chapter VI if it comes within section 144(a). The remark, it is submitted, is absolutely correct. The real question is the effect, not labels to be attached to offers.

4.8 DIFFERENT CONCEPTS OF PUBLIC

There is some measure of confusion about the meaning of the word public. While it is accepted that the concept "public" is difficult to explain, one doubts the wisdom in certain quarters that the word as used in section 141 is different from its use in Chapter VI.

Cilliers and Benade say there is such a difference, maintaining that:

> "Where an offer for sale does not fall within one of these[47] categories it may, notwithstanding, still be regulated by s141, which is based on a

concept of "public" which is different to that used here".[50]

The learned authors then refer to a footnote which says:

" The interpretation placed on the words "public" and "a member of the public" in s141, which deals with the prohibition of hawking of shares (S v Rossouw)[51] is of little assistance in the determination of whether there is an offer to the public or not in terms of other provisions of the Act(e.g. s1(1) and Chapter VI): S v National Board of Executors Ltd".[52]

A few pages down the argument is taken further:

"While the disclosure provisions which regulate offers to the public in terms of s142 are dealt with in C18,[53] the regulation of offers for sale in terms of s141, which is based on a concept of "public" which is different to that used in s142 will be discussed here."[54]

And here is the discussion spoken of:

"In the application of s141, as is also the case in the prospectus provisions of Chapter VI of the Act, the crucial concept is that of "offer to the public". This concept however, has its own meaning and content in s141 which is not similar to the concept of offer to the public in Chapter VI."

The reason given for the difference is because:

> "In Vlakspruit Landgoed v J Mentz,[55] it was held that it was not the intention of the legislature in s141 to interfere with domestic offers of shares where there was no intention to deal in shares as such, but only to place the assets of the company under new control. The vagueness and exhaustiveness of the concept "public" in use be limited by reference to the "intention of the offeror" in each case, and the answer to the question; what did the offeror wish to attain with his offer; did he wish to sell the shares or something else by way of shares?"[56]

In a footnote the authors doubt whether this formulation of the test in Vlakspruit Landgoed[57] case clarifies the difficult problem involved as shares are seldom sold or brought without taking the assets of the company concerned into consideration.[58]

An extensive quotation has been made to the learned authors view in order to enable us to follow very closely the "process" by which the conclusion has been arrived at. One would have expected a stronger authority for the proposition than the dubious Vlakspruit Landgoed decision.

Forces are joint on the proposition that s141 governs the hawking of shares.[59] When it is borne in mind that both Cilliers and Benade on the one hand, and Henochsberg on the other, are the work of reputable authors and editors, it comes as a surprise to find this ready acceptance that s141 governs share hawking.

Notwithstanding, on the view that s141 governs share hawking the humble submisions of Ribbens[60] that it does not mention such expression in the first place, that secondly, the section is not limited to that concept and thirdly, the section does not govern "share hawking"; are preferred. More about this in due course.

4.8.1 The difference between Sections 141 and 142

It was repeatedly indicated above that shares can be offered to the public in three ways namely:

(i) by a shareholder wishing to dispose of his shares. As the shares have already been allotted to him by the company, he cannot offer them to the public for subscription but can only offer them for sale in terms of s141.

(ii) by the intermediary offering the sale of shares allotted to it with a view that they be offered to the public or where it was made known at the time that the company concerned has or intends to apply for a listing on a stock exhange, there it is section 146 that governs.

(iii) By the company issuing from its authorised share capital, shares for subscription in terms of section 145.

Apart from these three open avenues, there is no other way in which shares can be offered to the public either for sale or subscription. That being so, it is dificult to understand how share hawking comes into play, whether it is a further method of disposing shares over and above the three statutory channels or perhaps a way of describing the operation of a sale in terms of s141. If "share hawking" indeed refers to a sale of shares in terms of s141, it is submitted, there is a misdescription of the position. To this question we now turn.

4.8.2 Share Hawking

Section 141 which is allegedly aimed at "share hawking" that is, the unscrupulous selling to the public of issued shares of a company[41] is headed "restriction on offering shares for sale" and then proceeds in subsection (1) to provide that no person shall either orally or in writing (including any newspaper advertisement) make an offer of shares for sale to the public...".

The phrase "share hawking" does not appear anyhwere in the section at all. The origin of "share hawking" concept is traceable back to the English Companies Act of 1929. Section 356(1) of that Act provided that it

shall not be lawful for any person to go from house to house offering shares for subscription or purchase to the public or any member of the public. Commenting on the section Buckley[62] says that it absolutely prohibits what is sometimes called "share hawking". In view of the express reference in that section to "from house to house", it is submitted, there is no need to quarrel the explanation that it regulates share hawking. But alas! there is no similar provision in our Companies Act.

Absent "from house to house" or "place to place" provisions in both our former and present Companies Act, it is difficult to justify the allegation that share hawking is the mischief aimed at by s141. The "unscrupulous selling" of shares referred to by Henchoberg comes from Le Roux AJ's dictum in Vlakspruit Landgoed (Edms) Bpk v J Mentz (Edms) Bpk[63] If the section governs "unscrupulous selling" of shares, one would like to know what governs if the selling is scrupulous. Would it not fall within the ambit of the section? It is this problem that leads the present writer to a call for a wider and thus proper interpretation of the section. The narrow share hawking interpretation does not seem to be apt.The very idea of share hawking itself is, in our law, traceable to the marginal note to section 80 bis of the 1926 Companies Act. That note read : "hawking of or written offers to sell shares or debentures". From this note there started

a list of cases saying that section 80 bis (now 141) is aimed at that mischief. The first case in this regard is Gaydon v du Preez[64] where Barry JD said that the mischief aimed at in the section is the "hawking" of shares to "members of the public". It is not difficult to detect how the the learned Judge President could have been influenced by the marginal note. However, to let such a note have an influence on the construction of a statute is wrong because our rules of construction of statutes do not allow it.[65]

Apart from relying on a marginal note, the dictum in Gaydon v Du Preez[66] that section 80 bis governs share hawking was obiter. The court in that case was not concerned with the interpretation of the section as the court clearly put it:

> "I do not think it necessity to consider the section, because I am clearly of the opinion on the facts of the case that the plaintiff did not offer to sell shares, but that the defendant offered to buy them".[67]

Gaydon's case was rejected in a later case of S v Roussouw[68] by a Full Bench of the Transvaal Court on two grounds. Firstly, because the dictum was obiter, and secondly, because it relied on a marginal note. In Roussouw's case the court per Boschoff J found:

"There is nothing in the section which indicates that the protection is limited to the share hawking situation".[69]

However, the learned Judge's view of the section has not found favour as in subsequent decisions our courts still continued to associate section 80 bis and its sucessor section 141 with share hawking.[70]

Notwithstanding Boshoff J's dictum, the court in Vlaksgruit Landgoed[71] in a single judge decision continued to say:

"The purpose of the legislature was clearly to combat hawking of shares in worthless companies by unscrupulous sales agents".[72]

The share hawking stance was also taken in a second Rossouw[73]case.

However, it is submitted that the view taken by the Full Bench of the Transvaal Court in S v Rossouw[74] that: "There is nothing in the section which indicates that the protection is limited to the hawking of shares", is correct. Furthermore, the conclusions by Ribbens[75] are preferable. The learned author is of the view that: "It therefore comes as no surprise that in line with this explicit finding by the Transvaal bench the prohibition in question is not restricted to hawking".[76]

A page later the author continues: "As the law stands at the moment, therefore, it must be accepted that the prohibition contained in section 141 is not restricted to the 'hawking' or 'ventery' of shares".[76]

As a result of the Transvaal Full Bench decision,[77] the marginal note to section 141 now reads "no offer of shares for sale to the public". The "no hawking of or written offers to sell shares or debentures" of section 80 has been done away with.[78]

4.8.3 Meaning of Hawking

The dictionary meaning of 'hawk' carries the idea of going from place to place, from house to house or cry in the street. The Oxford English Dictionary (Shorter) describes to 'hawk' as: "To carry about from place to place and offer for sale; to cry in the street". The old English Hawkers' Act[79] defined a 'hawker' as "any person who ... goes from place to place or to other men's houses".

In Vlakspruit Langoed[80] the court described share hawking as the 'unscrupulous selling' of shares in valueless companies, which description clearly shows 'hawking' to be a very evil business.

The Supreme Court of New Zealand had the occasion to decide the meaning of 'hawking' in the case of Calvert v

MacKenzie.[81] There the offence was created by a section[82] which provided:

> "It shall not be lawful for any person to go from house to house offering shares for subscription or purchase to the public or any member of the public".

The facts were that over a period of a month, the appellant had contacted debenture holders of his company, and had succeeded in meeting about five of them, at which meetings he discussed the question of their exchanging debentures for shares. The court had to consider whether the offence had been committed, i.e. there had been a going from house to house. Different views were expressed by the learned Judges.

Myers C J stated:

> "I assume, however, from the wording of section 343 that there may have been one evil at all events in New Zealand - namely, that there had arisen a practice on the part of persons either with or without a prospectus, and on behalf of the company itself or third parties who had had shares in such company issued and allotted to them, of making a business of calling at peoples' homes and endeavouring to persuade householders to take up or purchase shares, much in the same way as a hawker of goods endeavours to sell his wares. In Lynde v. Nash[83] Atkin, L.J. refers to the activities as

'share-pushers' of whom he speaks as gentlemen who canvass members of the public to apply for or buy worthless shares".[84]

Having therefore correctly identified the problem as calling at people's homes, his Lordship, on the matter of going from house to house, said this:

"Going from house to house is a popular expression to be understood in its popular sense of going to a series of houses in succession. 'It is not necessary to constitute the offence that the houses should be adjacent or in proximity. It is a question of fact in each case whether there is such a series of visits to different houses systematic and successive as to time and locality as to constitute a going from 'house to house'".[85]

Two other judges, Smith and Ostler JJ made a contribution by stating:

"The phrase 'house to house' ... implies a systematic visitation. It may still be systematic ... although the houses ... are separated by the actual distance between them. But the period elapsing must be short enough to enable the visits to be called a going 'from house to house'".[86]

Kennedy J emphasised that the central point of going from house to house is its repetitive or successive

nature in these words:

> "I think that when the phrase is used in the statute, the reference is to repeated or successive action or movement...The popular term used to describe the thing prohibited is 'share-hawking' or 'share-pushing'".[87]

If this is a true description of 'share-hawking', and it is submitted it is, then the Full Bench of the Supreme Court of New Zealand having:

(i) given the matter due and well taken consideration,

(ii) not suffered dissenting opinion,

(iii) taken into account the dictionary and statutory description of the phrase, and

(iv) considered the phrase in its popular usage and context,

it is therefore submitted that there is nothing to gainsay.

Those South Africans who consider that 'share-hawking' would not bear the same meaning as apply both in England and New Zealand have the task of telling us what a 'South African share hawking' means. How one does reconcile the going 'from house to house', 'from place to place' with the inclusion in section 141 of a newspaper advertisement as just one and the same thing is difficult to imagine.

It is furthermore submitted that:

(i) share-hawking bears its ordinary and popular meaning as in English and New Zealand law,

(ii) that section 141 is aimed at share selling and not to a restricted concept called share-hawking.

(iii) share hawking is a narrow concept which can at the most amount to just an example of share selling that does not go to the very foundation of section 141.

4.8.4 Different Public for the Purpose of Section 141?

It will be remembered that the reason given by Cilliers and Benade for their conclusion of a 'different' public for the purpose of section 141 is the dictum in Vlakspruit Landgoed[88] case.

To the extent that the court held in Vlakspruit Langoed that it was not the intention of the legislature in section 141 to interfere with domestic offers of shares the decision is unassailable. For indeed the section governs offers of shares to the public, not domestic offers. However, to go further and hold that the test as to whether there has been an offer to the public depends on the intention of kthe offeror, whether he intended to sell shares or something else by way of shares and thereby place the

assets of the company under new control, as the court did, is to bring confusion into the law.

The immediate impression created by the judgment is that if the offeror intended to offer shares, the offer automatically becomes public whereas if his intention is not to offer shares but to place the assets of the company under new control, that is not a public offer. This question begging approach does not provide the answer at all for the inquiry is still whether shares have been offered to the public or not. After all, any outsider wishing to acquire control of the company, and therefore assets thereof, will first have to acquire controlling interest in the shares.

The decision in Vlakspruit case while, it is submitted, wrong, was nevertheless policy orientated. The outcome itself is applaudable in that two genuinely and validly concluded contracts were sustained, namely, the sale of land owned by the company and a cheque contract. The policy orientation of the case appears from the following dictum:

> "The object of the legislature is ... not the provision of an opportunity to purchasers of getting out of genuine transactions which do not contain fraudulent elements".[89]

It is regrettable that the court rejected what appears a near indication of what the 'public' could be. This happened when the court rejected a contention raised, saying:

> "I think Adv. Ackermann's [counsel] definition of public as any member of the public who is a stranger to the offeror is much too wide and falls outside the intention of the legislature".

It is submitted that while the field of operation of section 141 [which regulated the sale of shares] is different from that of section 142 (falling under Chapter VI) the word 'public' in both sections bears the same meaning. The test as to whether there is an offer of shares for sale to the public is not the intention of the offeror, whether he wants to sell shares or something by way of shares as the court held in Vlakspruit Landgoed but just as is the case with offer of shares for subscription or sale under Chapter VI, whether depending on the facts and circumstances of the case, there is an offer to the public.[70] The only difference is found in the answer to question as to who is disposing of shares, and what requirements have to be complied with.

4.9 STATUTORY EXCEPTIONS TO OFFERS TO THE PUBLIC

The statutory limitations on circumstances under which an offer shall not be construed as one to the public

are stated in explicit terms in section 144. The section delimits the widest definition of an offer to the public in section 142.[71]

The wide definition of an 'offer to the public' and the inclusion of the phrase 'or in any other manner' have been held to give the provisions of the section 'an almost unlimited application to include such activities ... which are frequently, in appropriate circumstances, regarded as other than public in character'.[72]

Giving full effect to section 142 and then seeking reconciliation with section 144 which mainly leaves matters to be sorted out having regard to the circumstances of each case is not an easy task. It is not suggested that a ready solution exists. The courts have on many occasions decided that whether or not there has been an offer to the public is a question of fact, depending on the circumstances of each case.[73] We now turn to the exceptions in section 144.

