ANALYSIS OF PUBLIC OFFERINGS UNDER THE COMPANIES ACT 71
OF 2008

by

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1. INTRODUCTION

1.1 Introduction

Sections 95 to 111 of Chapter IV of the Companies Act 71 of 2008 ("the Act") regulates public offerings of company securities in the primary market (i.e. the first issue directly or indirectly) and the informal secondary market (i.e. where the securities are traded).¹ This is the equivalent of sections 142 to 169 of the Companies Act 61 of 1973 ("the 1973 Act").² Under the 1973 Act the objective behind the regulation of offers to the public was the protection of investors by prohibiting the making of such offers to the public unless they complied with the provisions of the 1973 Act in relation to full and truthful disclosures.³ The Act’s objective remains the same i.e. to protect those members of the public to whom an offer of securities is made by ensuring that, among other things, there is equality of treatment of offerees and that they receive all relevant information pertaining to the offer.⁴

Chapter IV introduces some fundamental changes to this area of company law.⁵ As mentioned, the principal aim of this legislation is to protect investors by ensuring that they are provided with adequate and accurate information relating to the state of affairs and prospects of a company before they subscribe for or purchase its shares. It does this by prohibiting offers to the public which do not comply with the stringent requirements laid down in the Act. Failure to comply may result in civil and criminal liability.⁶

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² Stein C with Everingham G (2011) 258.
⁶ Cassim FHI et al (2012) 649. The Act imputes personal liability to a range of persons involved in compiling and issuing the prospectus to encourage legal compliance and to provide recourse for investors where they have suffered harm as a result of a failure to comply. See Cassim FHI et al (2012) 664 in this regard. Section 104 of the Act governs liability for untrue statements in the prospectus. The Act distinguishes between liability for untrue statements in the prospectus and responsibility for untrue statements in the prospectus. See Cassim FHI et al (2012) 664 and 667 in this regard. A person who wrongfully makes an untrue statement in a prospectus could be held liable in terms of either section 104, section 77(3)(d)(ii), section 106 or section 214 all read with section 216. Such a person is held liable for
The emphasis on protection of the public is well illustrated in section 95(5) and (6). A provision of an agreement that requires an applicant for securities to waive compliance with a requirement of Chapter IV is void. A provision of an agreement is also void to the extent that it purports to affect an applicant for securities with any notice of any agreement, document or matter which is not specifically referred to in a prospectus or a written statement referred to in section 101 of the Act. Nothing in Chapter IV limits any liability that a person may incur under any other provision of the Act, or under any other public regulation, or under the common law.\(^7\)

The system which was in operation under the 1973 Act has been retained in essence in the 2008 Act, except that primary and secondary markets are regulated in the same Chapter (i.e. Chapter IV).\(^8\) In the 1973 Act these were dealt with in separate parts of the 1973 Act as offers for sale and offers for subscription, respectively. Delport submits that the combination of the primary and secondary market regulation was not successful due to the confusion between the prospectus and the written statement in respect of content, non-compliance and liability.\(^9\) Cassim et al submit that the way in which the Act now delineates and deals with these categories is simpler and clearer.\(^10\)

The Act now also recognises that the majority of offers to the South African public are made by listed companies, and that the rules of the recognised exchange on which a listed company’s securities are traded, provide sufficient protection for members of the public and are otherwise comprehensive enough to render it unnecessary for an already listed company to have to comply with both the provisions of the Act and the rules of the applicable stock exchange. Any offer to the public of listed securities need only comply with the rules of the exchange concerned. A public offer of securities is subject to the requirements of the Act and the rules of an exchange only where an unlisted company

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\(^7\) Stein C with Everingham G (2011) 258-259.

\(^8\) Delport PA (2011) 43.

\(^9\) Delport PA (2011) 43.

proposes to list on an exchange by way of an issue or a sale of its securities to the public for the first time.\textsuperscript{11}

\section*{1.2 Problem Statement, Purpose and Relevance}

The question “What constitutes an offer to the public?” represents one of the most difficult questions in this area of company law and is the source of most of the reported cases. The issue is that if an offer constitutes an offer to the public it falls within the purview of the legislative provisions and thus becomes subject to a substantial body of restrictions and requirements, most notably the requirement to issue a prospectus.\textsuperscript{12}

A problem arises where an offer does not fall precisely into one of the exempted categories and exhibits characteristics that make it difficult to determine whether an offer is public or private in nature and whether the offerees require legislative protection.\textsuperscript{13}

\section*{1.3 Objective}

The Act recently came into operation. It redefines public offerings of company securities and introduces a definition of an initial public offering. The Act also defines a primary and secondary offering. New distinctions are drawn between the primary and secondary markets and listed and unlisted securities. The Act introduces a number of new categories of offers that are deemed not to be offers to the public and provision is made for a public offering by way of an advertisement.

\textsuperscript{11} Stein C with Everingham G (2011) 262.  
\textsuperscript{12} Cassim FHI et al (2012) 652.  
\textsuperscript{13} Cassim FHI et al (2012) 653.
The objective is to analyse the new and amended provisions relating to the offering of company securities to members of the public as they are contained in the Act and to comment on and clarify uncertainties surrounding these provisions and their application to the extent that it is possible to do so.

1.4 Research Methodology

Literature Review

The Act provides the basis for the study undertaken and the Act together with case law will be used as primary sources. Textbooks and accredited law journal articles will be used for the evaluation of the relevant provisions of the Act as well as the principles underlying these provisions and the application thereof. The provisions of the Act will be compared to the provisions of the 1973 Act to advocate the transition from the 1973 Act to the Act. Where a comparison is drawn to the 1973 Act the 1973 Act and case law will be consulted as primary sources and textbooks and accredited law journal articles as secondary sources. The extent of the application of the common law in addition to the statutory provisions will also be addressed. Case law will be consulted as primary sources and textbooks and accredited law journal articles as secondary sources for purposes thereof.
2. DEFINITIONS

2.1 Companies Act 61 of 1973 and Companies Act 71 of 2008

Section 95(1) of the Act contains a number of definitions which apply to Chapter IV only. The meaning of “offer to the public” forms the basis of Chapter IV, as it did under the 1973 Act. If an offer falls outside this meaning, Chapter IV and its onerous provisions do not apply, and vice versa.14

Subsections 95(1)(e), (i) and (m) introduce into the Act three modern day, internationally recognised methods of offering securities to the public i.e. an initial public offering, a primary offering and a secondary offering.15

2.1.1 Offer

As mentioned, there are mainly three types of offers under the Act i.e. an initial public offering, a primary offering and a secondary offering. These offers may be made in respect of listed or unlisted securities. The Act prescribes the requirements in each instance.16

Section 95(1)(g) of the Act states that an offer, in relation to securities17, means an offer made in any way by any person with respect to the acquisition, for consideration, of any securities in a company.

15 Stein C with Everingham G (2011) 262-263.
17 Securities are defined in section 1 of the Act as any shares debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company. A share is one of the units into which the proprietary interest in a profit company is divided. See Delport P (2011) 74 THRHR 280 in this regard.
Section 142(1) of the 1973 Act determined that an offer, in relation to shares, meant an offer made in any way, including by provisional allotment or allocation, for the subscription for or sale of any shares, and included an invitation to subscribe for or purchase any shares.

