

PROSPECTUSES AND OFFERS OF SECURITIES FOR PURCHASE:

A REPLY TO PROFESSOR FORD

The scope of the prospectus provisions of the Uniform Companies Act¹ remains in doubt. This comment deals with the regulation of offers of securities for purchase.² There is no argument that written offers of securities to the public for subscription³ do require a prospectus. There is, however, some doubt as to which offers of securities for purchase also require a prospectus. In an article in this review in 1975 it was suggested that the Companies Act seemed to require a prospectus for all written offers to the public of securities for purchase.⁴ This represented a challenge to the widely held belief that the only offers of previously issued securities which attracted the prospectus provisions were those caught by s.43 of the Act. Professor Ford has recently presented an analysis which he believes supports the more limited view of the scope of the Act.⁵ It is proposed to examine the problem and the analysis suggested by Professor Ford in detail. The discussion will concentrate on what the Act does regulate rather than on what it ought to regulate.

There is no dispute that the prospectus provisions appear to be generally inappropriate for offers of securities for purchase. It is also likely that the state legislatures did not intend all offers of securities to the public for purchase to be made by a prospectus. Nevertheless it is contended in this comment that the probable intention of the legislature cannot be given effect by using the analysis presented by Professor Ford. An alternative analysis which may achieve the same purpose will be suggested.

The Key Prospectus Provisions

S.42(1) of the Companies Act provides that a prospectus shall not be issued, circulated or distributed by any person unless a copy thereof has first been registered by the Registrar.⁶ S.42(2)(b) directs the Registrar not to register a prospectus unless it appears to comply with the requirements of the Act which are laid down in s.39(1). Whether s.42 is applicable obviously depends on the meaning of "prospectus". S.5(1) provides that "unless the contrary intention appears . . . 'prospectus' means a prospectus, notice, circular, advertisement or invitation . . . offering to the public for subscription or purchase any shares in or debentures of . . . a corporation or proposed corporation."

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1. The term "uniform" is now, of course, misleading. However, with the exception of s.40, the Act as it relates to prospectuses is uniform throughout Australia. See the Companies Acts of New South Wales (1961), Victoria (1961), Queensland (1961), South Australia (1962), Western Australia (1961), Tasmania (1962) and the Companies Ordinances of the Australian Capital Territory (1962) and the Northern Territory (1962).
 2. An offer of securities for purchase implies that a corporation has already issued and allotted the securities. See, for example, *Re V.G.M. Holdings Ltd.* [1942] 1 All E.R. 224, 226.
 3. An offer of securities for subscription implies that the securities have yet to be issued or allotted by a corporation.
 4. Hambrook, "The Obligation to Provide Offerees of Corporate Securities With Formal Disclosure Documents", (1975) 5 *Adel. L.R.* 136, 148-150.
 5. Ford, *Principles of Company Law* (2nd ed., 1978), 290-293. See also Baxt, Ford and Samuel, *An Introduction to the Securities Industry Acts* (1977), 165-169.
 6. Depending on the State or Territory the relevant authority may be the Commissioner for Corporate Affairs or the Corporate Affairs Commission.

It seems to follow from the above provisions that all offers of shares to the public made by one of the means specified in the s.5(1) definition will be regarded as prospectuses. They therefore must be registered under s.42 and they must comply with s.39. No distinction can apparently be drawn between offers made by corporations of securities for subscription and offers made by persons of securities for purchase. "Prospectus" in s.5(1) relates to both kinds of offers and nothing turns on who issues a prospectus for the purpose of s.42. This literal and seemingly obvious interpretation of the sections does, however, give rise to difficulties.

The Role of S.43

Professor Ford suggests that the prospectus provisions can be interpreted so that s.43 is the only section which may require a registered prospectus for an offer of securities for purchase. S.43's actual and intended role, therefore, needs to be understood. It provides that if a corporation allots securities with a view to all or any of them being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the corporation. All enactments and rules of law relating to prospectuses are to apply as if the persons accepting the offer were subscribers therefore, but without prejudice to the liability of the persons by whom the offer is made.⁷ Further, the requirements of Division I of Part IV of the Act as to prospectuses apply as though the persons making the offer were persons named in the prospectus as directors of a corporation.⁸

It can be argued that s.43 assumes that the document by which the offer for sale to the public is made would not otherwise be a prospectus. Yet the s.5(1) definition of "prospectus", in so far as it relates to offers or invitations relating to securities for purchase, would seem to apply to the written offer for sale. If this is so, what is the purpose of s.43; is it a redundant provision? Even if the definition of "prospectus" is given its widest application s.43 would not be redundant. Though the written offer for sale to the public would have to take the form of a registered prospectus pursuant to ss.5(1) and 42, the corporation would not be considered to have issued the prospectus nor would the persons who accept the offer be regarded as subscribers for the securities from the corporation were it not for the operation of s.43. Similarly the persons making the offer would not be treated as though they were persons named in the prospectus as directors of the corporation. S.43 seems to impose obligations and potential liability on the corporation even though the corporation is not technically making the offer for sale.