4.9.1 The offer is not public if it can properly be regarded, in all the circumstances, as not being calculated to result, directly or indirectly, in the shares becoming available to persons other than those to whom it is made[74]

An indication of the possible application of the sub-section is succinctly put forward by Henochsberg[95] in the following words:

> "The question in each case is whether, considering all the circumstances (i.e. primarily, the content of the document embodying the offer, the number printed or written, the identity of the person issuing it, the number of persons to whom it was delivered and the manner in which the same came to be selected) the offer was or was not likely, objectively, to result in shares becoming available to persons other than those to whom it was made".[96]

The fact that the offer could physically be transmitted the recipient of it to another or others is in no case per se sufficient to warrant the conclusion that the offer was likely to have the said result.[97] In considering the likelihood of a particular offer becoming available to other persons the court may properly take into account what in fact happened as a result of the offer.[98]

In S v National Board of Executors Ltd[99] the court indicated that the relevant factors which will enjoy consideration will, among others, include:

(i) the manner in which the offer was phrased and made,

(ii) the nature of the shares offered and the type of the investor they would appeal to,

(iii) the negotiability and transferability of the shares offered,

(iv) the manner in which payment for the shares was to be made and allotment to applicants to take place,

(v) whether acceptances were received or allotments made to any persons other than those to whom the offer was made,

(vi) particulars of dealings in those shares after allotment.[100]

None of the considerations is conclusive as the question is not capable of rigid and exact definition.[101] In order to fall within the ambit of the sub-section, offers are sometimes labelled 'strictly confidential and private, offeree only'. This limitation in itself is not conclusive, as the court will still have to interpret the offer as a whole to see if, in all the circumstances it cannot be regarded to result in shares becoming available to others. In re South of England Gas Petroleum Co. Ltd.[102] a prospectus was marked "For private circulation only" and issued only to shareholders in certain gas companies in which the promoter was interested. It was there held that the prospectus did offer shares to the public, and none the less because

copies were sent to shareholders in gas companies who were the most likely subscribers.[103]

In two cases the limitation 'strictly private and confidential, not for publication', was held to make the offer not to the public. However, the restriction was not the only consideration. The first of the cases is Sherwell v Combined Incandescent Mantles Syndicate[104] where a prospectus was sent by directors to their friends. Warrington J said:

> "Whether or not capital had been offered to the public was a pure question of fact ...It meant... an offer of shares to any one who should choose to come".

The second is S v National Board of Executors Ltd[105] where a brochure was marked 'strictly private and confidential' and 'for information of the addressee only'. There were two persons to whom allotments were thereafter made who were not addressees but no evidence was adduced as to how it came about that they could apply for shares. The court held that there was no evidence upon which a reasonable man, acting carefully could conclude that the invitation contained in the brochure was other than one which could "properly be regarded in all the circumstances, as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for

subscription by persons other than those receiving the offer or invitation".[106]

The word 'calculated' which appeared in section 84 bis (2) was assumed in National Board case to mean 'likely'. Henochsberg submits that it is a proper interpretation that should obtain in relation to its reappearance in section 144(a). Cilliers and Benade[107] also accept it. There would appear, therefore, no reason to reject the view.

4.9.2 An offer is not made to the public if it is an offer for subscription to the members or debenture holders of the company without the right to renounce any right to take up shares in favour of other persons[108]

The key phrase of this paragraph is 'without the right to renounce' in favour of other persons. If an offer is made to members with the right to renounce in favour of others, the shares will very easily end up in the hands of strangers to the original offer. Under the 1926 Act, the equivalent section[109] was loosely worded and provided "whether with or without a right to renounce in favour of other persons". The loophole is, however, now closed with the removal of the phrase 'with the right to renounce'.

The question of an offer to member or debenture holders will be entertained at a later stage.

4.9.3 An offer is not public if it can properly be regarded in all the circumstances as being a domestic concern of the persons making and receiving it[110]. There is some measure of overlapping between this exception and that contained in sub-section (a). Henochsberg[111] indicates that in many cases an offer which is covered by this exception may in any event be covered by sub-section (a) as well. The remark by the learned author seems to be true.

According to Pennington,[112] while the expression 'domestic concern' cannot be precisely defined, what is contemplated is a private negotiation. Thus he says, a private placing, where the company's directors or brokers approach one or few likely investors with a request that they or other individuals whom they introduce personally, should subscribe for the company shares or debentures, will satisfy the concept.[113]

The learned author bases his conclusion on a provision in the American code[114] which exempts from the prospectus requirements 'transactions ... not involving a public offer of securities'. This, he holds, is the correlative of the English 'domestic concern' concept. The practice of the American Exchange and Securities Commission is to treat invitations addressed to twenty five persons or fewer as non-public under the exemption. The practice has

been endorsed by the Supreme Court in Security and Exchange Commission v Ralston Purina Co.[115] In similar circumstances, the learned author holds the court in England will find that the offer is a 'domestic concern'. In view of the dictum in Nash v Lynde[116] that an offer, even to one person, may be public one doubts the application of the thumb rule twenty-five number in English law. Apparently it may most definitely not apply.

That 'domestic concern' concept bears relation to private negotiations is also indicated by the controversial dictum of Le Roux A J in Vlakspruit Langoed case. It will be recalled that in that case the court held that the object of the legislature in section 141 was not to interfere in 'domestic offers'. A domestic offer in that context was the negotiation for sale of landed property which, being company property, could only be obtained through purchase of shares in the company.

Perhaps we could have gained something more from the Harcourt J decision in S v National Board of Executors Ltd[117] had it not been found unnecessary to decide the precise meaning of the words 'domestic concern'.

In a discussion of private placings,[118] Palmer[119] says that if such are to a small number of closely restricted circle of select investors no prospectus is required, but if the placings are to a wide clientele of the allottees who by way of circular letter or a similar general communication draw the attention of their clients to the availability of shares or debentures in an investment, this is no longer the 'domestic concern' of the persons making and receiving the invitation.[120]

What the author is in fact saying is that a 'domestic concern' is an offer involving personal negotiation and arrangement between offeror and offeree. This is submitted to be correct.

Professor Gower[121] maintains that an invitation by or on behalf of a private company to a few of the promoters' friends and relations, including an offer which can only be accepted by the shareholders of a particular company will, despite the definition of an offer to the public, apparently be regarded as a 'domestic concern', unless the shares are to be issued under renounceable allotment letters.[122]

Inherent weaknesses of the Gower thesis are that private companies are not permitted to make public offers of their shares and debentures; furthermore,

to say that an offer by a company to its shareholders is a 'domestic concern', it is submitted, takes the matter too far unless there are definite rules that govern and control eligibility for membership. On the other hand, an offer to friends and relations by a company's officers could well be a true reflection of the domestic concern doctrine. One can appreciate some measure of personal nature of the deal.

There is another method of determining the 'domestic concern' concept. In this case the question is not whether or not there is negotiation between offereor and offeree but whether a sufficiently intimate connection between offeror and offeree subsists. The offerees would be friends, customers, relations or otherwise; in other words, those with whom there is a subsisting relation.[123] To this list Lawsa[124] adds an offer to the offeror's family members, to employees of the company they work for etc. As judicial guidance is not available on the point, the argument is advanced that by virtue of the nature of the relationship between offeror and offeree, the matter is essentially a domestic concern. It is submitted that this approach also is correct.

The 'domestic concern' concept is held by Beuthin[125] not to create a completely distinct and alternative ground 'avoiding the wide definition of section 84

his(1)'.[126] To this view Henochsberg[127] replies that it no longer applies. It is submitted that Henochsberg is right. It would be better if indeed paragraphs (a) and (c) of section 144 are each given a full whip rather than receive similar treatment blurring the distinction.

4.9.4 An offer is not an offer to the public if it is a rights offer[128]

A "rights offer" as defined in section 142 means an offer for subscription, with a right to renounce in favour of other persons, to those members or debenture holders of a company who are not excluded from the offer in terms of sub-section (2),[129] for any shares (as defined in relation to an offer of shares for subscription or sale in section 1(1) of that company or any other company, where a stock exchange within the Republic or a stock exchange recognised by the Minister for the purposes of the definition... has granted or agreed to grant a listing for the shares which are the subject of the offer.

The listed shares offered for subscription may be the shares of a company making the rights offer or those of another company. The latter situation obtains when the company making the offer, instead of itself subscribing for listed shares offered to it for subscription by

another company, makes them available for subscription to its own members or debentures.

A rights offer must strictly comply with the definitional requirements in s142 in order to fall within the category of offers other than to the public in terms of section 144(d). A rights offer is not to be construed as an offer to the public notwithstanding that it carries with it a right to renounce in favour of others.[132]

But for the express statutory exemption, a rights offer with a right to renounce in favour of others would be an offer to the public. There should not, it is submitted, be any problems in terms of s144 in holding that where there is a right to renounce, the offer will properly be regarded, in all the circumstances, as being calculated to result, directly or indirectly, in the shares becoming available to persons other than those to whom the offer is made.

Again in terms of section 144(b) an offer of shares or debentures to members or debenture-holders of the company for subscription, is not construed as an offer to the public if it is without the right to renounce any right to take up the shares in favour of other persons. The result is different if the right to renounce is incorporated.

That a rights offer with a right to renounce in favour of others would be an offer to the public absent statutory exemption, derives further support from the provisions of section 146(1) which deals with listing shares on a stock exchange. In terms of the section, no person shall make any offer to the public for the sale of any shares in respect of which it has been made known in any way at or about the time of and in connection with such offer, that the company concerned has applied or intends to apply for their listing by a stock exchange in the Republic or elsewhere.[133]

The significance of a listing on a stock exchange is that when once it is completed, shares are available to the public. The making of shares available on the stock exchange is itself a potential public offer.

It is true that a rights offer as defined relates to "subscription" and not "sale" as does section 146. However, it would be strange if in terms of section 146 the legislature prohibits disposal of shares to the public in an indirect manner (by the company using an intermediary) while allowing direct disposal in terms of a rights offer in section 144(d) read together with section 142. The reason would appear to be that as a rights offer relates to listed shares, the rules of the Stock Exchange governing the sale of shares will apply. In this way a prospectus, which is aimed at investor

protection, becomes unnecessary because the Stock Exchange has its own rules to achieve the same objective.

A rights offer, while not an offer to the public, is controlled by the provisions of sections 145(a) and 146(a) which relate to public offers.

4.10 CONSIDERATION OF THE TERM PUBLIC

4.10.1 General

The term "public" is a word of art, difficult to understand and almost impossible to define. Although attempts have been made to give meaning, ~~hardly any~~ few appears satisfactory.

One looks in vain for the dictionary meaning of the terms, only to be met with endless descriptions serving to increase confusion. On the other hand, textbooks refer to decided cases which then lament that the term is incapable of definition and furthermore, the question as to what constitutes "public" is one of fact. Indeed decisions are many to this effect.

The term "public" has been held to be a general word.[134] According to the Shorter Oxford English Dictionary, the following meanings pertain to the term. "Pertaining to the people of a country or locality; of or pertaining to the people as a whole, common, national, popular.

Done or made by or on behalf of the community as a whole. That is open to, may be used by or may or must be shared by, all members of the community; generally accessible or available.

Of, pertaining to, or engaged in the affairs or service of the community; of or pertaining to a person in the capacity in which he comes in contact with the community.

The community as an aggregate, but not as organised, hence, the members of the community; A particular section, group or portion of the community, or of mankind".

The description can be taken a step closer to the context in which it should be used or understood for the purpose of this work by referring to the meaning ascribed to the term by Black[135] who writes that the "public" is:

> "The whole body politic, or the aggregate of the citizens of a state, nation or municipality. The inhabitants of a state, country or community. In one sense, everybody and accordingly the body of the people at large; the community at large, without reference to the geographical limits of any corporation like a city, town or country; the people.
>
> In another sense the word does not mean all the people, nor most of the people, nor many of the

> people of a place, but so many of them as contradistinguishes them from a few. Accordingly, it has been defined or employed as meaning the inhabitants of a particular place; all the inhabitants of a particular place, the people of the neighbourhood. Also a part of the inhabitants of the community".

The description seems endless for when used as an adjective, Black further explains:

> "Pertaining to a state, nation or whole community; proceeding from, relating to, or affecting the whole body of the people of a state, nation or community: not limited or restricted to any particular class of the community."

Like the proverbial horizon that moves further the nearer we approach, the description of the terms gets more complicated the moment we try to give it a closer look. The dictionary meanings of the terms as appear above can sometimes not only appear useless, but instead bring greater misapprehension. Nevertheless, they also contain certain basic guidelines from which to build up.

Seeing that the term can mean almost anything according to the context in which it is used, the real problem for the purpose of this work is to try to establish guidance on the way in which it might or could be understood.

Peprhaps the time is right to refer again to Black's interesting description of the term saying:

> "In another sense the word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few".

While Black demonstrates that in one sense the term contradistinguishes many from a few, Viscount Sumner is in a position to state that a few, and perhaps something fewer than few would also still make public. His Lordship said in Nash v Lynde.[136]

> "No particular numbers are prescribed. Anything from two to infinity may serve; perhaps even one, if he is intended to be the first of a series..."

Textbooks do in a way regret the hardships attendant upon the description of the terms. The initial remark is traditionally that the term is not defined in the Act, as indeed it is not, that it is difficult to describe and that it is a question of fact dependent upon the circumstances of each case. Lastly, they refer to decided cases. The main problems with cases is that some of them only serve as examples of situations where it has been held that the offer was or was not public, without laying down broad general guidance.

Anderson and Dalglish,[137] the New Zealand writers state:

> "There are various decisions on this matter, but it is not possible to lay down any rule as a guide in the consideration of any case which might arise. Each case depends upon the facts".