Under the 1973 Act it was uncertain whether an offer could also be made orally. Section 95(1)(g) of the Act puts an end to this uncertainty. The words “any way” in the definition in section 95(1)(g) indicates that it can be made orally. An offer can also be made electronically.  

Section 98(1) permits the publication of an offer to the public through electronic media. The section provides that, as an alternative to any other manner of making or presenting an offer to the public, such an offer may be made or presented by way of an advertisement. The advertisement must comply with all the requirements of the Act in respect of prospectuses, even if it is a primary or a secondary offering and irrespective whether it is a listed or unlisted company. Section 99 of the Act provides that an offer must be accompanied by a prospectus. In this instance the advertisement is the prospectus. See further the discussion below under 2.1.1.1 in this regard.

If the offer is made electronically the written statement or registered prospectus, which is to accompany an offer, is one which is published with or as part of the offer. A mere reference to a link to a site where the statement may be obtained is insufficient for compliance with section 101 of the Act.

Section 98 differs materially from its equivalent in section 157 of the 1973 Act by recognising contemporary methods of bringing offers to the attention of the public.

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19 Advertisement is defined in section 1 of the Act as any direct or indirect communication transmitted by any medium or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to bring any information to the attention of all or part of the public. See Delport P (2011) 74 THRHR 284 in this regard.
2.1.1.1 Offer & invitation

An offer is a declaration of the will of one party which is of such nature and in such form that acceptance thereof will be sufficient to constitute an agreement.24

An invitation to do business or to make an offer is not an offer and it is used by the person making the invitation to exercise a choice in respect of the counter-party and to communicate additional terms to the other party before finally concluding the contract.25

A company issuing shares uses an invitation instead of an offer as it can then accept offers from investors for fewer shares than that which the investor offers to subscribe for if there is an over-subscription.26

The common law definition of “offer” was not wide enough to cover contracts for subscription. This was recognised by the Van Wyk De Vries Commission and “invitation” was incorporated in the definition of “offer” in section 142(1) of the 1973 Act.27

An offer is aimed at the conclusion of a particular type of contract and an invitation to do business is not an offer. However, if the offer is for shares section 142(1) of the 1973 Act defined an offer to include an invitation. The first requirement could therefore not be avoided by making an invitation instead of an offer. The offer or invitation is aimed at concluding a contract for subscription or sale of shares.28

26 Delport P (2011) 74 THRHR at 284.
27 Delport P (2011) 74 THRHR at 284.
An invitation is not included in the definition of “offer” in section 95(1)(g) of the Act and is not so included in the common law meaning of “offer”. An invitation to solicit an offer from the invitee is not an offer within this definition. The offer must be made “in respect of” the particular securities. It can be made by a person acquiring the securities as well as the person from whom the securities will be acquired. An invitation by the company cannot be an offer “in respect of” securities by the company as the common law meaning of offer does not include an invitation and cannot be rectified by the words “in respect of”.29

As indicated above, an offer, in relation to securities, means an offer made in any way by any person with respect to the acquisition, for consideration, of any securities in a company. The definition could imply that the investor is making the offer. The investor is not offering any securities by or on behalf of the company and therefore it cannot be a primary offering or an IPO.30

It appears that the lack of inclusion of “invitation” in the definition of “offer” was sought to be addressed in other provisions of the Act, such as section 98 of the Act. However, it does not solve the difficulties with the interpretation of “offer” as the operative word in section 98 is still “offer” and the section merely regulates the content of the offer if it is made by way of an advertisement. Section 98 will apply if the offer is made by advertisement but it will not apply if the advertisement is an invitation.31

30 Delport P (2011) 74 THRHR at 284.
31 Delport P (2011) 74 THRHR at 283.
There is an overlap between section 98 and 99. Section 99 determines that a person must not make a primary offer to the public of unlisted securities of a company unless the offer is accompanied by a registered prospectus. A company that makes a written offer for shares must ensure that it is accompanied by a registered prospectus. If the offer is an advertisement it must comply with the requirements of a registered prospectus. The offer does not have to be in writing. A verbal offer can be accompanied by a prospectus. If the verbal offer falls within section 98 and the definition of “advertisement” it must be registered as a prospectus.32

Section 98(2) and (3) provide for the “tombstone advertisement” which, if certain requirements are met, is intended to merely draw attention to the offer. Should the requirements not be met the tombstone advertisement is to be regarded as having been intended to be a prospectus. This provision ignores the requirement that the offer must be accompanied by the registered prospectus and equates the offer to a prospectus. Prospectus is not defined in the Act. The confusion under the 1973 Act as to whether a prospectus is the offer or the information that must accompany the offer is perpetuated in the Act.33

2.1.1.2 Offers: Primary & Secondary Market

The definition in the 1973 Act distinguished between a contract for subscription and a contract of purchase and sale. “Sale” referred only to the underwriting constructions as the definitions in section 142 of the 1973 Act commenced with the words “In this Chapter”, the definitions could therefore not be used for the secondary market provision of section 141 in Chapter V.34

34 Delport P (2011) 74 THRHR at 283.
The definition in the Act merely refers to “acquisition for consideration” which includes subscription and sale with last mentioned applicable to the primary market or to the secondary market.\(^{35}\)

The distinction between the primary and secondary markets, in respect of an offer, is ignored and the regulation thereof is confusing. Section 99(3) determines that a person must not make a primary offer to the public of any listed securities of a company otherwise than in accordance with the requirements of the relevant exchange. It is impossible as the primary and secondary markets remain separate markets. The secondary market can only operate once the shares have been issued in the primary market. The primary market offer of listed securities is an impossibility.

See further the discussion under Chapter 3 in this regard.

2.1.2 Offer to the public

Section 95(1)(h) of the Act states that an offer to the public-

(i) includes an offer of securities to be issued by a company to any section of the public, whether selected-

(aa) as holders of that company’s securities;

(bb) as clients of the person issuing the prospectus;

(cc) as the holders of any particular class of property; or

(dd) in any other manner; but

(ii) does not include-

(aa) an offer made in any of the circumstances contemplated in section 96\(^{36}\); or

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\(^{35}\) Delport P (2011) 74 THRHR at 283.

\(^{36}\) Section 96 deals with offers that are not considered to be offers to the public. The categories that are regarded as non-public apply to all offers of securities in Chapter IV. Certain offers are, however, by necessary implication excluded from secondary offer regulation. See Delport P & Vorster Q (2012) 372 in
(bb) a secondary offer effected through an exchange

Section 142(1) of the 1973 Act determined that an "offer to the public" and any reference to offering shares to the public meant any offer to the public and included 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. Section 144 of the 1973 Act determined when an offer shall be interpreted as not being an offer to the public.

As is the case with the 1973 Act the definition of “offer to the public” still remains key under the Act in ascertaining whether or not the issuing of a prospectus are triggered.\textsuperscript{37}

The definition of offer to the public in the Act is substantially similar to the definition in the 1973 Act, save that the original definition contained in the 1973 Act did not include “the holders of any particular class of property” or a specific reference to the section itemising offers that do not constitute offers to the public in terms of the Act.\textsuperscript{38}

Certain categories is included and then later excluded in respect of the word “public”.