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7. S.43(1). The effect of deeming the persons who accept the offer to be subscribers may create privity of contract between those persons and the corporation. See Hambrook, *loc. cit.* (*supra*, n.4), 150; Gower *The Principles of Modern Company Law* (3rd ed., 1969), 329 n.3.
 8. S.43(4). The significance of this is unclear. Presumably the purpose was to make these persons subject to ss.46 and 47 which concern civil and criminal liability for mis-statements in a prospectus. However, any person who made a s.43 offer would seem to be a person who "authorized or caused the issue of a prospectus" and thus be within these sections whether or not they are deemed to be named in the prospectus as directors. This point lends support to Professor Ford's contention that "prospectus" as used in s.46 was only intended to embrace offers of securities for subscription. S.43(4) on this view was necessary to bring certain "offers for sale" within s.46 and presumably also s.47.

If it were not for the legislative history of s.43⁹ this account of its effect would probably not be surprising or contentious. In fact s.43 is based on what is now s.45 of the Companies Act, 1948 (U.K.). There has therefore been a tendency to assume that the role of s.43 must be the same as its United Kingdom counterpart. It is conceded that in adopting s.43 the State legislatures probably intended this result. However, the actual effect of any statutory provision often depends on other sections of the legislation.

The Companies Act, 1948 (U.K.), would not seem to require a registered prospectus for any offer of securities to the public for purchase or sale but for s.45 of that Act. The definition of "prospectus" in the U.K. Act is similar to that in s.5(1) of our Act in that it catches offers for subscription or purchase.¹⁰ However, pursuant to ss.38 and 41, the only prospectuses which apparently have to comply with the Act, and be registered, are prospectuses issued by or on behalf of a company or any person engaged in or interested in the formation of the company.¹¹ Thus were it not for s.45 no registered prospectus would be required in the circumstances detailed in the section. In Australia, s.43 arguably has a more restricted effect because the Companies Act has no sections equivalent to ss.38 and 41 of the U.K. Act to limit the apparent generality of s.42. In Australia, a registered prospectus would seem to be required for an offer of securities for sale to the public irrespective of s.43. S.43 may merely operate to impose responsibilities and obligations on the corporation whose securities are offered for sale. That it has even this limited effect, however, is significant; it would seem to defeat any argument that the section would be redundant if ss.5(1) and 42 were read and applied literally.

It might be suggested that the words "or purchase" in the s.5(1) definition were only included to take account of s.43. In similar vein Professor Ford believes that references in prospectus provisions to offering securities "for purchase" and to "purchasers" of securities are only intended to cover s.43 offers for sale.¹² S.40 regulates the advertising of offers of securities for subscription *or purchase* whilst s.45 requires the consent of an expert to the issue of any "prospectus inviting subscription

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9. The section was recommended by the Company Law Amendment Committee Report (1926), Cmnd. 2657. It was designed to prevent corporations avoiding the prospectus provisions by offering securities indirectly to the public. See Hambrook, *loc. cit.* (*supra*, n.4), 145-146, for a more detailed account of its history.
 10. Companies Act, 1948 (U.K.), s.455.
 11. See, for example, Gore Browne on Companies, (42nd ed., 1972), 212. Professor Gower has suggested a contrary view. He believes that s.38(3) of the U.K. Act may mean "that an offer for sale or placing (unless strictly private) made by existing holders always imposes an obligation on them to publish a formal prospectus even though the original issue was not made with this in view": Gower, *op. cit.* (*supra*, n.7), 301. S.38(3) is similar to s.37 of the U.C.A. in that it provides that no application forms for securities shall be issued unless accompanied by a prospectus in the prescribed form. However, it seems that s.38(3) should be read subject to s.38(1) which states that only prospectuses issued by or on behalf of a company, or by or on behalf of any person engaged or interested in the formation of the company must be in the prescribed form. S.37 of the U.C.A. prohibits a person issuing any form of application for securities of a corporation in connection with an offer of securities to the public unless the form is distributed together with a copy of a registered prospectus. There is nothing in s.37 similar to s.38(1) of the U.K. Act which may limit the section to offers of securities for subscription. An argument that s.37 is limited to these offers would have to be based on the indications in ss.39 and 42 that only prospectuses offering securities for subscription have to be in the prescribed form and have to be registered. These indications are discussed *infra.*, pp. 321-323.
 12. Ford, *op. cit.* (*supra*, n.5), 291; Baxt, Ford and Samuel, *op. cit.* (*supra*, n.5), 166.

for, or purchase of" securities if the prospectus contains a statement made by the expert. S.46 provides a civil remedy to "all persons who subscribe for or purchase" any securities on the faith of a misleading prospectus. However, the hypothesis that these references to "purchase" and "purchasers" only relate to s.43 offers for sale is very difficult to sustain.