On the other hand Pilcher, Usher and Baldock[138] do not seem to have reason to make any misgivings. They, without initial hesitation, boldly assert:

> "The question as to what is "public" is one of fact which can only be determined in relation to the circumstances of each case".

So much for the textbooks; perhaps at this stage only a list of some of the cases in which it was held that the question "public" can only be answered with reference to the circumstances of each case as is one o fact, can be made.[140]

4.10.2 Public and "Parys Diamante" cases

There is an unsolved controversy in our law, despite a handful of cases, relating to the precise description of the term "public". It is interesting to note that despite disharmony on interpretation, the courts in four decisions agreed that shares have been offered to the public or a member of the public in contravention of section 80 bis (1)[141] of the 1926 Companies Act.

Parys Diamante (Edms) Bpk was a company engaged in diamond mining in the small Orange Free State town of Parys. It was in respect of the sale of its shares that four prosections arose. In each of the prosecutions the factual backgrounds were different but at the end of the day the court in all of them was satisfied that there had been a sale to the public or a member of the public without a written statement of prospectus in contravention of section 80 bis (1).

In their chronologial order, the first is S v Rossouw[142] where the accused had sold shares, without requisite written statement, to two persons who were his acquaintances living in the same flat. On the question whether there had been a sale to a member of the public in contravention of the section, the court a quo having answered in the affirmative, the accused appealed to the Transvaal Provincial Division which upheld the conviction.

The Full Bench per Boschoff J with De Villiers J consenting said:

> "The word "public" ordinarily refers to the community as a whole, rather as an organised entity. It refers thus to members of the community as a whole. It can also refer to a section of the community, but this will depend on the context in which it is used. In that case there is usually an

> indication of which section of the community is referred to. There is nothing in section 80 bis which gives the word a limited meaning as therein used. According to sub-section (6) the meaning is extended by a provision that - 'for the purpose of the section a person shall not, in relation to the company, cease to be a member of the company by reason only that he is holder of shares or purchaser of property from that company".[143]

It is, with the greatest of respect, submitted that there can be nothing truer than this: "If Black's definition of "public" is borne in mind, this description of the term will fit in squarely therein.

Furthermore, the court in Rossouw's[144]case continued:

> "There is nothing in the section which in any way indicates that the word "public" must be given any other interpretation other than its ordinary meaning... Every member of the public is protected in so far as the exceptions... are not applicable. A single offer is thus sufficient to constitute a contravention".[145]

This decision is greatly applauded and highly welcome for its clear description of the term. But alas! it has been viewed with distaste, rejected and finally overthrown. However, a move to resist such a clear

statement of the law is looked at with suspicion and scepticism.

It was in the second S v Rossouw[146] that opposition was voiced. The Full Bench of the Northern Cape Division per Van den Heever J with Van Rhyn consenting expresed disapproval of and refused to follow the first Rossouw. The court firstly said that according to the first Rossouw the "public or a member of the public" actually means the same as "any person", an interpretation with which the court could not agree.

In disagreeing with the first Rossouw, Van den Heever J in the second case relied on an obiter dictum of Barry, JP in Gaydon v du Preez[147] where the learned Judge President had said:

> "The mischief aimed at in the section[148] is the 'hawking' of shares to members of the public. The phraseology is significant because it does not speak of an offer made to 'a person'".

Barry, JP's obiter dictum having found no favour in the first Rossouw case was nevertheless preferred in the second. The court further took into account the fact that since its utterance the dictum has been accepted by a number of writers.[149] The court then went on to give its ratio as follows:

"I therefore agree with Barry, JP that the 'phraseology is significant' and that in terms of section 80 bis (1) it is not an offer of shares to "a person" without an accompanying prospectus or written statement which is made an offence; it is only such an offer to "the public' or a "member of the public" which is an offence".[150]

Her Lordship further continued to state:

"It therefore appears that an offer of shares to the "public" or a "member of the public" is not synonomous with an offer of shares to "any person", but that the question of when an offer is one which has been made to the public or a member of the public is one which must be answered on consideration of all the circumstances of a particular case".[151]

Finally, it was said that regard must be had to the circumstances of each case, and to use the learned judge's words:

"In every case one must thus look at the circumstances of that particular case in order to determine in the light of the intention of the legislature... whether an offer was made to a private person as a domestic concern or whether it was made to "the public" or a "member of the

public". For such an inquiry, judgments in other cases can hardly provide a guide... no two cases have the same circumstances in all respects".

With respect, her Lordship erred, and that for a number of reasons:-

(i) The court relied on an obiter dictum of a single judge in Gaydon v du Preez[153] in preference to the ratio of a Full Bench;

(ii) Nowhere in the first Rossouw[154] case is there a mention of the word "person" or equation of the "public" or a "member of the public" with a person;

(iii) A reference to "person" in casu was induced by count number seven on the charge sheet. While it is true that the offeree in respect of that court was the offeror's friend and the offer related to a private company, this cannot be said of the other charges.

It is furthermore regrettable that the court pushed the test back to a question of fact to be determined by consideration of the circumstances of a particular case. "One looks in vain for guidance from the decision, only to be met with a less amicable answer that "judgments in other cases can hardly provide a guide... no two cases have the same circumstances in all respects."[155]

In the light of a clearer earlier decision, the court in the second Roussouw ought not, it is submitted, to have followed the approach it did.

Subsequent to the second Rossouw case, the question arose for the third time in S v Ward[156], a South West African Provincial Division case. There was not much said in this case which can therefore be dismissed by referring to the relevant extract. Badenhorst, JP said:

> "In S v Roussouw[157] the learned Judge states that in every case one must look at the circumstances of the particular case to determine whether an offer is made to a private individual as a domestic matter or whether it is made to the public or a member of the public".[158]

The court then proceeded to say that it agreed with the decision in Rossouw's case which it duly followed. The only merit of the case, and a very important one for that matter, is the court's correct interpretation of the first Rossouw case. Badenhorst, JP said that in the first Rossouw case it was held that every member of the public excluding the exceptions specifically mentioned, is covered by the section. It is submitted that this is the correct interpretation of the first Rossouw which it understood in this way could help avoid many hardships, although in S v Ward[159] the decision was not followed.

4.10.3 The Third Rossouw Dispensation.

The Parys Diamante shares led to a fourth and final prosecution which again resulted in a conviction. The Transvaal Court held that shares had been offered to the public where in S v Rossouw[140] the facts were that the accused had sold to one R, who at that stage was unknown to him, shares in a company without a written statement or prospectus.

The Full Bench with Nicholas, J delivering the judgment referred to the first Rossouw quoting both the ratio decidendi and policy of the case. That the first Rossouw would not receive favour could be suspected at that stage when the court said it would not seem that the Judge in the case would have formed the opinion that the effect of section 80 bis (6) was to given an extended meaning to the word "public" if he has been aware that the official English text differed in an important respect from the Afrikaans text.

On the crucial question as to what the "public" in section 80 bis is, the Court, said that it was not necessary for the decision nor was it desirable, to attempt to define the limits of what is meant by the word. The court approved of Van den Heever's dictum in the second Rossouw case where she said that the question whether an offeree is or is not a member of the public

can only be answered with reference to the circumstances of a particular case.[161]

The first Rossouw case, a Full Bench decision of the same court was duly overthrown, the fully constituted Court (this time comprising three members) approving of the Northern Cape Division decision in the second Rossouw.

The court stated the position of our law, as it is to this day, in the following way:

> "In so far as the statement from Rossouw's[162] case ... suggests that a "member of the public" in section 80 bis (1) is the equivalent of a "member of the community".

I am constrained to come to the conclusion that it is, with respect, clearly wrong and that Van den Heever, J was right when in considering the meaning of section 80 bis (1) in the case of S v Rossouw[163] said at 509 that:

> "an offer of shares to the 'public' or 'a member of the public', is not synonomous with an offer of shares to "any person".[164]

With reference to section 80 bis (6) which provided that a person shall not in relation to the company be regarded as not being a member of the public be reason only that he is a holder of shares in a company or a

purchaser of goods from the company, it was said that the sub-section clearly shows that the legislature contemplated cases in which "a person" would not be a "member of the public" for the purposes of sub-section (1).[165]

Finding no guidance in the section as to what cases there are where it cannot be said that "a person" is a member of the public, the court postulated its own. One such case was held to be a member of the immediate family of the offeror. In this regard reliance was found on the dictum of Dankwarts, LJ in IRC v Park Investments Ltd[166] where is was said:

> "I am sure that it [public] does not mean the family of those in control of the company... No one would regard a party to which only relatives of the giver of a party were invited as a "public party".

Finally, the court further said:

> "One can visualise other cases in which the connection between the offeree and the company concerned or the connection between the offeree and offeror, is such that in relation to the company or in relation to the offeror, the offeree would not be a "member of the public" for the purposes of section 80 bis (1). Where, for example, a private company is administered by two shareholders, each of whom holds half the issued shares, an offer by one to sell his shareholding to the other would not, in my view, be an offer to a member of the public".[66]

4.10.4 The position following the third Rossouw

The third Rossouw case, being a Full Bench decision comprising three members in unequivocally not only declining to follow the first Rossouw but also holding that it was wrong, has effectively overruled it. The first Rossouw was, by the way, also a strong judgment of the same Full Bench court comprising two members. The third Rossouw reinforces the second Rossouw case and together make our law as it is this day. Both are decisions of a Full Bench. The third Rossouw case, like S v Ward[167] correctly interpreted the first Rossouw in saying that there the court held that a 'member of the public' in section 80 bis (1) is the equivalent of a member of the community. However, it is submitted, the court erred in readily accepting van den Heever, J's interpretation in the second Rossouw case of the first as saying the 'public' or a 'member of the public' is synonymous with 'a person'. The first Rossouw nowhere made mention of 'a person' or made a similar equation as van den Heever, J alleged.

The law can thus briefly be summarised as follows:

(a) The first Rossouw case has been jettisoned.

(b) The 'public' or a 'member of the public' no longer bears ordinary and wide meaning in the sense of a member of the community.

(c) "Public' cannot be defined.

(d) It is a question of fact which can only be answered with reference to the circumstances of a particular case.

(e) Judgments in other decisions are unhelpful as no circumstances of different cases can be exactly the same.

4.10.5 Problems of the present approach

The second Rossouw case, on which the third relied, was based on Barry, J.P's dictum in Gaydon v du Preez[166] to the effect that section 80 bis (1) referred to the 'public' and not 'person' The phraseology was held to have been important. Secondly, the second Rossouw incorrectly interpreted the first as saying that the 'public' or a 'member of the public' is synonymous with a 'person'. This, of course, is not what the first Rossouw said.

In the third Rossouw case, there was strong persuasive authority to which the court referred which could, and therefore should, it is submitted, have been taken into account as supportive and not destructive of, the first Rossouw. That authority is the English case of Tatem Steam Navigation Company v Inland Revenue Commissioner,[167] where Scott L J said:

"There is no reason why the word 'public' should be given anything but its ordinary meaning. The definition contained in Murray's Oxford Dictionary is -

> The community as an aggregate, but not in its organised capacity; hence 'the members of the community', and it is in that sense, as it seems to me, that the words 'the public' are used in this section".[170]

The above dictum, it is submitted, is in line with the first Rossouw case which has since been overruled. The third Rossouw case is, however, good in showing some of the circumstances in which it will be found that there has not been an offer to the public, e.g. where the offeror and offeree are immediate family members or the only members of a small private company. Regrettably that is surely not the real problem which still is - the exact meaning of the word 'public'.

It is furthermore submitted that, as a result of the second and third Rossouw cases, the following hardships prevail in our law:

(i) Since the test of the word 'public' is a question of fact depending on the circumstances of each case, the word has not been defined.

(ii) Because judgments in other cases can hardly provide a guide and no two cases have the same circumstances in all respects (second Rossouw case), there are no broad general guidelines

within which the court will determine the meaning of 'public'.

(iii) The two cases are conducive to discord, disharmony and uncertainty. Arbitrary decisions and development of the law can be expected.

Furthermore, the following submissions are made:

(a) The first Rossouw case, although since jettisoned, in ascribing to the word 'public' its popular and ordinary meaning, ought to have been the preferred line of reasoning. The case is supported by Tatem's[171] case, the dictionary meaning of the word and Black's definition.

(b) Because of the tempting wording of dicta in the second and third Rossouw case, i.e. that the definition of 'public' is a 'question of fact to be determined by consideration of the circumstances of each case' and the strong constitution of the courts in deciding the matter, it is virtually unlikely that they will be judicially disturbed.

(c) Legislative intervention in favour of reversion to the first Rossouw dispensation would seem the only solution.

It is therefore suggested that the law be amended, with the insertion in section 142 of the Act of the definition of the word 'public' along the line of the now

jettisoned first Rossouw case, if for anything else but clarity.

4.10.6 Post Rossouw cases

After the Rossouw cases only two cases have been reported in South African law dealing with this thorny issue. The first is S v National Board of Executors Ltd[172] (to which we shall soon revert), the other being Vlakspruit Langoed (Edms) Bpk v J Mentz (Edms) Bpd,[173], the two of which touch only slightly upon the issue without making real contribution. To make matters worse, the latter decision is not only controversial but also dubious.

In Vlakspruit Langoed case a very important argument was raised that 'public' means any member of the public who is a stranger to the offeror, to which the court replied as being too wide and thus falling outside the intention of the legislature in section 141. Finding the concept too vague and wide, the court put forward its own limitation in the following manner:

> "The vague and wideness of the concept 'public' must, in my opinion, be limited by looking at the intention of the offeror in each case, also in the light of the answer to the question : what did the offeror want to attain with his offer; did he want to sell shares or something else by means of shares".[174]

Alas! All was but obiter as the court found that no offer was made to the 'public' but only to two individuals. The controversy surrounding this obiter and the decision itself have been addressed earlier on and would therefore not be repeated. Suffice it at this stage to say that the test is not what the offeror intended to sell but the manner in which the offer is made. Speaking generally the test is as to who can accept the offer, whether anyone who chooses to come in or perhaps only those chosen, with limitations that might have been placed on the offerees.[175] South African courts have, moreover, taken a firm stand that the test is one of fact depending on the circumstances of each particular case.[176]

4.10.7 The Harcourt Court

The case of S v National Board of Executors Ltd[177] is the last one, although preceding Vlaksruit Langoed[178] which, in passing, touches upon the question of 'public'. In this case, which was concerned with section 84 bis (2)[179] exempting an offer from being one to the public if:

> "..it can properly be regarded, in all the circumstances, not calculated to result, directly or indirectly, in the shares becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or

otherwise as being a domestic concern of the persons making or receiving it".