An offer to the public may be one which is made only to a section of the public, however selected.\textsuperscript{39}

The case law on the meanings of “offer to the public” and “section of the public” will remain as relevant as it was under the 1973 Act.\textsuperscript{40}

\textsuperscript{37} De Smit G & Ntuta C (2010) \textit{De Rebus} 47.
\textsuperscript{39} Delport P & Vorster Q (2012) 365.
\textsuperscript{40} Stein C with Everingham G (2011) 258.
The words in section 95(1)(h)(i)(dd) “or in any other manner” govern the word “selected” in section 95(1)(h)(i). 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 made is to be irrelevant. Irrespective of the manner or criteria of selecting a section of the public, an offer would be an offer to the public unless it falls within one of the exceptions of this section.\(^{41}\)

The authors of Henochsberg have reservations in respect of the correctness of this application as the primary intention of the disclosure provisions in Chapter IV must be to provide information to addressees other than those who are able to fend for themselves. It is submitted that a distinction is to be made between “public” and “private” and that the circumstances under which the distinction is sought and the purposes sought to be achieved by such distinction be determining factors relative to such distinction. An offer to a random section of the public would be a public offer. An offer in which there is a rational connection between the offer and characteristics which set the section of the public apart can be a non-public offer. A mere rational connection is not sufficient and other factors such as an existing relationship between the group and the offeror are also required. The mere fact that a person has a particular type of private property does not make an offer one which is not an offer to the public in the absence of the other criteria.\(^{42}\)

\(^{42}\) Delport P & Vorster Q (2012) 366. See also chapter 4 below for a detailed discussion in this regard.
Section 95(2) of the Act states that a person is to be regarded, by or in respect of a company, as being a member of the public, despite that person being a shareholder of the company or a purchaser of goods from the company. The definition was carried over from section 141(10) of the 1973 Act. The authors of Henochsberg submit that it was unnecessary as it creates “member of the public” as a third category apart from “public” and “section of the public”. The concept was used in the 1973 Act for a different definition in that section of public. Also, the purchaser category and the category in section 95(1)(h)(i)(cc) would fall under the “or any other manner” category in section 95(1)(h)(i)(dd).43

As mentioned, offers which fall within the categories in section 96 of the Act and secondary offers effected through an exchange are excluded. However, off-market offers and trades of listed securities are not offers through an exchange and may not fall within this exception.44

2.1.3 Primary Offering

Primary offers are divided into offers of listed securities and offers of unlisted securities. A primary offering of listed securities requires compliance with the rules of the relevant exchange. A primary offering of unlisted securities requires a prospectus that satisfies the requirements of section 100 of the Act.45

A primary offering can only be an offer for subscription of securities.46

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46 Stein C with Everingham G (2011) 262.
Section 95(1)(i) of the Act states that a primary offering means an offer to the public, made by or on behalf of a company, of securities to be issued by that company, or another company—

(a) within a group of companies of which the first company is a member; or

(b) with which the first company proposes to be amalgamated or to merge.

It is required that the particular other company in the group or the other amalgamated or merged company makes the offer. The relation with the company seems irrelevant as that offer of that other company is a primary offer in terms of the Act in any case.47

Delport is of the view that the provision in section 95(1)(i)(a) is confusing. A “group of companies” is defined as “a holding company and all of its subsidiaries”. A “subsidiary” has the meaning determined in accordance with section 3”. A “holding company” in relation to a subsidiary means a juristic person that controls that subsidiary as a result of any circumstances contemplated in section 2(2)(a) or 3(1)(a). Sections 2(2)(a) or 3(1)(a) also provide for holding/subsidiary relationships in respect of other juristic persons such as trusts but the offer can only be in respect of companies in terms of the Act. If the offer is therefore made by a subsidiary company and it is to the public, a prospectus must be issued because it is a separate legal entity. If the offer is made on a pro rata basis to existing shareholders part of the offer or the whole offer in the case of a wholly owned subsidiary will be to the holding company. This does not change the nature of the offer or the nature of the subsidiary as a separate legal entity and the only question will be whether the holding company is “public”. The extended application of “primary offering” becomes even more confusing if one considers section 95(1)(i)(b) as this company is even more “remote” than the subsidiary. The wording also has the effect that if the offer is made not by the particular subsidiary or target company, but on its behalf, it is not a primary offering.

These transactions were previously regulated by sections 142 to 169 under the 1973 Act.

See further the discussion under Chapter 3 in this regard.

2.1.4 Secondary Offering

Section 95(1)(m) of the Act states that a secondary offering means an offer for sale to the public of any securities of a company or its subsidiary, made by or on behalf of a person other than that company or its subsidiary.

Secondary offers are, by implication, divided into offers for the sale of listed securities and offers for the sale of unlisted securities. A secondary offer for the sale of listed securities is regulated by the definition of “offer to the public” which stipulates that a secondary offer effected through an exchange is not an offer to the public. The Act requires a secondary offer of unlisted securities to be accompanied by the prospectus that accompanied the primary offering or a written statement that complies with the requirements of subsections 101(4) to (6).48

It is strange that “subsidiary” is included in the definition of a secondary offering as a subsidiary is for the purposes of the secondary market a separate entity. As the company is not involved in the secondary market it will not have any influence on the trading of shares in its subsidiary.49

Cassim et al submit that these distinctions provide legal clarity and certainty as to the relevant requirements. It is also aimed at supplying prospective investors with as much information as they require in making informed investment decisions without placing the primary or secondary offeror under an unreasonable or unnecessary administrative and financial burden in the process.50

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The separate provision made for offers pertaining to listed and unlisted securities should provide prospective investors with the requisite protection without unnecessary duplication or overregulation in terms of compliance with stock exchange and company law requirements.\(^{51}\)

As per the definition this is a purchase and sales contract as the securities already exist and are not issued. If the consideration is something other than money it may not be such a contract and would not fall under this definition.\(^{53}\)

A secondary offering can thus only be an offer of sale of securities. As indicated, the secondary offer is not made by the company and it is therefore, unlike the IPO and primary offering, not a capital raising exercise by the company.\(^{54}\)

These transactions were previously regulated by section 141 under the 1973 Act.

See further the discussion under Chapter 3 in this regard.

2.1.5 Initial Public Offering

As indicated above, this is a new definition which has been included in the Act.\(^{55}\)

Section 95(1)(e) of the Act states that an initial public offering (“IPO”) means an offer to the public of any securities of a company, if-

(i) no securities of that company have previously been the subject of an offer to the public; or

(ii) all of the securities of that company that had previously been the subject of an offer to the public have subsequently been re-acquired by the company.

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\(^{51}\) A stock exchange is an organized secondary market for the trading of shares where an association of persons trade for their own account or on behalf of others in shares contained in a list maintained by the association. See Cilliers HS & Benade ML et al (2000) 264-265 in this regard.


\(^{54}\) Stein C with Everingham G (2011) 263.

An IPO can be an offer for either subscription or sale of securities, or both.\textsuperscript{56}

Section 99(2) of the Act determines that a person must not make an IPO unless that offer is accompanied by a registered prospectus.