S.43, unlike s.5(1) and ss.40 and 45, refers to "offers for sale" and not "offers for purchase". Although the expressions in law may amount to the same thing, if the words "or purchase" were meant to cover s.43 one would expect the same terminology to be used. This point is reinforced by the fact that s.44(6)(b) adapts the operation of s.44 to "a prospectus offering shares for sale". S.44 regulates the *allotment* of securities where a prospectus indicates that the securities may be listed on a Stock Exchange. The use of the term "for sale" in this context is perfectly consistent with s.43. Perhaps most significantly, one effect of s.43 applying to an offer for sale is that the offer is deemed to be an offer by the corporation of securities for subscription. Thus the offers caught by s.43 would be within the s.5(1) definition, and within ss.40 and 45, even if the words "or purchase" were deleted from those sections. Similarly, persons who accepted s.43 offers for sale would still receive the benefit of the s.46 remedy for mis-statements in a prospectus if the reference to persons who purchase securities was deleted from it. The U.K. equivalents to ss.45 and 46 are effectively confined to offers of securities for subscription yet there is no doubt that s.43 type "offers for sale" are within them.¹³ In order to give the words "or purchase" and "purchasers" some positive operation in the Uniform Companies Act it can thus be argued that they were intended to cover situations not dealt with by s.43.

For s.43 to play the role probably intended for it, it is necessary to interpret the other key prospectus provisions as not requiring a registered prospectus for offers of securities for purchase. The gist of Professor Ford's analysis is that the s.5(1) definition of "prospectus" may not apply to some of these provisions. Like most statutory definitions those in s.5(1) of the Companies Act apply "unless a contrary intention appears". If it can be shown that there is a contrary intention then it may be possible to argue that the legislature only intended prospectuses to be registered if they offered securities to the public for subscription.

Is There a Contrary Intention Sufficient to Displace the Definition of Prospectus?

(A) THE CONTENT OF A REGISTERED PROSPECTUS

The content of prospectuses prescribed by s.39 of the Act, which incorporates the Fifth Schedule, does not appear to be entirely appropriate for offers of securities for purchase. Some of s.39's requirements seem only consistent with the raising of capital by a corporation by an issue of securities. S.39(1)(f) requires a prospectus to contain a statement that none of the securities offered shall be *allotted* on the basis of the prospectus later than six months after the date of the issue of the prospectus. Clause 5 of the Fifth Schedule requires a statement by the

13. For example, persons who accept an offer for sale within s.45 of the Companies Act, 1948 (U.K.) receive the benefit of s.43 of that Act (*cf.* s.46 U.C.A.) even though s.43 is limited to persons who subscribe for securities on the faith of a prospectus. See Gower, *op. cit.* (*supra*, n.7), 331-332.

corporation's directors relating to the minimum amount that must be raised by a share *issue*. Clause 6 refers to the opening of *subscriptions* while clause 7 refers to the amount payable on application and *allotment* on each share. All of these requirements seem inappropriate for offers for purchase of existing company securities. Their presence in the Act can be explained by the fact that they are copies of the requirements of the Companies Act, 1948 (U.K.), which, of course, only regulates offers of securities for subscription and offers deemed to be offers for subscription under the equivalent of our s.43.

Professor Ford relies on some of the above requirements for prospectuses as indicating that, except for offers regulated by s.43, the prospectus requirements of the Act are only intended to apply to offers of securities which are to be allotted by a corporation. It is doubtful whether these indications in themselves are strong enough to displace the statutory definition of "prospectus", and in particular its reference to offers for purchase, where the word "prospectus" appears in sections such as s.39 and s.42.