The facts were briefly that a company and its officers had issued a brochure worded 'strictly private and confidential', 'for information of addresse and' and 'issue by private placing', containing an invitation to certain selected addressees to apply for shares and debentures. There were only two persons to whom allotments were thereafter made who were not addressees. No evidence was available to show how the uninvited allotees had come to apply for shares.

The sole question was whether there was evidence upon which a reasonable man, acting carefully, could conclude that the invitation in question, namely that contained in the brochure, was one which "can properly be regarded in all the circumstances, as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription by persons other than those receiving the offer or invitation" in terms of section 80 bis (2).[100]

The court found that there was none and discharged the accused.[101] Referring to the second Rossouw[102] case, Harcourt J said:

"I have been unable to extract any helpful conclusion from the case which dealt with another section of the

Act (section 80 bis) in which the relevant enquiry was whether 'persons' to whom shares had been offered were proved to have been the 'public' or 'member of the public'. The conclusion was that whether a 'person' is or is not a member of the 'public' can only be answered with reference to the circumstances of a particular case. This conclusion has been accepted by the Full Bench of the Transvaal in S v Rossouw,[103] in preference to the earlier Transvaal Division decision in S v Rossouw[104] which was overruled. Reference was also made to S v Ward[105] in which the construction of section 80 bis of the Act[106] was also in question in the Northern Cape Rossouw case without adding anything of assistance in the present case".[107]

There is only one small extract from the case, which is vitally important. It was argued, and the court accepted:

> "That in principle an offer or invitation to the public is one which can be accepted by anyone who becomes aware of it. This can readily be accepted and such an offer may usefully be contrasted with an offer which is made only qua shareholders in specified companies as was the situation in the case of Government Stock and Other Securities Investment Co. Ltd. v Christopher and Others,[108] and the offer was held not to be one to the public".[109]

The test formulated in this case can be contrasted with Le Roux's J in Vlakspruit Langoed[190] when he said that the vagueness and wideness of the concept 'public' can be limited by the intention of the offeror, in asking what he wanted to attain, whether to sell shares or something else by way of shares.

The National Board of Executors case is not really in issue as a general approach to the question of 'public', but is considered a good indication of the openess and enlightenment with which South African courts should attend to matters relating to the prospectus provisions of the Act. Most important, the twelf point approach which indicates flexibility on the part of the Harcourt court.

4.11 ANOTHER APPROACH OF HANDLING THE CONCEPT PUBLIC

4.11.1 General

The starting point is Viscount Sumner's famous dictum in Nash v Lynde.[191] In this case, his Lordship said:

> "The public ... is of course a general word. No particular numbers are prescribed. Anything from two to infinity may serve, perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole. The point is that the offer is such as to be open to any one who brings his money, and applies in due form, whether

the prospectus was addressed to him on behalf of the company or not. A private communication is not thus open ...".[172]

The expression 'invitation to the public' means an invitation made to the public generally and capable therefore of being acted upon by any member of the public.[173] It means an offer of shares to anyone who should choose to come in.[174]

But whether the question is whether the invitation is ex facie an invitation to the public by reason of the nature and extent of its issue, the basic question is that the invitation, though not universal, is general; that it is an invitation to all and sundry or some segment of the community at large. This does not mean that it must be an invitation to all the public everywhere or in any particular community. How large a section of the public must be addressed in a general invitation for it to be an invitation to the public in the relevant connection must depend on the context of each particular case and the circumstances thereof.[175]

The test of 'public' is not who receives the circular embracing the offer, it is who can accept the offer put forward.[176] In this connection the fundamental requirement is that the recipients of the offer or invitation must answer the description of and fairly be

capable of being characterised as members of the general public quo the offeror or invitor (be they the community at large or only some section or even individual members of it). It is not sufficient that, in a general or colloquial sense, the offerors are also members of the public community when they at least stand in a private (or non-public) and special or restricted relationship of the offeror or invitor.[197]

The crucial test as to whether or not there is an invitation to the public is found in a dissenting judgment at Windeyer J in Lee v Evans.[198] In this case, his Lordship put the test as follows:

> "The essence of an invitation to the public is not in the manner of persons to whom it is addressed. The criteria are rather, are the recipients of the invitation persons chosen at random, members that is of the general public, the public at large, all and sundry; or are they one select group to whom, and to whom alone, the invitation is addressed, so that if an outsider sought to respond to it he would be told that he was not one of those invited to come in".[199]

4.11.2 Dividing line between public and private offer

To be public an offer need not be open to the whole world.[200] For this reason the court in Securities and Exchange Commission v Sunbeam Gold Mines Co[201] per

Denman J said:

> "In its broadest meaning the term 'public' distinguishes the populace at large from groups of individual members of the public segregated because of some common interest or characteristic. Yet such a distinction is inadequate for practical purposes: manifestly, an offering of securities to all red-headed men, to all residents of Chicago or San Francisco, to all existing shareholders of the General Motors Corporation or the American Telephone and Telegraph Company, is no less 'public' in every realistic sense of the word, than an unrestricted offering to the world at large. Such an offering, though not open to everyone who might choose to apply, is none the less 'public' in character, for the means used to select the particular individuals to whom the offering is to be made bear no sensible relation to the purposes for which the selection is made ... To determine the distinction between 'public' and 'private' in any particular context under which the distinction is sought to be made, it is essential to examine the circumstances and to consider the purposes sought to be achieved by such distinction".[202]

The High Court of Australia has demonstrated that whether an offer is public falls to be determined by the reference to a variety of factors. The most important

of these factors, said the court in Corporate Affairs Commission (SA) and Another v Australian Central Credit Union[203] would be:

(i) the number of persons comprising the offeree group,

(ii) the nature and content of the offer,

(iii) the subsisting relationship between the offeror and offeree,

(iv) the significance of any particular characteristic which identifies the members of the group to whom the offer is made,

(v) any connection between that characteristic and the offer.[204]

4.11.3 Application of the test

Wishing to elaborate on the test as enunciated, the court in Credit Union[205] case said that no particular number of persons can be designated as being, of itself necessarily sufficient or inadequate to constitute the public or a section of the public for every purpose. In accordance with Nash v Lynde[206] "anything from two to infinity may serve: perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself taking the whole".[207]

The magnitude of the number is, by itself, a factor militating in favour of a conclusion that the offerees

would constitute the public or a section thereof in relation to the offer made to them.[208]

In this regard the dictum of Kitto J in Lee v Evans[209] is very helpful. His Lordship said:

> "I am not intending to hold, however, that the size of the immediate audience is conclusive of the question whether the invitation is an invitation to the public. That is a question of the true scope of the invitation. While it may be answered exclusively in one case by the terms in which the invitation was expressed, it may require in another case a consideration both of the words in which it is expressed and of the circumstances in which they were used".[210]

Where the characteristic which set the proposed offerees apart as a group was both restrictive and well-defined, it being membership of a union, the rules of which restricted eligibility for membership by reference to employment and/or residence, with clear and prescribed procedures for application for membership and acceptance or rejection thereof, the court in Corporate Affairs Commission (SA) and Another v Australian Central Credit Union[211] held that the proposed offer by the Union to its members would have a perceptible and rational connection with their membership and that, notwithstanding that

such membership topped a high figure of 23 000, the offer of shares was not public.

In an earlier case the High Court had held that there was an offer to the public in Australian Softwood Forests Pty Ltd. and Others v Attorney-General (NSW) ex relatione Corporate Affairs Commission[212] where it was observed:

> "Although the company through the brokers negotiated with members of the public individually, the persons signed up were approached as members of the public. The facts do not suggest that the company or its brokers looked to a particular class of persons as growers. The documents contain no hint of any restriction to a class or group of persons having some common characteristic or qualification, except that of possessing the money with which to buy the trees".[213]

The approach and test therefore appears to be that the bond holding together the offerees in their selection is crucial to the determination of the question whether or not an offer is public. The looser the bond, the more unlikely is the court to find that it is not an offer to the public or a section thereof.

4.11.4 Unsatisfactory Hodgson decision

The Supreme Court of New South Wales has taken a rather

unsatisfactory stance in the case of Hurst and Others v. Filmco Ltd.[214] where the facts were that one, Mr. Fox, who was a director of the defendant company had sent a letter to a group of individuals who had previously been involved in tax schemes promoted by him. In the letter, offers were made for purchasing an interest in films. It was accepted that there was no evidence that any person who sought to invest in the scheme was rejected and no restriction was made on those who would be accepted as investors. In all, over 160 persons invested.

It was in these circumstances that the court per Hodgson J held that there was no offer to the public, explaining:

> "However, so far as the evidence goes, all the persons who did invest had certain matters in common. They were persons who had indicated to Mr. Fox or to their own accountant (himself being a person who had previously dealt with Mr. Fox) an interest in tax avoidance schemes or, alternatively, were the partners or part of the immediate family of such persons".[215]

The court further held that what was being offered was in substance a tax avoidance scheme and was seen as such by those to whom it was offered and those who invested in it. Furthermore, the court indicated that it would have reached a different conclusion had it taken the

view that what was in substance being offered was an investment with incidental tax benefits.

That the decision is wholly unsatisfactory will be evident from the following extract as the court continued to say:

> "The persons to whom it was offered were essentially in the first place persons who looked to Mr. Fox or to accountants having some association with Mr. Fox for tax advice and, secondly, close associates of those persons. I do not think that an offer or invitation to these persons by Mr. Fox's company ... relating to tax avoidance scheme was an offer or invitation to the public. I do not think that the circumstances that it may well have come to the attention of other persons, and may have resulted in investments by other persons, alters the situation".[216]

Yet it is this last sentence quoted that strikes a fatal blow to the decision. The Hodgson approach is, with greatest respect unto his Lordship, objectionable for a number of reasons, and ought not therefore be followed. The objections are:

(i) It is a single judge decision of a State court.

(ii) It is against a plethora of High Court and other authorities.[217]

(iii) The fact that the invitation was open for and might have resulted in investment by other persons, weighed heavily in favour of the

(iv) The link between the offeror, his accountants and associates including their clients, i.e. those who had consulted them before for tax advice, is not sufficiently strong.

(v) The fact that the essence of the scheme was tax avoidance and not investment did not make it any less public if the offerees, such as they were, were in fact members of the public.

4.12 VARIOUS OTHER TESTS THAT HAVE BEEN USED.

4.12.1 Relationship between offeror and offeree.

The relationship between the offeror and offeree is important in deciding whether an offer is public or not. In situations governed by the 'domestic concern' doctrine and those where offers have been made to members of the offeror company, the courts have emphasised the antecedent relationship as taking the offer outside the public domain.[218] The reverse view was taken when those to whom the offer was made did not have a relationship with the offeror but were chosen as members of the public whose only common charcteristic is membership of another body other than the offeror.[219]

Referring to Broken Hill Proprietary Co. Ltd. v Bell Resources Ltd.[220] and In re South of England Natural Gas and Petroleum Co. Ltd.[221] where it was held that the offers made were public, the trial court in Australian Central Credit Union v Corporate Affairs Commission (SA) and Another[222] said:

> "In both cases the offerees had no particular special relationship with the offeror. They were simply target members of the public at large who were identifiable and selected by reference to their relationship with another corporation or other corporations".[223]

In casu, the trial court held the offer was to be a private offer restricted to persons who stand in the special relationship of members or shareholders of the offeror and was available to no other person. This view was also shared by the appeal court.[224]

The offeror-offeree relationship takes a different dimenskon in America. In that system, the fact that the offeree is an insider e.g. in the sense of employee[225] or shareholder[226] of the offeror company does not matter at all. What is decisive is the availability of information a registration statement would afford a prospective investor in a public offering. Such availability of information means either disclosure of, or effective access to, the relevant information.[227]

The relationship between offeror and offeree, the insider status as it is called in America, does not mean that the offer ceases to be public. The reason is that an insider may be an insider with respect to fiscal matters of the company, but an outsider with respect to a particular use of securities. He may know much about the financial structure of the company but his position may nevertheless not allow him access to a few vital facts pertaining to the transaction at issue.[228]

The availability of information means 'transactional insider' in the sense of effective access to all information that registration would provide. If, on the other hand, inside knowledge is incomplete or access ineffective, the offeree would be a transactional outsider despite the fact that he is an 'insider' for other purposes.[229]

Disclosure can be proved by showing that all offerees were actually furnished the information a registration statement would have provided. Access can be proved by showing that the offeree had access to the files and record of the company that contained the relevant information. Such access might be afforded merely by the position[230] of the offeree, in which case his bargaining position becomes crucial or by the offeror's promise to open appropriate files and records to the

offeree as well as to answer inquiries regarding material information.[231]

The law in America is therefore that the offeror-offeree relationship is not important. The point is the availability of information, either in the sense of disclosure or access. An offer is not public if made to those who are able to fend for themselves whether or not they stand in a relationship to the offeror.[232]

The American position is greatly applauded in so far as it treats every offeree, including insiders as the public or members thereof (transactional outsiders) to the extent that they, due to unavailability or inaccessibility of the relevant information, cannot fend for themselves.