There is an overlap between an IPO and a secondary offering. Although a secondary offering is defined as “an offer for sale” the use of “offer” in the definition of an IPO is on the basis of the definition of “offer” which is wide enough to include an offer for sale. This could lead to confusion.\textsuperscript{57}

\textbf{2.1.6 Rights Offer}

Section 95(1)(l) of the Act states that a rights offer means an offer, with or without a right to renounce in favour of other persons, made to any holders of a company’s securities for subscription of any securities of that company, or any other company within the same group of companies.

The word “any” infers that incumbent shareholders do not have pre-emptive rights as is the case under section 39.\textsuperscript{58}

Section 142(1) of the 1973 Act determined that a "rights offer" meant 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 such offer under subsection (2), 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 this definition by notice in the Gazette, has granted or has agreed to grant a listing for the shares which are the subject of the offer.

\textsuperscript{56} Stein C with Everingham G (2011) 262.
\textsuperscript{57} Delport P (2011) 74 \textit{THRHR} at 286.
\textsuperscript{58} Stein C with Everingham G (2011) 278.
As can be seen, the definitions above are similar except that the definition in the 1973 Act was restricted to offers with a right to renounce and referred to shares in any company, not just a group of companies.\textsuperscript{59}

A rights offer may take a variety of forms. Such an offer or issue involves the delivery by the company to each of its existing securities holders a letter of right (letter of allocation) conferring on him/her the right to subscribe within a specified period for securities in the new issue of the company in which he/she is the holder of securities or in a company within the group of companies in proportion to his/her existing holding usually by way of inducement at a price below the current market price of the securities comprising such holding. The letter of allocation may or may not be renounceable and where same is renounceable it is usually accompanied by a form of renunciation. The securities are allotted by the company or a company within the group of companies to the holder of the letter who applies therefor and pays the price. The letter of allocation can take the form of a provisional letter of allotment. A rights offer need not be one to subscribe for securities in proportion to the recipient’s existing holding. It may be to subscribe for any number of securities in the new issue subject to section 38 of the Act. The rights offer can be in respect of listed and unlisted securities. If it is in respect of the first mentioned it is not an offer to the public and a prospectus is therefore not required, however, if it is in respect of the last mentioned it is an offer to the public unless it complies with the requirements of section 96(1)(c) of the Act.\textsuperscript{60}

\textsuperscript{59} Stein C with Everingham G (2011) 278.  
\textsuperscript{60} Delport P & Vorster Q (2012) 368.
3. DOCTRINE OF DISCLOSURE

3.1 Introduction

The doctrine of disclosure is a term adopted from the English law which is fundamental to the companies legislation of England and, as a consequence, of South Africa.61

The basic manner in which to protect investors in securities is disclosure. If an incorporeal is sold the buyer cannot determine whether the consideration is fair and what the value of the incorporeal is. To make these valuations and decisions the buyer is dependent on the information that is in the possession of the seller. The seller must give this information to the buyer and also ensure the relevance and integrity of this information.62

It is trite law that the investor in the shares and other securities in a company must be protected beyond what is available at common law in the case of the purchase and sale of corporeals. The type of protection may vary from direct regulation of the modus operandi of the company to laissez faire requiring only disclosure with various permutations between these two extremes. South African company law has always opted for disclosure, putting emphasis on who must disclose and the extent of the disclosure depending on the market where the shares are to be issued or traded. This market may be divided into primary and secondary markets.63

If a company issues securities to investors the sale takes place on the primary market. If the investor later decides to sell any or all of the securities the sale occurs on the secondary market. The secondary market can be formal e.g. there is a place where certain securities that comply with certain requirements are listed and then bought and sold which is regulated or informal e.g. a private transaction between a buyer and seller. There is disclosure in both markets but the level differs.64

62 Delport PA (2011) 43.
63 Delport P (2011) 74 THRHR at 280.
64 Delport PA (2011) 43.
Three principles are usually used to determine whether there must be disclosure i.e. there must be an offer, the offer is of securities and the offer is made to the public.65

3.2 Subscription

In the primary market the offer must be intended for the conclusion of a contract for subscription. It is a subscription contract and not a contract of purchase and sale because the share, as an incorporeal, is not in existence before issue and can therefore not be sold. The company therefore does not offer the shares for subscription, but issues an invitation to investors who then make offers to the company. The company then accepts the offers to the extent that shares are available and the allotment and issue follow. Initially it was accepted that subscription only takes place when the consideration for the shares is paid in cash, but this requirement has been effectively deleted.66

In Gold Fields Ltd ("Gold Fields") v Harmony Gold Mining Co Ltd ("Harmony")67 one of the questions which had to be considered by the Court was whether a share exchange qualified as an offer for the subscription of shares as section 145(1) of the 1973 Act makes specific mention of the fact that no person is permitted to make any offer to the public for the subscription of shares unless it is accompanied by a prospectus complying with the requirements of this Act. The Court came to the conclusion that the term subscription was not limited to the taking up of shares for cash. The offer which was structured as a share exchange would thus fall within the ambit of the section.68

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65 Delport PA (2011) 43.
67 Gold Fields Ltd v Harmony Gold Mining Co Ltd 2005 (2) SA 506 (SCA).
Section 99 of the Act makes no mention of subscription when the section refers to IPOs, primary offers or secondary offers. The definitions of these terms in section 95 of the Act also make no mention of “subscription” and refer merely to “an offer of securities”. See the discussion under chapter 4 below in this regard.\(^{69}\)

### 3.3 Offer: Primary / Secondary Market Transaction

The initial process whereby the company, through whatever means, makes investment opportunities available to investors and then receives the proceeds is termed the “primary market”. One of the attributes of a share is that the investor can trade his investment. The transaction where the investor and not the company gets the proceeds is the secondary market. The two markets are separate.\(^{70}\)

In the best efforts or firm underwriting constructions there are two offers. The first is one for allotment to the underwriter and his or her offer for sale to the investors. This is clear and uncomplicated, except to determine when an offer to investors is an offer by an underwriter i.e. a primary market underwriter transaction and when it is a \textit{bona fide} secondary market offer.\(^{71}\)

The primary market underwriter transaction problem was addressed in the 1973 Act by creating a presumption that it is a primary market transaction if the shares were offered for sale to the public within 18 months of the initial allotment.\(^{72}\)

It is important to distinguish between the primary and secondary markets. In the primary market the company must disclose and the extent of the disclosure is substantial. In the secondary market the seller must disclose and the extent is limited due to the fact that the seller does not have access to all the financial information.\(^{73}\)

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\(^{69}\) Glazewski J (ed) (2010) 120.
\(^{70}\) Cilliers HS & Benade ML \textit{et al} (2000) 256.
\(^{71}\) Delport P (2011) 74 \textit{THRHR} at 282.
\(^{72}\) Delport P (2011) 74 \textit{THRHR} at 282.
\(^{73}\) Delport P (2011) 74 \textit{THRHR} at 282.
Due to confusion between the provisions that applied to the primary and secondary markets in the Companies Act 46 of 1926 ("1926 Act"), the Van Wyk de Vries Commission recommended that the provisions be in different chapters of the 1973 Act and the secondary market regulation was placed in Chapter V while the primary market regulation was the new Chapter VI. The confusion was due to the same words being used in different contexts. The meaning of the word “public” in the primary market and in the secondary market will and should differ because the need for and extent of disclosure differ. The confusion was unfortunately not excluded.74