(B) PERSONS RESPONSIBLE FOR A PROSPECTUS

Several of the prospectus provisions impose liability and responsibility for prospectuses in a manner which may suggest that they were only intended to apply to offers of securities for subscription. Professor Ford believes that this is true of s.46, which relates to the liability of specified persons for any mis-statements that are contained in a prospectus. The section applies to directors and promoters of the corporation whose securities are offered to the public and to any other person who authorized or caused the issue of the prospectus. Professor Ford believes that "if it had been desired to catch sellers of securities it seems odd to focus on directors and promoters of the corporation whose securities are on offer".¹⁴ Given that the prospectus provisions are primarily aimed at public capital raisings by corporations it surely is not surprising that key corporation personnel are specified in s.46 along with other persons who authorized or issued the prospectus. The reference to directors, in particular, may be taken as a logical consequence of the fact that directors must sign a prospectus before the Registrar will register it under s.42. Most importantly, s.46(3)(b) exempts a person from liability arising from mis-statements if he proves that the prospectus was issued without his knowledge or consent and he gave reasonable public notice thereof forthwith after he became aware of the issue. This exemption would in practice protect directors from liability in connection with the issue of non-registered prospectuses because in the case of registered prospectuses, which have to be signed by all directors, it would be difficult to establish lack of knowledge of, and consent to, the prospectus' issue. There is consequently nothing inherently unfair or improbable in the section applying to all prospectuses as defined in s.5(1). Finally, unlike its U.K. counterpart,¹⁵ s.46 expressly provides a remedy to both subscribers for, and purchasers of, securities on the faith of a prospectus. For the reasons given above it is difficult to construe the reference to "purchasers" as only being intended to embrace persons who accept s.43 offers for sale. It will be suggested later that Professor Ford should really be contending that s.46 does attract the definition.

14. Ford, *op. cit.* (*supra*, n.5), 292; Baxt, Ford and Samuels, *op. cit.* (*supra*, n.5), 166.

15. Companies Act, 1948 (U.K.), s.43.

It is surprising that Professor Ford should focus attention on s.46 when much stronger indications are to be found in the key prospectus provisions. S.39(4) imposes liability on each director of the corporation and other person responsible for the issue of a prospectus which does not comply with the requirements of the Act. Strict liability would appear to attach to the corporation's directors. This may be thought to be manifestly unreasonable in the case of an offer of securities for purchase which is in no way initiated by the directors or their corporation. A similar problem arises with s.42(3) which provides that if a non-registered prospectus is issued the corporation and every person who is knowingly a party to the issue of the prospectus shall be guilty of an offence. The corporation referred to is clearly intended to be the corporation whose securities are offered to the public. It also appears that the corporation would be strictly liable as the requirement of knowledge would only seem to relate to the liability of other persons. Accordingly, it can be argued that it would be obviously unfair to hold a corporation liable for the issue of a prospectus relating to its securities by a person with whom it may have no association and over whom it may have no control. Indeed both s.39(4) and s.42(3) seem to assume that the corporation will necessarily have issued the prospectus. These problems would be avoided if s.39 and s.42 were interpreted as only being intended to apply to prospectuses offering securities for subscription.¹⁶

A further argument in support of a restricted application for s.42 may perhaps be based on s.42(2)(a). It directs the Registrar not to register a prospectus unless it is signed by every director or proposed director of the corporation. This requirement is a sensible one in connection with offers of securities for subscription which are, of course, designed to raise capital for the corporation. It is less clear why directors should have to sign a prospectus which aims to realise the investment of a shareholder or debentureholder.

When these indications are combined with those arising from the prescribed content of a prospectus a viable argument can be made that the legislature has demonstrated an implied intention to exclude the definition of prospectus in ss.39 and 42.

(C) THE RELEVANCE OF S.40

Professor Ford does not base his analysis solely on the indications to be drawn from ss.39 and 46. He also believes that s.40 supports his argument. S.40, which has been repealed by member states of the Interstate Corporate Affairs Commission,¹⁷ seeks to regulate the content of advertisements

16. S.45 poses a similar problem but it is one that is much more difficult to interpret away. S.45(1) prohibits the issue of a prospectus containing a statement made by an expert without the expert's written consent. The section applies to "a prospectus inviting subscriptions for, or purchase" of securities (*italics added*). However s.45(2) provides that if any prospectus is issued in contravention of the section the corporation and every person who is knowingly a party to the issue shall be guilty of an offence. Again it might be contended that it is manifestly unfair for a corporation to be liable in respect of a prospectus over which it had no control. However the fact that s.45(1) refers to prospectuses inviting purchase of securities obviously makes the argument that the section was only intended to apply to offers of securities for subscription virtually impossible to sustain unless, of course, one accepts the contention that the words "or purchase" only relate to s.43 offers for sale.