4.12.2 The Public may consist of an Individual

Where an offer is made to an individual or individuals the scales are evenly balanced in which event the decision can, depending on other considerations and the circumstances, very easily turn either way. However, there is a certain temptation for courts to readily find that where one or two individuals are the only offerees involved, the offer has been made particularly to them notwithstanding that they were picked up at random, the offer or not having had prior connection with or knowledge of them. This tendency, it is submitted, is wrong. It

is further submitted that the better approach would be to hold that an offer is public if the offeree was chosen at random without using any criteria that distinguishes the same from all others.

It will be recalled that Viscount Sumner in Nash v. Lynde[233] said that the offer is no less public if it is addressed to one person who was intended to be the first in a series of offerees but makes further proceedings needless by taking up all the shares. It is 60 years since the dictum was first uttered but, to date, no single contradiction has been noted.

In Hamilton v Austicon[234] the offerees were related and had been introduced to the offeror. The court held that it was quite clear that the invitation made to an individual not the subject of a general invitation or of publicity, was particular to that individual and not public. With this decision, because of antecedent relationship between offeror and offeree which was very close, there can be no fault.

Against the Hamilton case may be contrasted the approach of the Court in Lee v Evans[235] where no reason was found to doubt that the making of an invitation even to one person only may be seen, when considered in the light of all the circumstances, to be part of, even though the first step in, the communication of the invitation to

the public generally, so that if the lonely hearer were to tell some stranger of it the stranger would be right in treating it as open to acceptance by him no less than by the bearer. On this approach therefore, an invitation to an individual may be as much public as one addressed to the multitude.

The crucial question under consideration was correctly spotted by Kitto J again in Lee v Evans[234] who observed:

"If a person, wishing to obtain a loan, makes his request to a stranger whom he picks at random in the street, it remains, I think, a question of fact whether his invitation is to the public or to the selected individual only".

Having raised the question correctly, the court took some hesitation to provide an answer. His Lordship proceeded to say that in many cases the answer may be easy, but that does not mean that the question is not there to be answered. It was only after these initial remarks that the court said in considering the answer the distinction must not be overlooked between the case of an invitation which itself is open to acceptance by any member of the public who may be interested on the one hand, and the case of an invitation which itself is open to acceptance by a specific individual only, but if declined by him, is likely to be followed by similar

invitations to other specific individuals in succession until an acceptor is found, on the other hand. The first situation, said Kitto J is an offer to the public, but not the second.[237]

It is therefore submitted that:

(i) no easy solution exists,

(ii) the question can only be answered by a consideration of the facts and circumstances of each particular case,

(iii) policy considerations play a major role,

(iv) as the test is not the method or technique of communication used, even Kitto J's second proposition in Lee's case should just as well be held an offer to the public.

If an offer or invitation made to all offerees at a time, without any criteria or restriction on those individuals preferred is public, it comes as a surprise that when the offeror could just as well approach all offerees at one timer, he instead chooses to meet them one after the other without having any particular offeree in mind, the offer thus made becomes non-public. In that case, his offer being open and without restriction or criteria except that whoever comes first if not declining to take becomes acceptor, it is submitted, the same should be held pubic. With due respect, Kitto J's second proposition in Lee v Evans[238] is as much a public offer as the first.

4.12.3 The Public consisting of a section of the Public

The definition of 'offer to the public' says an offer is also made to the public if it is made to a 'section of the public'.[239]

Wallace and Young,[240]Australian writers, indicate that the phrase "any section of the public" is incapable of precise definition and is a question of fact to be determined in the circumstances of each case. The proper construction, however, is a matter of some difficulty. Furthermore, the authors add:
"If a stockbroker offers shares to a large number of persons who are or have been his clients, such an offer would clearly be an offer to a large group and therefore to a section of the public. On the other hand, if the offer was confined to a very small number of regular share dealing clients it is conceived that no offer to a section of the public would be involved".[241]

In the course of delivering a dissenting judgment, Matheson J in Australian Central Credit Union v. Corporate Affairs Commission (SA) and Another[242] stated:
"The question whether an offer to a particular segment of the public is an offer to a 'section of the public' within the meaning of the Code is not capable of rigid and exact definition. It depends on the circumstances of each case... the number of persons to whom the offer is sent, the circumstances in which such persons receive

it, and the character of the offer itself are all determining factors".[242]

Meanwhile Paterson, Ednie and Ford,[243] also Australian writers, opine that judicial considerations of the expression 'offer to the public' have established that offers or invitations may remain within the concept of an offer to the public regardless of the limited extent to which they are circulated provided they are open to such members of the community at large as desire to take them up. An offer to a 'section of the public' is by definition, they say, not necessarily open to the community at large, but to a section of it. The segment may be identified in some way without an individual offer reaching every member of it or it may simply be identified as comprising those individuals who receive individual offers.[244]

The question whether a particular group of persons constitute a 'section of the public' cannot be answered in the abstract. For some purposes and in some circumstances, each citizen is a member of the public and any group of persons constitute a 'section of the public'. For other purposes and in other circumstances, the same person or the same group can be seen as identified by some special characteristic which isolates him or them in a private capacity and places him or them in a position of contrast with a member or section of the public.[245]

In a case where an offer is made by a stranger and there is no rational connection between the characteristic which sets the members of a group apart and the nature of the offer made to them, the group will, at least ordinarily, constitute a section of the public for the purposes of the offer. If, however, there is some subsisting special relationship between the offeror and members of a group or some rational connection between the common characteristic of members of a group and the offer made to them, the question whether the group constsitutes a section of the public for the purposes of the offer will fall to be determined by reference to a variety of factors, of which the most important will be:

(i) the number of persons comprising the group,

(ii) the nature and content of the offer,

(iii) the subsisting relationship between the offeror and the members of the group,

(iv) the significance of any particular characteristic which identifies the member of the group, and

(v) any connection between that characteristic and the offer.[246]

None of the considerations is singularly decisive as in each case it is a question of fact depending on the circumstances whether an offer to a 'section of the public' has been made. The court deciding the matter

has a discretion which shall be exercised judicially. It is interesting to note that while the Act says a 'section of the public' is public', the courts says it is a question of fact.

According to Brennan J in Corporate Affairs Commission (SA) and Another v Australian Central Credit Union[247] a group of offerees who are not a 'section of the public' are not to be distinguished from a group who are a 'section of the public' by reference merely to the manner in which they are selected to receive the offer. He maintains that the criterion from which a group is to be distinguished from a 'section of the public' is the viewpoint of the offeror. When an offeror contemplates the making of a particular offer to a particular group, the question is whether or not that group is to be seen by a reasonable person in the offeror's position as a section of the public. The answer to that question depends on whether there exists some particular relationship between the offeror and the group to whom he has in contemplation as offerees which is apt to distinguish the group from a section of the public. The relationship must exist before the offer is made, for the group must be classified as a section of the public at the moment when the offer is made.[248]

But then problems do arose as relationships, and particularly commercial relationships, are various and

not every relationship between the offeror and the group will suffice to make kthe offer one to a 'section of the public'. Some relationships between offeror and offerees may have no connection or only a tenuous connection with the subject matter of the offer to be made. When an antecedent relationship exists between the offeror and a group of offerees and, by reason of that relationship, the offerees have a special interest in the subject matter of the offer, there is a ground for distinguishing the group from the public and the offer is therefore not public even if to a 'section of the public'.[249]

Brennan J then wrapped up the position as follows: "in my opinion the criterion which distinguishes an offer to a group of offerees who are not a section of the public from a section of the public is this: whether the offerees are members of a group who, by reason of their antecedent relationship with the offeror, have an interest in the subject matter of the offer substantially greater than or substantially different from the interest which others who do not have that relationship would have in the subject matter of the offer".[250]

When the offeree group's special interest is substantially greater than, or substantially different from, the interest which the offerees would have had in

the subject matter of the offer if the antecedent relationship did not exist, the ground for distinguishing them from a section of the public is substantial.[251]

It is submitted that Brennan J's views are very attractive and should be accepted as satisfactory. Particularly so when his Lordship stresses the point that antecedent relationship between the offeror and offeree group is crucial. However, a word of warning should be sounded on another point raised by the learned Judge in saying that the viewpoint which distinguishes the offerees as a section of the public is that of the offeror. On this point his Lordship proceeded to say that the question is whether or not that group is to be seen by a reasonable person in the offeror's position as a section of the public.

In that regard his Lordship, with great respect, appears to have confused the subjective with the objective test. Surely the offeror's contemplation is subjective while a reasonable person in offeror's position denotes objective approach.

The subjective approach, it is submitted, ought not to be followed as it puts the offeror in a stronger position to state, ex post facto, when faced with the consequences of prospectus provision violations, that it

was not his contemplation to make a public offer and thereby easily frustrate the provisions of the Act. The objective test on the other hand, which it is submitted should be followed, judges the effect of the offer as a question of fact by a consideration of the circumstances of a particular case and the impression created by the offer or invitation in the form and context in which it is likely to be understood.

While the 'interest' as stated by his Lordship is not defined and may therefore put the test too wide, the qualification that such 'interest' should be substantial and not tenuous, further that it should be based on a relationship antecedent to the offer, strengthens his Lordship's test making it a very helpful weapon.

4.12.4 A 'Member of the Public' may be the Public

A person may, in relation to the offer, be or not be a member of the public. In each case, it is a question of fact depending on the circumstances. If the court in a given case holds that the offeree was a member of the public, the offer thus made is public. If, on the other hand, a different conclusion is reached, the offer is not public.

There is a dictum to the same effect in Corporate Affairs Commission (SA) and Another v Australian Central Credit Union[252] where the court said that for some

purchases and in some circumstances, each citizen is a member of the public. However, for other purposes and in other circumstances, the same person can be seen as identified by some special characteristic which isolates him in a private capacity and places him in a position of contrast with a member of the public.[253]

Section 141(10) of the South African Act provides that for the purposes of the section a person shall not, in relation to the company, be regarded as not being a member of the public by reason only that he is a holder of shares of the company or a purchaser of goods from the company. It should be noticed further that the section says that a person is such a member in those circumstances unless the context otherwise indicates. In this regard the section has helped identify at least two sets of circumstances in which a person might be held a member of the public and an offer to him a public offer. The predecessor of section 141 expressly provided for the 'public' or a 'member of the public'.[254]

In Lee v Evans[255] Kitto J had no reason to doubt that an invitation to one person only may be seen, when considered in the light of all the circumstances, to be part of, even though only the first step in, the communication of an invitation to the public generally, so that if the lone hearer were to tell some stranger of

it, the stranger would be right to treat it as open to acceptance by him no less than by the hearer.[256] The learned Judge further indicated that a distinction should not be overlooked between the case of an invitation which is open to acceptance by a specific individual only but, if declined by him, is likely to be followed by similar invitations to other specific individuals in succession. The first situation, held his Lordship, is a case of an invitation to the public; the second is not. The hardships attendant to this approach have been indicated when the position of an individual was considered.

The fundamental requirement is that to be members of the public the recipients of an offer or invitation must answer the description of and fairly be capable of being characterised as members of the general public the offeror or invitor. It is not sufficient that, in a general or colloquial sense, they are also members of the public community when they stand in a private (or non-public) and special or restricted relationship to the offeror or invitor.[257]

The distinction between the case where the offeree is and where he is not a member of the public is a fine one on which decided cases whow no pattern of consistency or harmony. In Lee v Evans[258] where the offer was made to the two offerees who were hitherto

unknown to the offeror who was desirous of raising capital for his company, although there was evidence to show that the offeror would have proceeded to find other offerees if his offer was declined, the court held that the offer was particular to the offerees concerned and not public.

In S v Ward[259] the accused sold his shares to two persons who were known to him, one of whom was his medical adviser. The court having said that the circumstances of a particular case must be looked at to decide whether an offer was made to a private person as a matter of domestic concern or whether it was made to the 'public' or a 'member of the public', held that on each count there had been an offer to a 'member of the public'.

Again in Lynde v Nash[260] Eve J held that the plaintiff was a member of the public when, ignorant of and unknown to the company and its directorate to whom the existence of the company was first made known by 'an offer of shares to the public' with intent to obtain from "all and sundry to whom the contents should be made known", the much desired subscriptions.

In situations covered by the 'domestic concern' doctrine and where there is, in terms of the rule in Corporate Affairs Commission (SA) and Another v Australian Central Credit Union,[261] a substantial antecedent

relationship prior to the offer, the court should find, it is submitted, that the offer was not to a 'member of the public'.

4.12.5 Shareholders and Debenture-holders may or may not be [members of] the public. For this reason section 142 defines an 'offer to the public' and any reference to offering shares to the public as meaning any offer to the public whether selected as members or debenture-holders of the company or in any other manner. For some purposes and in some circumstances shareholders and debenture-holders may be members of the public, but not in others. For this reason section 142 defines an 'offer to the public'.

In relation to the sale of shares, section 141 provides that for the purposes of the section a person shall not in relation to the company, be regarded as not being a member of the public by reason only that he is a holder of shares of the company.

That an offer to shareholders and debenture-holders can, depending on the circumstances and the facts of each case, be either an offer to the public or only a non-public matter derives support from the dictum of Farwell J in Burrows v Matabele Gold Reefs and Estates Co[262] where his Lordship said:

> "An offer is not the less made to the public because it is sent to shareholders or debenture-holders as well as others or because it is advertised in the public newspapers. But if it is sent solely to the shareholders or debenture-holders of the company, there is no offer to the public. The distinction is between members or debenture-holders of the company on the one hand, and those who are not, on the other".