Chapter IV of the Act now contains the equivalent of section 141 as well as the principles contained in Chapter VI of the 1973 Act. This may not seem problematic but the ambit, application and history of section 141 and Chapter VI of the 1973 Act may tell a different story. The Act resurrected the problems of the 1926 Act.75

3.4 Markets

3.4.1 Primary Market

The primary market is the first distribution.76

The eventual investor is a party to the contract, whatever form it may take, and the company is the other party. In many instances this is a face-to-face transaction. However, it can also be necessary, and prudent, for the company not to do the distribution itself but to utilise the services of a third party. If this third party is an agent of the company with or without additional obligations as to shares that are not distributed, basic agency principles determine that the distribution is by the company as principal. This third party can, however, also act as principal in a different contractual relationship. This will be the case where he or she acquires the shares in the company

74 Delport P (2011) 74 THRHR at 282.
75 Delport P (2011) 74 THRHR at 282.
76 Delport P (2011) 74 THRHR at 280. See the discussion in chapter 4 below in this regard.
for whatever consideration and then, as per the agreement with the company distributes the shares to other investors. The undistributed shares are already acquired by the agent and therefore he or she remains the owner. The common principle is that the two parties to the contracts are the company who acquires the consideration for the shares and the eventual investor who acquires the shares and therefore this is the primary market.  

3.4.1.1 Sections 145 and 146 of the Companies Act 61 of 1973

Section 145(1) of the 1973 Act determined that no person shall make any offer to the public for the subscription for shares unless it is accompanied by a prospectus complying with the requirements of the 1973 Act and registered in the Companies Registration Office, and that no person shall issue such a prospectus which has not been so registered.

Section 146(1) of the 1973 Act determined that no person shall make any offer to the public for the sale of any shares which have been, or have been agreed to be, allotted by the company concerned with a view to all or any of them being offered to the public; or 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, unless it is accompanied by a prospectus complying with the requirements of this Act and registered in the Companies Registration Office, and no person shall issue such a prospectus which has not been so registered.

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3.4.1.2 Sections 99 and 100 of the Companies Act 71 of 2008

Section 99 represents one of the fundamental differences between the regime which governed public offerings under the 1973 Act and the regime under the Act.\textsuperscript{78}

Section 99 places restrictions on offers to the public of the securities of a company and also prescribes certain requirements, most notably the issue of a prospectus, in this regard.\textsuperscript{79}

A person must not offer to the public any securities of any person unless the second person is a company and, if a foreign company, a copy of its Memorandum of Incorporation has been filed at least 90 days prior to the public offer being made. Furthermore, the section provides that an IPO requires a prospectus.\textsuperscript{80}

Section 95(1)(a) provides that, in Chapter IV, a “company” includes a foreign company which is defined in section 1 as an entity incorporated outside the Republic. This change has cast the net of Chapter IV wider to include public offerings within the Republic of the securities of any company incorporated anywhere in the world, irrespective whether or not it is an “external company”. Section 143(2) of the 1973 Act subjected only an external company, not a foreign company, to its public offering requirements.\textsuperscript{81}

Section 99(3) draws a distinction between the primary and secondary markets, as well as the securities of a listed entity and the securities of an unlisted entity. These distinctions are new in South African company law in so far as it relates to public offers. It clarifies the ambit and application of the restrictions in this regard.\textsuperscript{82}

\textsuperscript{78} Stein C with Everingham G (2011) 261-262.
\textsuperscript{79} Glazewski J (ed) (2010) 117.
\textsuperscript{80} Glazewski J (ed) (2010) 118.
\textsuperscript{81} Stein C with Everingham G (2011) 262.
\textsuperscript{82} Glazewski J (ed) (2010) 118.
Once it has been determined that an offer is an offer to the public and that it must be accompanied by a prospectus, section 100 of the Act sets out the required standards of compliance. Section 100(1), a new section, states that the section does not apply to listed securities except in so far as the listed securities are the subject of an IPO. This is in line with the definitions in sections 95 and 99(3) which, read together, make a primary offering of listed securities subject to the rules of the exchange and deem a secondary offering of listed securities effected through an exchange not to be a public offer, which therefore does not require a prospectus.83

Whereas the 1973 Act as well as a previous draft version of the Act both referred to the fact that the prospectus must adhere to the specifications of Schedule 3, which contains detailed prescriptive provisions as to matters which must be stated in a prospectus in addition to those stated in the Act, the Act contains no such reference. Section 100(2)(b) of the Act only determines that a prospectus must adhere to the prescribed specifications. There is no reference as to what the prescribed specifications are and where these may be found. Section 1 of the Act defines the word “prescribed” as meaning determined, stipulated, required, authorised, permitted or otherwise regulated by a regulation or notice made in terms of the Act. Section 223 deals with the authority of the Minister to make regulations under the Act and the procedure to be followed in this regard. The conclusion to be drawn is that the Minister will make regulations that will deal with the prescribed content and form of a prospectus.84

3.4.2 Secondary Market

The investor who acquired shares in the primary market by whatever means may want to sell the shares and this transaction takes place on the secondary market. This proposed transaction has no direct relevance for the company and due to the present principles in respect of nominee shareholding, the company may not even know about the change of ownership if the name of the buyer is not entered into the share register.

This secondary market is informal and should be distinguished from the formal regulated market’s regulated by the Securities Services Act 36 of 2004. This distinction is important as the former is regulated exclusively by the common law and by the Companies Act and the latter by the Securities Services Act.\textsuperscript{85}

It is critical to remember that primary and secondary markets operate strictly in numerical order as per the nomenclature and it is physically and legally impossible for the secondary market to exist before the primary market. This is true for the informal secondary market, and even more so in the formally regulated market.\textsuperscript{86}

“Offers not to the public” in section 96 of the Act also applies to the secondary market, but given the difference in the type of contract, only some of the exclusions will apply. Also, certain of the exclusions that can be used in the secondary market are suited only for the primary market.\textsuperscript{87}

\textbf{3.4.2.1 Section 141 of the Companies Act 61 of 1973}

Section 141 of the 1973 Act determined that no person shall either orally or in writing (including any newspaper advertisement or any advertisement in a format) make an offer of shares for sale to the public or issue, distribute or publish any such material which in its form and context is calculated to be understood as an offer as aforesaid unless it is accompanied by a written statement containing the particulars required by this section to be included therein.

\textsuperscript{85} Delport P (2011) 74 \textit{THRHR} at 281.
\textsuperscript{86} Delport P (2011) 74 \textit{THRHR} at 281.
\textsuperscript{87} Delport PA (2011) 50.
Under the 1973 Act “public” was not governed by the definitions in section 142 or the further provisions relating to a prospectus. The meaning of “public” in the context of section 141 had been considered in a number of cases but its content remained uncertain. A person was, in terms of section 141(10), not to be regarded as being a member of the public simply because he was a shareholder or purchaser of goods of the company concerned. The statement was of very limited assistance. It appeared that an offer became one to the public as and when the offeror intended to deal in his shares as opposed to disposing of assets represented by those shares or when he went beyond individually negotiating the sale of the shares in a close circle of parties with joint interests regarding the company and its activities.88

3.4.2.2 Section 101 of the Companies Act 71 of 2008

A person must not make a secondary offer to the public of any securities of a company or its subsidiary, unless the offer satisfies the requirements of section 101 of the Act.

Section 101 states that this section does not apply in respect of securities that are—

(a) listed on an exchange; or

(b) in respect of which an exchange has granted permission to deal.

(2) Subject only to subsection (3), a person making a secondary offering of the securities of a company must ensure that the offer is accompanied by either—

(a) the registered prospectus that accompanied the primary offering of those securities, together with any revisions required to address changes in any material matter since the date the prospectus was registered; or

(b) a written statement that satisfies the requirements of subsections (4) to (6).

As indicated, section 101 does not apply in respect of securities that are listed on an exchange or in respect of which an exchange has granted permission to deal. Section 101 will thus not apply to a secondary offer of listed securities or to unlisted securities which are to be listed pursuant to a secondary offer.\(^89\)

A person making a secondary offering must ensure that the offering is accompanied either by the registered prospectus that accompanied the primary offering of those securities plus any revisions required to address changes in any material matter since the date of registration of the prospectus alternatively, a written statement that satisfies the requirements of section 101(4)-(6) of the Act must accompany the offering.\(^90\)

The purpose of section 101 is to prohibit, except in the cases envisaged by subsection (2), the making of a secondary offering, unless the offer or invitation is accompanied by a written statement dated and signed as required, containing the information mentioned in subsection (6), complying as to its form and having annexed to it the annexures contemplated by subsection (6)(c). Where the securities are those of a public company the statement must be lodged with the Commission for registration and may not be issued, distributed or published after three months have expired since the date of such registration. Alternatively the offer must be accompanied by the registered prospectus that accompanied the primary offering, as mentioned above. If the prospectus was issued in respect of an IPO it would not suffice and a written statement must accompany the secondary offer.\(^91\)

The essence of the provisions of section 101 is the requirement of disclosure of the information material to any intending purchaser’s decision as to whether or not to purchase. The owner or holder of a company’s securities who may wish to sell them for his personal gain ought not to be precluded from seeking a purchaser among the public at large but if that is his object he ought to be candid concerning the true market value of the securities and all matters affecting it.\(^92\)

\(^{89}\) Stein C with Everingham G (2011) 266.


\(^{91}\) Delport P \& Vorster Q (2012) 385.

\(^{92}\) Delport P \& Vorster Q (2012) 385.
The prospectus or written statement is not required if the offer is made by a person acting in the capacity of an executor or administrator of a deceased estate, or a trustee of an insolvent estate, or a liquidator or trustee referred to in the Administration of Estates Act 66 of 1965, or for the purpose of a sale in execution, or by public auction or by public tender. The whole of section 101 of the Act is not applicable if the securities are listed on an exchange.93

The application of this section to any offer or invitation depends on whether same is an offer to the public. In terms of the 1973 Act, whether or not an offer or invitation is of this kind was a question of fact depending on the circumstances of the particular case. The intention of the person making the offer or invitation was decisive i.e. whether it is to hawk the securities among the public at large or to dispose of them in the context of a private negotiation. This will not apply in respect of section 101 as the ambit of the public is now clearly defined and the question whether the intention was to hawk will not be relevant. All secondary offerings will have to comply with section 101 and even if the intention was to sell the asset rather than the shares or securities.94

Delport presumes that the principles in Vlakspruit Landgoed (Edms) Bpk v J Mentz (Edms) Bpk95 would continue to apply. These principles are that the intention of the legislature with section 141 of the 1973 Act was to regulate the hawking of shares and not to interfere with transactions where the intentions of the parties in the sale of the shares are to merely place the control of the assets of the company in different hands. These principles would not apply if the securities are not shares.96

93 Delport PA (2011) 50.
95 Vlakspruit Landgoed (Edms) Bpk v J Mentz (Edms) Bpk 1977 (1) SA 780 (T) 786. See Delport PA (2011) 51 in this regard.
96 Delport PA (2011) 51.
4. OFFERS OF SECURITIES TO THE PUBLIC

As indicated above, section 95(1)(h) of the Act determines that an offer to the public includes an offer of securities to be issued by a company to any section of the public, whether selected as holders of that company’s securities; as clients of the person issuing the prospectus; as the holders of any particular class of property or in any other manner. It does not include an offer made in any of the circumstances contemplated in section 96 or a secondary offer effected through an exchange.

Section 95(1)(h) of the Act includes and later excludes certain categories in respect of the general term public.\(^\text{97}\)

As is the case in the 1973 Act, the definition of an offer to the public in the Act includes an offer to a “section of the public” being a group smaller than the public at large but qualifying as an offer which is by its nature an offer to the public.\(^\text{98}\)

Also, as mentioned, section 95(2) of the Act states that a person is to be regarded, by or in respect of a company, as being a member of the public, despite that person being a shareholder of the company or a purchaser of goods from the company. Also, as the definition of “offer to the public” in the Act is very similar to the definition that appeared in the 1973 Act, the case law that has developed around this phrase should still assist the courts in their interpretation of the legislation.\(^\text{99}\)

In \textit{Re South of England Natural Gas and Petroleum Co}\(^\text{100}\) the distribution of a prospectus marked “for private circulation only” to shareholders in a number of gas companies was held to be an offer to the public.\(^\text{101}\)

The most recent case decided in this regard is that of \textit{Gold Fields Ltd (“Gold Fields”) v Harmony Gold Mining Co Ltd (“Harmony”).}\(^\text{102}\)

\(^{100}\) \textit{Re South of England Natural Gas and Petroleum Co} (E 1911).  
In *Gold Fields Ltd v Harmony Gold Mining Co Ltd*, Harmony made an offer to all certified Gold Fields shareholders to issue and exchange 1.275 Harmony shares for one Gold Fields share in order to obtain control of Gold Fields. The offer was made only to persons who were able to deliver Gold Fields shares. This entitled the Gold Fields shareholders to be allotted new shares in Harmony. Gold Fields sought a declaratory order to the effect that the offer was prohibited in terms of section 145 of the 1973 Act as constituting an offer to the public for the subscription of shares which was not accompanied by a prospectus.

The first question which had to be considered by the court was whether a share exchange qualified as an offer for the subscription of shares because section 145(1) of the 1973 Act specifically mentioned that no person was permitted to make any offer to the public for the subscription of shares unless it was accompanied by a prospectus complying with the requirements of the Act.

Subscription in the context of an offer of shares has usually been understood to mean the acquisition of unissued shares for a consideration in cash. After considering the ordinary meaning of subscription and referring to case law it was held that a subscription for shares is an undertaking to take up shares, not only for cash. A share exchange can thus qualify as subscription for shares. This has the effect that a prospectus in terms of Chapter VI of the Companies Act had to be issued if the offer to exchange was made to the public.