As his Lordship has just indicated above, an offer made solely to shareholders or debenture-holders of the company has on numerous occasions been held not to have been made to the public. Thus in Government Stock and Other Securities Investment Co. Ltd. & Others v. Christopher and Others[263] a company having offered to acquire the whole shareholding in other two companies in exchange for shares in its own share capital, the offer was held to being made only to shareholders of the companies sought to be acquired. Wynn-Parry L J held that there was no offer to the public, stating:

> "I am further of the opinion that the circular was not distributed to the public. I accept the proposition put forward ... namely, that the test is not who received the circular, but who can accept the offer put forward. In this case it can only be persons legally or equitably interested as shareholders in the shares of Union-Castle or Clan".[264]

An effective device which the courts have designed in relation to shares offered to shareholders is to ask the capacity in which the offer was made to them. The test which is applied when this approach is followed is to ask whether the offerees were selected in their capacity as members of the public having a common characteristic, e.g. shareholders or whether they were approached because of the nature of their relationship with the offeror. In the former situation the offer will be held public, but not in the latter. Eastern Petroleum Australia Ltd and Another v Horseshoe Lights Gold Pty Ltd. & Another[265] illustrates the application of the test. In this case an offer was made to the company's major creditor and seven corporate shareholders. The court considered that the construction most favourable to the plaintiffs demanded an inquiry as to whether the offerees were approached in their capacity as members of the public, although identified by virtue of a pre-existing relationship with the offeror, or whether they were approached because of the nature of their relationship with the offeror. It found that, as chosen corporate shareholders who were prepared to help the company in a liquidity crisis, an offer to them was not public, and further observed:

> "They were approached, it seems to me, because as the shareholders of the HSL [company] they were the organizations most vitally concerned with its survival and the protection of its only asset, the gold mine".[266]

A distinction is between an offer or invitation to persons who are members of the 'public' and those who, in a technical sense, are not. Questions of fact and degree remain to be considered and, in some circumstances, it may be extremely difficult to draw the line.[267] Where the offer is a private one restricted to persons who stand in the special relationship of members or shareholders of the offeror and is available to no other persons, the court will hold that it is not an offer to the public.

The application of the above principles to an offer by a corporate organization to its own large membership presents considerable hardships. In Australian Central Credit Union v Corporate Affairs Commission (SA) and Others[268] King C J noted:

> "Some clubs and associations are so small that an offer by the organisation to its restricted members would clearly by of a non-public character and would not be regarded as an offer to the public. On the other hand, there may be organisations whose conditions for eligibilityof members are so unrestrictive and whose procedures for attaining membership are so undemanding that an offer by the organisation to its members would amount to an offer to a section of the public. Much depends upon the size of the organization, its conditions of eligibility for membership and the procedures and practices regarding membership".[270]

Applying the above principles to the facts, the Chief Justice said:

> "The present respondent has a large membership numbering 23 000. There are, however, clear conditions of eligibility to membership, although they extend eligibility to residence in certain areas as well as employment in certain organisations. The rules contain clear procedures for application and membership and rejection of applications. I cannot regard the members of this co-operative organization as a section of the public in their relations with their own organization. Their relationship of member to co-operative organization is essentially non-public in character. An offer made by the credit union to its own members is not made to them in their character as members of the public, but in their non-public or domestic character as members of the co-operative".[271]

In Booth v New Afrikander Gold Mining Co. Ltd.[272] the company sold its business to another partly for cash and partly for shares which the liquidator of the selling company distributed to shareholders. It was held that there was never any offer of shares to the public.

Sometimes shares are offered to persons whose only common characteristic is that they are shareholders of

another company not being the offeror. In that case it is still a question of fact whether an offer is made to the public even though it is not unlikely to have it found public. A prospectus distributed by the promoter only to shareholders in certain gas companies in which he was interested, and no more than 3 000 copies having been sent out, was held in re South of England Natural Gas and Petroleum Co. Ltd.[273] to have offered shares to the public and none the less because copies were sent only to shareholders who were the most likely subscribers.

In Broken Hill Proprietary Company Limited v Bell Resources Ltd.[274] the respondent company was a shareholder of the applicant wishing to dispose its shareholding to fellow shareholders in exchange for debentures. The court held that the document issued by the respondent was a multi-purpose one partly offering shares and partly seeking to raise a loan. It was furthermore the opinion of the court that the offer was made to the public or a section thereof.[275]

Explaining the rationale behind the decisions in In re South of England Natural Gas and Petroleum Co. Ltd.[276] and Broken Hill Proprietary Ltd. v Bell Resources Ltd.,[277] Boller J in Australian Central Credit Union v Corporate Affairs Commission,[278] said:

"In both cases the offerees had no particular special

relationship with the offeror. They were simply target members of the public at large who were identifiable and selected by reference to their membership of another corporation or other corporations".[279]

The state of the law may therefore be summarised as being that an offer to a class defined as the shareholders of a company unconnected with the offeror will be an offer to the public.[280]

An offer by a company to its own shareholders will, provided membership is qualified, regulated and the procedure for application is clearly defined, and enforced, such relationship of membership existing at the relevant time of the offer and the offerees being approached because of the nature of their relationship with the offeror and not in their capacity as members of the public, will, as a rule, not be held public.[281]

The above principles should be read subject to a cautious remark by Walter Seaman Q S in Eastern Petroleum Australia Ltd. v Horseshoe Lights Ltd.[282] who said:

"I consider it open to argument that an offer to a very large group of persons, all of whom stand in a special relationship to the offeror, may in certain circumstances be an offer to a section of the

public ... although the relationship preceeded the offer by the members of the group".[203]

Although this remark is only by way of obiter, it should not be totally disregarded. In Bell Resources[204] case the offer was made to 163 000 shareholders. Perhaps that number was one of the considerations that induced the court to hold that the offer was public. However, the number alone, unaccompanied by other factors, should not, it is submitted, be decisive.

4.12.6 Clients may also be the public

Included in the definition of 'offer to the public' is the clientele. The definition as contained in section 142 says that 'an offer to the public' and any reference to offering shares to the public mean any offer to the public and includes an offer of shares to any section of the public, even if selected as clients of the person issuing the prospectus concerned.

In connection with transactions covered by section 141 the situation is far from clear. Sub-section (10) of the section says that for the purposes of the section, a person shall not, in relation to a company, be regarded as being not a member of the public by reason only that he is a purchaser of goods from the company. The section would have, it is submitted, limited application to the extent that the clientele

relationship does not arise by virtue of a person being a purchaser or goods from the company e.g. no goods purchased but only services rendered. Another hardship is brought about by the fact that the section says in relation to the company - but surely the application of section 141 is not to the sale of shares by the company but by shareholders. Normally a company issues its own shares, it does not sell them unless when acting on behalf of another in respect of shares already issued to him.

Notwithstanding the rather unsatisfactory wording of section 141(10), it is proposed to go ahead with a consideration of the position of clients as possible members of the public. Although the section has the effect of making a purchaser of goods from the company a member of the public, van den Heever, J in S v Rossouw[205] indicated that depending on the circumstances of each case, an offer to someone who does business with the company, may be an offer to a member of the public or it may not be affected by the section.[206]

An indication of a situation where an offer to clients will not be one to the public is given by Palmer[207] who explains that where a business is converted into a company and shares are offered by vendors to selected customers or suppliers, the offer is not made to the public. It is common in that case to announce that

'none of the shares will be offered to the public, the whole being taken by the vendors and their friends and customers'.[288]

While section 142 in its definition of an 'offer to the public' says that it includes an offer to a section of the public as well as clients, its operation would seem not to be as straightforward as all that. The Australian writers, Wallace and Young,[289] after giving the matter due consideration, make the following observation. The proper construction of the equivalent section in Australia,[290] is a matter of some difficulty. The first thing that the section does is to make it clear that the fact that the persons to whom an offer is made are clients of the person making the offer does not mean that the offer is not made to a section of the public. Further, they note that the selection by the person making the offer of his clients does not necessarily make the clients 'the public or a section of the public'.[291]

On the application of the principles they give this example:

> "If a stockbroker offers shares to a large number of persons who are, or have been, his clients, such offer would clearly enough be an offer made to a section of the public. On the other hand, if the offer were confined to a very small number of

regular share dealing clients it is conceived that no offer to a section of the public would be involved".[292]

Interpreting the equivalent of South African section 142 definition of an offer,[293], the Supreme Court of New South Wales in Hurst v Filmco Ltd[294] per Hodgson J said:

"In my view, that provision does not mean that whenever there is an offer made to persons selected as clients of the person making the offer, then those clients are a section of the public. All I think it means is that the mere circumstance that the offerees are selected as clients of the person making the offer does not necessarily prevent them from being a section of the public. The question still has to be asked whether having regard to the relationship between the person making the offer and the person's receiving it, and the nature of what is offered, the clients can fairly be regarded as a section of the public".[295]

His Lordship further referred to an extract in Australian Central Credit Union v Corporate Affairs Commission (SA) and Another[296] where Olsson J had said:

"... the fundamental requirement to find the recipients of an offer or invitation must answer the description of and fairly be capable of being characterised as members of the general public que

> the offeror or invitor (they be the community at large or only some sections or even individuals)... It is not sufficient that in a general or colloquial sense, they are also members of the public community when they stand at least in a private (or non-public) and special or restricted relationship to the offeror or invitor".[297]

The court in Hurst's,[298] case added that it may also be necessary to consider the nature of the interest being offered in order to determine whether an offer can fairly be considered an offer to the public or a section thereof. In the instant case, there were offers to clients of a certain Mr. Fox in respect of interests in tax avoidance scheme. The court held that an offer to those clients was not public. The case has been criticised earlier on other points.

The view expressed and the example given by Wallace and Young[299] and also the approach of the court in Hurst v. Filmco[300] would appear to be beyond question. In a subsequent decision the High Court of Australia fell back to the same explanation. This is what King C J said in Australian Central Credit Union v Corporate Affairs Commission (SA) and Another:[301]

> "What significance then is to be attached to the provision that a group may be a section of the public whether selected as clients of the offeror

> or invitor or in any other manner? It cannot mean, in my opinion, that a group of people is a section of the public irrespective of the criteria of selection ...I do not think that it means that an offer to a small number of long standing clients is necessarily an offer to a section of the public. It does mean, however, that an offer by an offeror with a mass clientele does not fail to be an offer to a section of the public simply because the offerees are clients. The offeree group is a section of the public unless the criteral selection are such as to show that the offer is made to the members of the group not in their character as members of the public, but in substance and reality, in their character as parties to a special non-public relationship with the offeror".[302]

The Chief Justice has therefore fully endorsed Wallace and Young's approach which should therefore be accepted as settled law [or perhaps only in Australia].

What is surprising with the definition of an 'offer to the public', in so far as it concerns clients, is that the interpretation given to it is that it does not mean what it says but only indicates that it is a question of fact depending on the circumstances of each particular case. To that extent the courts have been consistent in attempting to interpret the terms 'public' and its

various elements contained in the definition of an 'offer to the public'. The word 'clients' as it appears in section 142 has been narrowly construed.

4.12.7 The Public may be made up "in any other manner". The act says that an "offer to the public" and any reference to offering shares to the public mean any offer to the public and include an offer of shares to any section of the public, whether selected "in any other manner".[303] Having indicated situations where an offer should be found to have been public, the inclusion of the catch-phrase "or in any other manner" in the definition of an "offer to the public" in section 142 can only serve to extend the meaning and operation of the section.

Harcourt J indicated in S v National Board of Executors[304] that these words as they appeared in section 84 bis (1) of the 1926 Act gave the provisions of that sub-section:

> "an almost unlimited application to include such activities as invitations to participate in rights, conversion or bonus issues which are frequently, in appropriate circumstances, regarded as other than public in character".[305]

The equivalent section in English Law[306] has been held by Palmer[307] to extend the meaning of an "offer to the public" beyond the popular meaning of that phrase.

Henochsberg[308] submits that the phrase "or in any other manner" governs the word "selected" and that the intention is that in determining whether an offer is one to the public the consideration as to the manner of the selection of those to whom the offer is to be made is irrelevant.

The exact meaning of the phrase has not yet received judicial pronouncement. It remains a matter of construction and it is submitted, the correct interpretations of the phrase would be on eiusdem generis of the other provisions of the definition.

4.12.8 The Public May Consist of a Class

The usage of the term "class" does make appearance in some textbooks and judicial statements. Its exact meaning is far from clear and may seem to overlap with a "section of the public". Even when it does appear it mainly comes in the context of "issue" of a prospectus.

Wallance and Young[307] are those authors who indicate that the term is not unknown. They demonstrate that "a limited class might be the public". The terminology seems traceable back to Lynde v Nash[310] where the court per Scrutton LJ said:

> "On the other hand, they [directors] may easily send it [invitation] to so many people, though of a limited class, that it becomes an offer to the public".[75]

When the matter came to the House of Lords in Nash v Lynde[312] Lord Buckmaster took the opportunity of shed some light on the concept of a "class". His Lordship explained:

> "A distribution of a prospectus among a well defined class of the public would be the issue within the meaning of s81.[313] Many ilustrations might be given of such a use of a prospectus, for example: A company like the Army and Navy Stores Ltd, originally confined in membership to members of His Majesty's forces; the Civil Service Stores in a similar way was I believe originally limited to members of the Civil Service. There may be, there probably are, assurance companies whose membership is similarly limited to members of the legal or clerical profession; in each of these instances the only source from which membership could originally be obtained would be from a class of people selected out of the general body of the public having marked and definite characteristics."[314]

As his Lordship indicated, a class of the public would be a group of persons with marked and definite characteristics. Whether a "class" is another category of the public standing on its own or falling within a "group" or "section of the public" is not clear, but some measure of overlapping does definitely exist.

In Calvert v MacKenzie[315] the court referred to a class as a "special set of people".[316]

4.12.9 Employees May be the Public

An offer made by a company to its employees may or may not, depending on the facts and circumstances of each case, be an offer to the public. There is authority either way.

In Corporate Affairs Commission v David Jones Finance Ltd[317] an invitation circulated to more than 12 500 employees of the company's subsidiaries was held not to have been issued, circulated or distributed to the public. The court explained: "An invitation which is restricted to a section of the public, in the sense that no one else may apply, is not an invitation "to the public", and this is so even though that section is itself large."[318]

The court distinguished and declined to follow In re South of England Natural Gas and Petroleum Co Ltd[319] where an offer made by the promotion of a company to shareholders in certain gas companies in which he was interested was held to have been public.

There is again the American case of Securities and Exchange Commission v Ralston Purina Co[320] where an offer made to "key employees" was held to be public.