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103 *Gold Fields above n48.*
104 Section 145(1) provides that no person shall make any offer to the public for the subscription for shares unless it is accompanied by a prospectus complying with the requirements of the 1973 Act and registered in the Companies Registration Office, and that no person shall issue such a prospectus which has not been so registered.
105 *Gold Fields 506 above n48.* Both are public mining companies whose shares are listed on securities exchanges in South Africa and abroad. See p508 in this regard.
Section 99 of the Act puts an end to this debate as no specific mention is made of subscription when the section refers to IPOs, primary offers or secondary offers. The definitions of these terms in section 95 of the Companies Act also make no mention of the term “subscription” and refer merely to an offer of securities.\textsuperscript{109}

The second question which had to be considered by the court was whether the offer described above was an offer to the public for the subscription of shares which required the offer to be accompanied by a prospectus.\textsuperscript{110}

The Court was of the view that it could add nothing useful to what had been said in earlier cases as to the meaning of public as there was no suggestion that the word was used in section 145 in any special sense. Reference was made to \textit{S v V}\textsuperscript{111} and \textit{S v Rossouw}\textsuperscript{112} and it was concluded that the ordinary meaning of the word “public” is the community as a whole rather than the community as an organised body. It was held that it was unhelpful and potentially misleading to attempt to determine by inference what was included in an offer to the public by referring to the inclusions and exclusions in sections 142 and 144 as same may have been inserted to avoid uncertainty.\textsuperscript{113}

It was held that the better approach was to determine whether the present offer was to the public within the meaning as that term is ordinarily understood. The Court found that in order to qualify as an offer to the public the terms of the offer had to be capable of being offered to and accepted by the public at large. However, every offer in such terms is not necessarily an offer to the public nor must an offer be made to the public at large in order to qualify. An offer that is made to the public would necessarily be in terms that would enable it to be made to and accepted by the public at large and it could thus be made with indifference to any random section of the public.\textsuperscript{114}

\textsuperscript{110} Cassim FHI \textit{et al} (2012) 654.
\textsuperscript{111} \textit{S v V} 1977 (2) SA 134 (T).
\textsuperscript{112} \textit{S v Rossouw} 1968 (4) SA 380 (T).
\textsuperscript{113} Delport PA (2005) 17 SA Merc LJ at 389 and \textit{Gold Fields} 509 above n48.
\textsuperscript{114} \textit{Gold Fields Ltd} 509 above n48.
However, that will not be so where the offer aims at acquiring specific private property for the terms of such an offer must necessarily be such that it is directed to, and is capable of being accepted by, only the owner of the property. The offer, in its terms, will not be capable of being extended to the public at large, or even to a random section of the public. The owner is addressed in the peculiar capacity, not shared by the public at large, as owner of specific limited property. An offer of that kind doesn’t become an offer to the public or a section of the public by a process of multiplication when it is extended to the acquisition of similar property in the hands of other owners.115

Reference was made to Corporate Affairs Commission (South Australia) v Australian Central Credit Union116 and TNT Australia (Pty) Ltd v Normandy Resources NL117 and it was found that there was a rational connection between the offer and the characteristic that sets the group apart from the public due to the fact that the offer was made only to people in the peculiar capacity of owners of certain private property. It might be that any member of the public is able to acquire a Gold Fields share, but, until he/she does so, the offer is not made to him/her. Insofar as members of the public might have been invited by Harmony to acquire Gold Fields shares that is no more than an invitation to qualify for the offer. An offer that aims to acquire specific private property would not achieve its purpose if it was made to the public for no reason but that the property is in private hands. The present offer is not made to the public but to shareholders in Gold Fields who are not, in that capacity, a mere section of the public at large. The selection was therefore not random and the offer not to the public so that section 145 did not apply.118

115 Gold Fields Ltd 510 above n48.
116 Corporate Affairs Commission (South Australia) v Australian Central Credit Union (1985) 157 CLR 201 (HC).
117 TNT Australia (Pty) Ltd v Normandy Resources NL (1989) 15 ACLR 99 (SC).
The concept of “public” made its first appearance in section 30 of the British Companies Act of 1900. This section was incorporated in the Companies Consolidation Act of 1908. In this regard, the House of Lords made the remark, in respect of public, in *Nash v Lynde*\(^{119}\) that no particular numbers are prescribed and that anything from two to infinity may serve, perhaps even one. The point is that the offer is such as to be open to anyone who brings his money and applies in due form. In *Lynde v Nash*\(^{120}\) it was stated “to obtain from all and sundry … the much desired subscriptions” in respect of the concept “public”. Due to this interpretation the practice developed whereby offers were made to selected addressees and only they could accept it. This practice was curtailed by the British Companies Act of 1929 which included as “public” any section of the public however selected. This enactment was taken over into the 1926 Act. Definitions were inserted in Chapter VI of the Companies Act and S142(1) provided that “offer to the public” and any reference to offering shares to the public meant any offer to the public and included an offer of shares to a section of the public whether selected in any other manner.\(^{121}\)

If an offer was included in an offer to the public by section 142(1) and did not fall within the exceptions in section 144, it was one to the public. There was therefore no room for a common law non-public category.\(^{122}\)

It is Delport’s view that the reasoning of the Court in respect of the meaning of “public” is flawed on a number of grounds. The concept of “public” is clearly and exhaustively defined in section 142(1). This definition applies to Chapter VI and should be applied in the context of the meaning of “public” as it developed. The definition draws two clear distinctions, namely an offer to the public and an offer to a section of the public. An offer to the public is an offer if it is to all and sundry or to the public at large. This was not the position in this case. If the offer is not made to the public at large, but to a

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119 *Nash v Lynde* [1929] AC 158 at 169.
120 *Lynde v Nash* [1928] 2 KB 93 at 116.
121 Delport PA (2005) 17 *SA Merc LJ* at 391.
section of the public, the definition makes it clear that however the selection is made, it will still be an offer to the public for purposes of Chapter VI.123

As far as disclosure requirements are concerned, an offer to the public and an offer to a section of the public are the same thing. The reference to and the reliance on the meaning of “public” in S v V and S v Rossouw is therefore inappropriate as it may only serve to determine the meaning of public which is not in issue here. The definition of “offer to the public” in section 142(1) does not qualify the word “public” with “includes” but uses it to include a section of the public in the meaning of public. The definition of “public” in section 142(1) is exhaustive and does not include any other common law meaning.124

It is also Delport’s view that the reliance on Corporate Affairs Commission (South Australia) v Australian Central Credit Union may be displaced due to the differences between the Companies (South Australia) Code and section 142(1) and the incorrect application of the ratio in that case.125

Section 5(4)126 of the Code determines that a reference in the Code to, or the making of, an offer to the public, or to the issuing of, an invitation to the public shall, unless the contrary intention appears, be construed as including a reference to, or the making of, an offer to any section of the public. This definition is identical to the definition in section 84 of the repealed South African Companies Act of 1926. It is, however, in

125 Delport PA (2005) 17 SA Merc LJ at 392
126 Section 5(4) is not intended to provide a comprehensive definition of what constitutes, for the purposes of the Code, an offer or invitation “to the public”. It does not, for example, expressly include the most obvious case of an offer to the public, namely, an offer to the entire world. As the use of the word “including” indicates …, the subsection is expansive of what would otherwise be included in the notion of an offer or invitation to the public. That does not, however, mean that none of the cases which the subsection includes would have been included in that notion in any event. The function of such an inclusive definition is commonly both to extend the ordinary meaning of the particular word or phrase to include matters which otherwise would not be encompassed by it and to avoid possible uncertainty by expressly providing for the inclusion of particular borderline cases. Corporate Affairs Commission (South Australia) 794 above n90. Delport PA (2005) 17 SA Merc LJ at 392.
contrast with section 142(1) of the Companies Act. It does not define “public” but includes in the ordinary meaning of “public” also a “section of the public”.  

Under the Code and previously under section 84 of the South African Companies Act of 1926 it was possible to establish a “non-public” category that falls outside the expressly included exceptions. Even if the definitions in section 142(1) of the Companies Act and section 5(4) of the Code were the same, the application of the Court of the ratio would still not be correct. As to the requirements of the non-public category, it was stated in the case that the question whether a particular group of persons constitutes a section of the public for the purposes of section 5(4) of the Code cannot be answered in the abstract. 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 constitutes a section of the public for the purpose of the offer will fall to be determined by reference to a variety of factors of which the most important will ordinarily be: the number of persons comprising the group, the subsisting relationship between the offeror and the members of the group, the nature and content of the offer, the significance of any particular characteristic which identifies the members of the group and any connection between the characteristic and the offer. As a basis requirement, there must be some existing relationship between the offeror and the addressees. The minority judgment went even further and required that the common characteristics between the group must be as a result of the relationship with the offeror. 

In the present case there was no relationship between the offeror and the offerees. The definition of the non-public category as the peculiar capacity not shared by the public at large of owner of specific limited property causes more confusion. The peculiar capacity that sets the group apart as a non-public category and the rational connection between the group and offeror is not enough especially if the rational connection is

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merely an offer to acquire that which causes the peculiar capacity to include a person in the group.\textsuperscript{129}

In \textit{Corporate Affairs Commission (South Australia) v Australian Central Credit Union} the offer for shares was made by the Australian Central Credit Union to its own members and there was a clear, existing rational connection between the offeror and offerees.\textsuperscript{130}

The test for “public” or “non-public” for purposes of disclosure must comply with the basic philosophy that the “non-public” includes those “who are shown to be able to fend for themselves”. If there is not at least an existing relationship between the offeror and addressees, it cannot be a non-public offer, even if the legislative provisions in the Companies Act would allow a common law “non-public” category.\textsuperscript{131}

As previously indicated in chapter 2, section 95(1)(h) of the Act determines that an offer may be made to only 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 definitions. An offer to the public or a section of the public will not be an offer to the public if it falls within section 96(1)(a)-(g) of the Act.\textsuperscript{132}

It is the view of Cassim \textit{et al} that in future such an offer as mentioned above will qualify as a public offer by virtue of the definition of “offer to the public” contained in section 95(1)(h)(i) of the Act and that this is a welcome clarification of the legal position. There are accordingly three possibilities i.e. an offer is an offer to the public because that is its true legal nature and it complies with the definition in the Act; an offer is an exempted non-public offer because it is specifically exempted in terms of section 96 of the Act or an offer is a non-public offer because though it does not fall within the section 96(1) exemptions that is its true legal nature. Therefore it is possible that an offer may qualify as an offer to the public even though it is made to a limited group of persons because it

\textsuperscript{129} Delport PA (2005) 17 \textit{SA Merc LJ} at 393.
\textsuperscript{130} Delport PA (2005) 17 \textit{SA Merc LJ} at 393.
\textsuperscript{131} Delport PA (2005) 17 \textit{SA Merc LJ} at 394.
\textsuperscript{132} Delport P & Vorster Q (2012) 365.
is an offer to a section of the public as contemplated by the definition in section 95(1)(h) of the Act.\textsuperscript{133}

As indicated above, if an offer was included in an offer to the public by section 142(1) of the 1973 Act and did not fall within the exceptions in section 144 of the 1973 Act, it was one to the public. There was therefore no room for a common law non-public category. The definition of “offer to the public” in section 142(1) does not qualify the word “public” with “includes” but uses it to include a section of the public in the meaning of public. The definition of “public” in section 142(1) is exhaustive and does not include any other common law meaning. This is not the case with the definition of “offer to the public” in section 95(1)(h) under the Act. Section 95(1)(h) of the Act therefore leaves room for a common law non-public category.

\textsuperscript{133} Cassim FHI \textit{et al (2012)} 654.
5. CONCLUSION

The meaning of “offer to the public” forms the basis of Chapter IV. If an offer falls outside this meaning, Chapter IV and its provisions do not apply.

Section 95 introduces into the Act three contemporary and internationally recognised methods of offering securities to the public.

The Act puts an end to uncertainties which existed under the 1973 Act.

The Act makes it clear that an offer can be made orally. The Act also makes it possible for an offer to be made electronically. An invitation is not included in the definition of “offer”.

The Act permits the publication of an offer to the public through electronic media and as an alternative to any other manner of making or presenting an offer to the public, such an offer may be made by way of an advertisement.

New distinctions are drawn between the primary and secondary markets and listed and unlisted securities.

Cassim et al submit that these distinctions provide legal clarity and certainty as to the relevant requirements. It is also aimed at supplying prospective investors with as much information as they require in making informed investment decisions without placing the primary or secondary offeror under an unreasonable or unnecessary administrative and financial burden in the process.\(^{134}\)

Yeats is of the view that the aim of the drafters to modernise and simplify this area of law appears to have been achieved to a significant extent. The distinctions drawn between listed and unlisted entities and the primary and secondary markets are lucidly and sensibly differentiated from one another as regards the particular requirements of investors in those circumstances.\(^{135}\)

\(^{134}\) Cassim FHI et al (2012) 650.

The definition of “offer to the public” remains a difficult legal question to be answered and some uncertainty regarding this concept still exists.

The authors of Henochsberg have reservations in respect of the correctness of this application. It is submitted that a distinction is to be made between “public” and “private” and that the circumstances under which the distinction is sought and the purposes sought to be achieved by such distinction be determining factors relative to such distinction.136

The authors of Henochsberg also submit that the statement in section 95(2) that a person is to be regarded, by or in respect of a company, as being a member of the public, despite that person being a shareholder of the company or a purchaser of goods from the company was unnecessary as it creates “member of the public” as a third category apart from “public” and “section of the public”.

Yeats is, however, also of the view that although this area of law may always present some challenging legal questions such as what exactly constitutes an offer to the public, these are not questions which can be definitely dealt with through legislative intervention. The new and improved framework and content of Chapter IV should provide companies and the courts with a clearer and more certain foundation from which to operate and to make these difficult legal decisions.137

It appears that the Act will still present some challenging legal questions to be answered in future. Yeats’ view that these are not questions which can be definitely dealt with through legislative intervention may be correct. However, it does appear that some of the problems that existed under the 1973 Act were perpetuated under the Act and that some of the provisions in this part are not as clear and free of confusion in interpreting same. The way in which the provisions were drafted does have an impact on the interpretation of same.

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