The court explained:

> "We agree that some employee offerings may come within section 4 (1)[321] e.g. one made to executive personnel who because of their position have access to the same kind of information that the Act would make available in the form of registration statement. Absent such a sharing of special circumstances, employees are just as much members of the investing "public" as any of their neighbours in the community."[322]

While it is not contended that in each and every case an offer made to employees should be held non-public, the decision in David Jones[323] case is not, it is submitted, beyond doubt. In that case, the offer was, firstly, not made to the company's own employees but those of the subsidiaries. This point could as well have weighed heavily in favour of a contrary conclusion. Secondly, the court declined to follow In re South of England Natural Gas and Petroleum Co. Ltd[324] which held the opposite view. And finally, the court said that an invitation to a "section of the public"is not an invitation to 'the public' although that 'section' is itself large. This proportion is objectionable if it is borne in mind that a statutory provision in New South Wales existed at the time providing that an offer to the public meant any offering of the shares to the public whether selected as a "section of the public" or in any other manner.[325]

It is thus submitted that where the facts and circumstances of a particular case drive to a contrary conclusion, David Jones should not be an obstacle. Furthermore, that case is only a State decision.

4.12.10 Friends have not yet been held to be "the public".

The question of friends being or not being members of the public has arisen in the context of "domestic concern" doctrine. Friends and relatives are traditionally cited as examples of the application of the doctrine. There is yet a case to be heard holding that friends are members of the public.

The position of friends can therefore be summarily dismissed by referring to a statement by Palmer[326] who explains:

> "Where ... shares are offered by the vendors to a small circle of friends, relations... the offer is not made to the public; in such a case it is common to announce publicly that "none of the shares will be offered to the public, whe whole being taken up by the vendors and their friends and customers. Similarly, an offer by a promoter to a few of his friends, relations.. has been held not to be an offer to the public."[327]

Whether it will make a difference if the offer is not made to s "small circle" or a "few" of the friends but a "big circle" and "many" of the friends is uncertain. Absent authority, there is no need to speculate.

4.12.11 "The Public" and Creditors

In Eastern Petroleum Australia Ltd and Another v. Horseshoe Lights Gold Pty Ltd & Others[329] an offer was made to the company's major creditors and seven of its corporate shareholders. Having to decide whether the offer was to the public or a section thereof, the court said:

> "I consider that the construction... most favourable to the plaintiffs in this case is that the section[330] demands and inquiry as to whether the offerees were approached in their capacity as members of the public, although identified by virtue of a pre-existing relationship with the offeror or whether they were approached because of the nature of their relationship with the offeror."[331]

The court arrived at a definite conclusion as follows:

> "I have come to a clear and definite conclusion that it is manifestly groundless to argue that these emergency arrangements between this company, its major creditor [and those of its seven corporate shareholders] who [were] was prepared to

support it in a liquidity crisis, constitutes and offer to the public or a section of the public".[332]

One wonders if a company in liquidity crisis can dare approach its major creditor in a capacity as a member of the public, although such is identified by the [pre-] existing relationship with the offeror. One can only venture to say that a major creditor who comes to the relief of the company in a crisis would normally be approached because of the nature of his relationship with the offeror. Perhaps only minor creditors when the offeror is in liquidity surplus can be approached in their capacity as members of the public although identified by virtue of pre-existing relationship with the offeror.

4.12.12 Special Category of the "Public": The Option Holders

The case of Venture Acceptance Corporation Ltd v Kirston and Others[333] indicates that depending on the circumstances of each case, an offer to a special category of offerees will generally, not be an offer to the public. Option holders are one such special category of offerees.

In this case an offer was made to some 176 offerees all of whom held option over the offeror's shares. In

deciding whether the offer was public or not, Cohen J said:

> "It is in my view still necessary to look at the particular circumstances of the case and to see whether the offer... sent to the option holders was available to be acted upon by any member of the section of the public concerned. Any group of persons, however small, might be said to be a section of the public, but it is necessary to consider whether the offer is made to those persons in a public as against a private capacity and to look at the relationship of those persons with the offeror. A section of the people is not necessarily a section of the public for the purpose of receiving an invitation."[334]

The court accordingly ruled:

> "In my opinion this put those option holders in an special category. I regard the circumstances of the offer and the relationship of the option holders to the company as being such as would not constitute them members of the public. There was not section of the public outside this group holding contractual rights who would have taken up the offers contained in the ... letters or have obtained the benefits as to payment which were available to the members of the group. Even within the group the offer were not

general but were varied according to option holders. I am satisfied that there was no offer to the public."[335]

4.12.13 Numerical test of the Public.

The number of those to whom the offer or invitation is made is not decisive even though it still plays an important role. The first problem of the numerical test relates to the actual delimiting number of the offerees/invitees while the second is the controversy whether the offerees or only those of them who actually come forward to subscribe or purchase shares should be taken into account."[336]

The Supreme Court of America was advised in Securities and Exchange Commission v Ralston Purina Co[337] that "whatever the special circumstances, the Commission has consistently interpreted the exemption as being inapplicable when a large number of offerees is involved". To this view the court replied that:

> "But the statute would seem to apply to a "public offering" whether to a few or many. It may well be that the offerings to a substantial number of persons would rarely be exempt. Indeed nothing prevents the Commission, in enforcing the statute, from using some kind of numerical test in deciding when to investigate particular exemption claims. But there is not warrant for superimposing a

quantity limit on private offerings as a matter or statutory interpretation."[338]

Pennington[339] asserts it is the practice of the American Securities and Exchange Commission to treat invitations addressed to twenty-five or fewer persons as non-public offerings. If the invitation is made to more than twenty-five persons, its character is judged by whether the addressees need the protection of statutory rules as to the contents of the prospectus in order to be adequately informed about the company's affairs or whether they are likely to be adequately informed already because of their connection with the company. Indeed this is what the court said in Ralston Purina[340] case although on the numerical test no figure was fixed.

Cary and Eisenberg[341] also tell the same story, explaining "Prior to the Ralston Purina case, many practitioners relied on a rule of thumb of 25 offerees as a cut-off point for a private offering ... However, the current judicial standard, as reflected in Ralston Purina case, clearly rejects any strict numerical test as determining the availability of the exemption... nevertheless, implicit in the cases appears to be recognition that the number of offences is relevant."[342]

The rule of thumb of 25 offerees has subsequently been changed by the Securities and Exchange Commission Rule

146 which provides that the private offering exemption is applicable if the offer includes less than 35 purchasers [not offerees]. To the extent that the Rule refers to purchasers, it is regretable that considerable hardships will be encountered in attempting to accommodate subscribers.

In English Law the numerical test would not seem to be that important since Viscount Summer's dictum in Nash v Lynde[343] that:

> "No particular numbers are prescribed. Anything from two to infinity may serve: perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole".[344]

However, it is submitted that in appropriate circumstances, the number of offerees might be crucial if not decisive.

In Australia the question of the number of those to whom the offer or invitation is made is, as a relevant consideration in deciding whether an offer is made to the public or not, a much debated one. First there is the dictum of Kitto J in Lee v Evans[345] that:

> "I am not intending to hold, however, that the size of the immediate audience is necessarily conclusive of the question whether the invitation is an

> invitation to the public... I see no reason to doubt that the statement of an invitation to one person only may be seen, when considered in the light of all the circumstances to be part of even though only the first step in communication of the invitation to the public generally.[346]

In the same Lee v Evans[347] case Barwick CJ also entertained the question saying:

> "How large a section of the public must be addressed in a general invitation for it to be an invitation to the public in the relevant connection must depend on the context of each particular enactment and the circumstances of each case.[348]

According to Corporate Affairs Commission v David Jones Finance Ltd[349] an invitation which is restricted to a section of the public, in the sense that no one else may apply, is not an invitation to the public and this is so even though that section is itself large.

Thus far the issue has arisen mainly in the context of the largeness of the number. On the opposite, Venture Acceptance Corporation Ltd. v Kirston and Others[350] states that any group of persons, however small, might be said to be a section of the public and therefore public.

While no particular number of offerees or invitees can be designated as being, of itself, necessarily sufficient or insufficient to constitute the public or a section of the public for every purpose, the magnitude of the number is, by itself, a factor militating in favour of a conclusion that those offerees would, in relation to the offer, constitute the public or section thereof.[301] Moreover, the court in Eastern Petroleum Australia Ltd and Another v Horse Lights Gold Pty Ltd and Others [302]considered it open to argument that an offer made to a very large group of persons, all of whom stand in a special relationship to the offer, may in some circumstances be an offer to a section of the public, although the relationship preceeded the offer and although the offer may only be accepted by the members of the group.

The position would thus seem to be, it is submitted, that the number of offerees or invitees, while not conclusive, is nevertheless a relevant consideration, and a very important one in determining whether or not an offer is public. The smaller the number, the lesser the onus lies upon the offeror but the situation changes drastically where the offerees are a multitude. In each case it is a question of fact and degree as determined by the circumstances.[303]

4.13 CONCLUSION

The concept public is a complicated one, difficult to explain and impossible to define. It would have been better if the legislature had chosen to give some kind of definition, even if not exhaustive, as the term is a key to the operation of the prospectus and written statement provisions.

Our courts have not succeeded in handling the matter. To say that it is a question of fact depending on the circumstances of each particular case without giving some guidelines, it is submitted, is not conducive to good future development of the law. The problem is further complicated by the dictum in S v Rossour[304] that as no circumstances of any two cases can be similar, previous decisions can give no assistance.

I disagree

Nevertheless, from a comparative study of the law the following conclusions are reached:

1 That the court in two later Rossouw[305] cases took, with respect, an incorrect view;

2 (i) That section 141 does not govern hawking but sale of shares;

(ii) That share hawking is not the equivalent, but will at the most amount to one method, of share selling;

(iii) That there is no mention in the Companies Act of 1973 of share hawking. Further that traditional share

hawking provisions ordinarily use "from place to place", "from house to house" expressions.

3 (i) That while there is no statutory definition of the term "public" the Courts consider it a question of fact depending on the circumstances of each case.[386] Furthermore, the following considerations nevertheless play a major role namely:-

(a) the number of persons to whom the offer is made,

(b) the nature and content of the offer,

(c) the subsisting relationship between the offeror and offerees,

(d) the significance of any particular characteristic which identifies the offerees.[387]

4 (i) None of the considerations is singularly decisive as due regard must be had to the totality of the facts and circumstances of each case;[388]

(ii) That the fact that the offer is made to a single offeree does not conclude its non-publicity. The test is who can come forward to take the offer, whether anyone who chooses or a specified offeree only.

(iii) To be public the offer does not need to be made to the whole world. An offer even to one offeree may suffice.[389] On the other hand, the fact that the offerees are a multitude, thought not conclusive, is consistent with the conclusion that the offer is public.

(iv) That the definition of "offer to the public" as

including an offer to a "section of the public" does not mean, without more, what it says. Regard should be had to the circumstances and characteristics of the offer and the relationship between the offeror and oferee.[360]

(v) That the definition of "offer to the public" as including a section of the public whether selected as members or debenture holders of the company only raises a question of fact.[361]

(vi) That "offer to the public" as including clients of the offeror raises a presumption which the offeror can rebut.[362]

5 That there is no exhaustive definition of the concept "public".

Furthermore, it is submitted that a South African court faced with the concept "public" can take a bold step in providing some intuitive guidance based on comparative research and not just pay lip service to the traditional approach that it is a question of fact depending on the circumstances of each particular case.

The Courts in other jurisdictions having considered the issue on many occasions, it is submitted that a South African court faced with a similar problem in future can have regard to foreign guidance. Where a case falls within any of the established categories of the public as decided in other jurisdictions, a South African court

deciding the matter may, having regard to the facts and circumstances of the case before it, take into account the approach in the relevant jurisdiction.

It is further submitted that a statutory definition of the term public in its widest sense is enunciated in the jettisoned S v Rossouw[363] and Black's Law Dictionary is warranted in our section 142.

Footnotes - Chapter 4

1. S v Rossouw 1968 (4) SA 380(T); S v Rossouw 1969 (4) SA 504(N.C); S v Word 1970 (4) 626; Sherwell v Combined Incandescent Mantles Syndicate (1907) W.N. 110
2. 1971 (3) SA 817 (D)
3. In S v National Board of Executors Ltd, Harcourt J thought that the plan of s84 bis of the 1926 Act (now s142) was to define "public" very widely. However, only "offer to the public" is defined.
4. Section 144.
5. 1987 (2) 783 (T) at 785
6. Company Law 4th ed 50
7. Ibid
8. Section 32 of Companies Act 1973
9. Memorandum and articles of association.
10. Section 141 (1), 145 (1) and 146 (1)
11. Supra
12. Loc cit
13. Cilliers and Benade 217
14. Principles of Modern Company Law 4th ed 350
15. Loc cit
16. Ibid
17. Section 148 and Schedule 3
18. Sections 160, 161, 162
19. (1867) LR 2 (HL) 500
20. At 501
21. Henderson v Lacon (1867) LR 5 Gq 249
22. (1860) 1DR SM 363

23. At 381

24. 1971 (3) SA 817 (D) at 825-6

25. 1977 (3) SA 780 (T) at 786

26. Lynde v Nash (1928) 2 KB 93

27. Securities Act 1933

28. Promulgated by the Securities and Exchange Commission

29. Less than $5 000 000

30. Section 4(2)

31. Ibid

32. Rule 146; Securities and Exchange Commission v Ralston Purina Co. 346 US 119 (1953)

33. Section 4(2)

34. Section 4(2); Rule 501 Regulation D; Cary and Greenberg 1245

35. 376 F 2d 675 (4th Cir 1967); SEC v Tax Service Inc. 375 F 2d 143 (4th Cir 1966)

36. Referring to banks, insurance companies and investment companies.

37. Rule 2(15) (c) - (g)

38. Section 4(2)

39. Securities and Exchange Commission v Ralston Purina Co supra; Cary and Greenberg cases and Materials in Corporations, 5th ed 1245.

40. Cary and Greenberg 1244

41. Ibid

42. Section 142

43. Company Law 4 edition at 222 relying on S v National Board of Executors Ltd 1971 (3) SA 817 (D) at 824C

44. Ibid

45. Gower Modern Company Law 3rd ed at 150

46. Ibid

47. On companies Act 4th ed at 211

48. Dealing with a situation where in all the circumstances, the offer cannot be held to be public.

49. Referring to s 144

50. At 222

51. 1969(4) SA 504 (N.C)

52. 1971(3) SA 817(D)

53. Chapter 18 of Cilliers and Benade

54. At 225

55. 1977 (1) SA 780(T)

56. At 226

57. Supra

58. Footnote 2 at 226

59. Henochsberg

60. "Caveat vendor: Voidness of a sale of shares in contravention of Section 141 of the Companies Act" (1980) Modern Business Law Vol 2 at 20.

61. Henochsberg 205

62. On Companies Act 11th ed at 644

63. 1977 (1) SA 780

64. 1946 WLD 198

65. Durban Corporation v Estate Whitaker 1919 AD 195 at 201

66. Supra

67. 201

68. 1968 (4) SA 380(T)

69. Own translation at 385 H

70. S v Rossouw 1969 (4) SA 504 (N.C) at 510 A, Vlakspruit Landgoed case supra.

71. Supra

72. At 876 E - 5

73. 1969(4) SA 504(N.C.)

74. 1968 (4) SA 380 (T)

75. Supra at 23

76. At 24

77. S v Rossouw 1969 (4) SA 380 (T)

78. Ribbers at 23

79. Hawkers (Imperial Act) 1885

80. Supra

81. 1937 NZLR 966

82. Section 343 of the Companies Act 1933 (N.Z.)

83. (1928) 2 KIB 93

84. At 976-7

85. At 978 15-20

86. At 982 20-30

87. At 984

88. Supra

89. Translated, at 786

90. S v Rossouw 1969 (4) SA 504 (N.C.) S v Rossouw 1971 (3) SA 222 (T)

91. Gower 3rd ed 150

92. S v National Board of Executors Ltd 1971 (3) 817 (D) at 824

93. S v Rossouw 1969 (4) SA 504 (N.C.) S v Rossouw 1971 (3) SA 380 (T)

94. Section 144(a)

95. At 215

96. At 215; 5 2nd ed of Halsburg 189; Cilliers and Benade 223

97. Henochsberg op cit

98. Ibid; S v National Board of Executors supra

99. Supra

100. At 828-32, summarised by Cilliers and Benade

101. Halsburg 2nd ed 189

102. (1911) 1 Ch 573

103. At 573

104. (1907) 23 TLR 482

105. 1971 (3) SA 817 D

106. The wording at section 84 bis (2) of 1926 Act

107. Company Law 3rd ed

108. Section 144(b)

109. Section 77(7)

110. Section 144(c)

111. At 216

112. 3rd ed 216

113. Ibid

114. Federal Securities Act 1933 s4(1)

115. (1953) 346 US 119

116. (1929) AC 158

117. 1971 (3) SA 827 (D)

118. An arrangement/offer by offeror to a few offerees, usually institutional investors. This is a private arrangement.

119. On Company Law Vol 1 (1982) by Schmitthof, Davies, Farror

120. Palmer at 219

121. Modern Company Law 3rd ed

122. At 296

123. Palmer's Company Precedents 16th ed 10

124. Volume 4 par 60 at 87; Corporate Affairs Commission & Another v Australian Central Credit Union (1985) 10 ACLR 59 at 64

125. "By invitation only: The public are not invited" (1972) SALJ 8 at 13

126. Now section 144(a)

127. At 216

128. Section 144(d)

129. Which empowers the company with written approval of the Registrar, to exclude from a rights offer, members or debenture holders who are not South African residents.

130. At 225

131. Ibid

132. Henochsberg

133. Section 146(1) (b)

134. Per Viscount Summer in Nash v Lynde (1929) AC 158 at 169

135. Black's law Dictionary 5th ed

136. (1929) AC 158 at 169

137. The Law Relating to Companies in New Zealand (1934) at 45

138. The Australian Companies Act (1937) at 291

139. Australian Company Law and Practice (1965)

140. South African - S v Rossouw 1968 (4) SA 380(T); S v Rossouw 1969 (4) SA 504 (N.C.) S v Ward 1970 (4) 626 (SWA); S v National Board of Executors Ltd 1971 (3) SA, 817 (D).

English - Nash v Lynde (1929) 1 ch 573; Sherwell v Combined Incandescent Mantles Syndicate (1907) W.N. Eng 110

Scottish - Sleigh v Glasgow Options (1904) 6 F 420

141. Now section 141 at the 1973 Act

142. 1968 (4) SA 380 (T)

143. At 385 C - E Translation

144. Supra

145. Own translation - at 385 G - H

146. S v Rossouw 1969(4) SA 504 (N.C.)

147. 1946 WLD 198

148. Section 80 bis (1) of 1926 Act

149. Cilliers and Benade Company Law 2nd ed. 99; Pyemont (6th ed. by Diemont & Bochmke 223; Henochsberg 2nd ed. 223)

150. At 509 A - translation

151. Ibid at D

152. At 510 A - translation

153. 1946 WLD 198

154. 1968 (4) SA 380 (T)

155. At 510B - translation

156. 1970 (4) SA 626 (SWA)

157. 1969 (4)504 (N.C.)

158. At 629

159. 1970 (4) CA 626 (SWA)

160. 1971 (3) SA 222 (T)

161. Supra at 509 H

162. 1968 (4) SA 380 (T)

163. Translation - at 226 A

163. Section 80 bis (1) only referred to 'public' or 'member of the public', but not to 'person'.

165. (1966) 2 All E.R. 785 (CA) at 795

166. At 226 A

167. 1970 (4) SA 626 (SWA)168.

168. 1946 WLD 198

169. (1941) 2 K.B. 194 (CA)

170. At 203

171. Supra

172. 1971 (3) SA 817 (D)

173. 1977 (1) 780 (T)

174. At 786

175. Sherwell v Combined Incandescent Mantles Syndicate_ TLR 482; Nash v Lynde(1929) AC 158

176. S v Rossouw 1969 (4) SA 504 (N>C>); S v Rossouw 1971 (3) SA 222 (T); S v Ward 1970 (4) SA 626 (SWA)

177. 1971 (3) SA 817 (D)

178. Supra

179. Now section 144(a) and (c)

180. Of the 1926 Act

181. Act 834 G-H

182. 1969 (4) SA 504 (N.C.)

183. 1971 (3) SA 222 (T)

184. 1968 (4) SA 380 (T)

185. 1970 (4) SA 626 (SWA)

186. 1926 Companies Act

187. At 828 - 829

188. (1956) 1 WLR 237 (Ch.D)

189. At 526 B

190. Supra

191. (1929) AC 258

192. Supra at 169

193. Hamilton v Austen Property Investment Ltd. (1981) 5 ACLR 469 at 471

194. Sherwell v Combined Incandescent Mantles Syndicate (1907) 23 TLR 482 at 483

195. Lee v Evans (1964) 112 CLR 276 at 286-5; Central Credit Union v Corporate Affairs Commission (SA) (1985) 9 ACLR 718

196. Government Stock and Other Securities v Christopher (1956) 1 All E.R. 490

197. Australian Credit Union v Corporate Affairs Commission (South Australia) (1985) ACLR 7189 at 138

198. (1964) 112 CLR 276

199. At 292

200. In re South of England Natural Gas and Petroleum Co (1911) 1 Ch 575

201. 95 F 2nd 699 (CA 9th Cir. Wash 1938)

202. At 701

203. (1985) 10 ACLR 59

204. At 63

205. Corporate Affairs Commission v Australian Central Credit Union supra

206. (1929) AC 158

207. At 169

208. Corporate Affairs Commission v Australian Central Credit Union supra

209. (1964) 112 CLR 276

210. At 287

211. Supra

212. (1981) 148 CLR 121

213. At 135. By virtue of statutory provision, the prospectus provisions of the Companies Act 1961 (New South Wales) were made applicable to pine tree plantations, i.e. acquisition of interest therein.

215. (1985) 9 ACLR 963

215. At 973

216. At 974

217. Lee v Evans (1964) 112 CLR 276; Australian Softwood Forestry v Attorney-General (N.S.W.); Ex rel Corporate Affairs Commission (1981) 148 CLR 121; Ex parte Lovell re Buckley (1928) 38 SR (N.S.W.) 153; Corporate Affairs Commission (SA) and Another v Australian Central Credit Union (1985) 10 ACLR 59

218. Government Stock and Investment Co. & Another v. Christopher (1956) 1 All E.R. 490; Eastern Petroleum Australia Ltd. v Horseshoe Lights Gold Pty Ltd. (1985) 9 ACLR 980

219. In re South of England Natural Gas and Petroleum Co. Ltd. (1911) 1 Ch 573; Broken Hill Pty Co. Ltd. v Bell Resources (1984) 8 ACLR 609

220. Ibid

221. Ibid

222. (1985) 9 ACLR 132

223. at 138

224. Australia Central Credit Union v Corporate Affairs Commissioner & Another (1985) 9 ACLR 718 at 738.

225. Securities and Exchange Commission v Ralston Purina Co. (1953) 346 US 119

226. Doran v Petroleum Management Corporation 545 F. 2nd 893

227. Cory and Eisenberg Cases and Materials on Corporations 5th ed. at 1236

228. Ibid

229. Cary and Eisenberg loct cit fn 18

230. Executive personnel indicated in Ralston Purina case supra

231. Cary and Eisenberg at 1237

232. Securities and Exchange Commission v Ralston Purina Co 346 US 119 (1953)

233. (1929) AC 158 at 169

234. (1981) 5 ACLR 469

235. (1964) 112 CLR 276 at 287

236. Ibid

237. Ibid

238. Kitto J's Dictum at 287 of the report

239. Definition of "offer to the public" in section 142

240. Australian Company Law and Practice (1965)

241. Ibid

242. (1985) 9 ACLR 718 at 727

243. Australian Company Law at 5038

244. Ibid

245. Corporate Affairs Commission (SA) and Another v. Australian Credit Union (1985) 10 ACLR 59 at 63

246. Ibid

247. (1985) 10 ACLR 59

248. At 66

249. Ibid

250. Ibid

251. Ibid

252. Supra

253. At 63

254. Section 80 bis at the 1926 Act

255. Supra

256. At 287

257. per Olsson J in Australian Central Credit Union v. Corporate Affairs Commission (SA) and Another (1985) 9 ACLR 132 at 138

258. supra

259. 1970(4) SA 626 (SWA)

260. (1928) 2.KB 93 (C.A) Reserved by the House of Lords on ground that the prospectus was not issued - Nash v Lynde (1929) AC 158 (HL)

261. (1985) 10 ACLR 59 at 66

262. (1901) 2 Ch 23

263. (1956) IWLR 237

264. At 242

265. (1983) 9 ACLR 980

266. At 988

267. Australian Central Credit Union v Corporate Affairs Commission (SA) and Another (1985) 9 ACLR 132 at 138

268. Ibid

269. (1985) 9 ACLR 718

270. At 722-3

271. At 723

272. (1903) 1 Ch 295

273. (1911) 1 Ch 573

274. (1984) 8 ACLR 609

275. At 617

276. Supra

277. Supra

278. (1985) 9 ACLR 718

279. At 738

280. In re South of England Natural Gas and Petroleum Co Ltd (1911) 1 Ch 573; Broken Hill Proprietary Co Ltd v Bell Resources Ltd (1984) 8 ACLR 609; Eastern Petroleum Australia Ltd & Another v Horshoe Lights Gold Pty & Others (1985) 9 ACLR 980

281. Eastern Petroleum Australia Ltd v Another v Horsehoe Lights Gold Pty Ltd supra; Australian Cenntral Credit Union v Corporate Affairs Commission (1985) 8 ACLR 609; Government Stock and Other Securities Investment Company Ltd v Christopher and Others (1956) 1 WLR 237

282. Supra

283. At 988

284. Supra

285. 1969 (4) SA 504 (N.C.)

286. The then section 80 bis (6) of the Companies Act 1926

287. Palmer's Company Law and Practice (1965)

288. Ibid

289. Austrlian Company Law and Practice (1965)

290. Section 5 (6) of the Australian Companies Act 1937

291. Op cit

292. Ibid

293. Section 5(6) of the Companies Act 1961 (NSW)

294. (1985) 9 ACLR 963

295. At 975

296. (1984) 9 ACLR 132

297. At 138

298. Supra

299. Supra

300. Supra

301. (1985) 9 ACLR 718

302. At 722

303. Section 142 - paraphrased

304. 1971(3) SA 817 (D)

305. At 824

306. Section 55 (1) of the 1948 Companies Act

307. Palmer's Company Law (1982) at 225

308. At 211

309. Supra

310. (1928) 2 K.B. 93

311. At 102.

312. (1929) AC 158(H.L>)

313. Of the Companies (Consolidation) Act 1908

314. At 170-1

315. (1937) NZLR 966

316. The "set of people" were debenture-holders

317. (1975) 2 NSWLR 710

318. At 716

319. (1911) 1 Ch 573

320. (1953) 346 US 119

321. Of the Securities Act (Federal) 1933 exempting non-public offerings from registration requirements.

322. At 125-6

323. Supra

324. Supra

325. Ibid

326. Op cit 226

327. Sleigh v Glasgow and Transvaal Options (1904) 6 F 420; Sherwell v Combined Incandescent Mantles Syndicate (1907) W.N. 10

328. Generally - Henochsberg, Pennington 3rd ed 214; S v. Rossouw 1969 (4) SA 504 (N.C.) at 510

329. (1985) 9 ACLR 980

330. Section 169 of the Companies Code 1961 (Western Australia)

331. At 989

332. Ibid

333. (1984) 9 ACLR 390

334. At 399

335. At 399-400

336. Hennard and Alexander Laws of Corporations (1987) at 1240

337. (1953) 346 US 119

338. At 125

339. Op cit at 216

340. Supra

341. Cases and Materials Corporation 5th ed.

342. At 1240

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