17. See ss.40, 40A and 40B of the Companies Acts of New South Wales, Victoria, Queensland and Western Australia. The significance of these changes is considered *infra* p.325.

which offer, or call attention to offers of, securities to the public for subscription or purchase. An advertisement which fails to comply with the section is deemed to be a prospectus and to be subject to all of the Act's prospectus provisions including presumably, ss.39 and 46. The basic problem with s.40 is that it seems capable of deeming an advertisement to be a prospectus if it fails to comply with the section when the advertisement would be a prospectus under the s.5(1) definition irrespective of whether or not s.40 was complied with. The s.5(1) definition specifically defines "prospectus" to include an *advertisement* which offers securities to the public for subscription or purchase. As a consequence Professor Ford believes that

"the deeming in s.40 of an advertisement which is already a prospectus under s.5(1) to be a prospectus, was either redundant or such an advertisement was not a prospectus within that term as used in s.46. This suggests that 'prospectus' when used in s.46 and possibly other sections in Div. 1 of Pt. IV was not used in the sense defined in s.5(1)."¹⁸

However, a close analysis of s.40 indicates that the section can be given effect without in any way questioning the meaning of the word "prospectus" in the section.

S.40 applies to two different types of advertisements. The first is an advertisement which calls attention to an offer or intended offer of securities for subscription or purchase. This type of advertisement would not seem to be a "prospectus" as defined in s.5(1) for the advertisement would not itself offer the securities for subscription or purchase. To deem such an advertisement a prospectus if it fails to comply with s.40 is perfectly comprehensible and is certainly not inconsistent with the s.5(1) definition. The second type of advertisement dealt with in s.40 is an advertisement which itself offers securities to the public. It is true that such an advertisement is within the s.5(1) definition of prospectus and s.40 would be redundant to the extent that it deemed it to be a prospectus. It seems that the legislature should have deemed this second type of advertisement not to be a prospectus if it complied with the section.¹⁹ In any event, it is clear that s.40 can be given effect without the word "prospectus", as it appears in that section, being given a different meaning to that stated in s.5(1). In so far as s.40 may deem advertisements that merely call attention to offers of shares to be prospectuses it is clearly bringing within s.46 and, indeed, the other prospectus provisions, advertisements which otherwise would not attract those sections.

Professor Ford has sought to use s.40 to advance his contention that "prospectus" as used in the prospectus provisions does not necessarily have its s.5(1) meaning. The particular problem that he perceives in s.40 has,

18. Ford, *op. cit.* (*supra*, n.5), 292; Baxt, Ford and Samuel, *op. cit.* (*supra*, n.5), 166.

19. It is arguable that an advertisement which complies with s.40 must be an advertisement which merely calls attention to an offer of securities. This may follow from the requirement in s.40(1) that the advertisement must state that applications for the securities can only be made on a form referred to in, and attached to, a printed copy of a prospectus. On one view, the advertisement in these circumstances is merely calling attention to an offer which is detailed in the prospectus. Another result of the necessity to refer to a prospectus is that it is impossible to advertise an offer or intended offer of securities for purchase without there being a prospectus. If there is no prospectus separate and distinct from the advertisement the advertisement itself will be deemed to be a prospectus.

however, nothing directly to do with the question of whether all offers of securities to the public for purchase require a prospectus. It is interesting to note that, like the s.5(1) definition of "prospectus", s.40 applies to advertisements relating to securities offered to the public for subscription or purchase. Rather than being seen as inconsistent with this aspect of s.5(1), s.40 is obviously at one with the definition.

As mentioned above s.40 has been repealed and replaced with ss.40, 40A and 40B by members of the Interstate Corporate Affairs Commission. Although the substituted sections refer to notices and reports rather than advertisements they seem to be concerned with the same general problem as the repealed provision. Significantly, however, the sections do not deem an offending notice or report to be a prospectus. It is this aspect of the repealed provision which Professor Ford relies on to bolster his contention that "prospectus", as used in both ss.40 and 46, was not intended to have its s.5(1) meaning. The question obviously arises as to whether the repeal of s.40, and its replacement with sections which avoid the problem perceived by Professor Ford, affects the meaning of "prospectus" in s.46. Professor Ford contends that whatever meaning "prospectus" had in s.46 prior to the repeal of s.40 that meaning would be the same now because "there is nothing in those new provisions impinging on s.46."²⁰ This contention involves quite difficult and complex questions of statutory interpretation.²¹ However, it would seem possible to construe the changes effected to s.40 as being impliedly intended to rectify the difficulties that the wording of that section poses. This argument gains force from the fact that the troublesome "deeming" aspect of s.40 has been removed. In so far as the "deeming" aspect of s.40 may have created uncertainty as to the meaning of "prospectus" in sections such as s.46 that uncertainty has now been resolved.

(D) WHERE DOES THE DEFINITION OF PROSPECTUS APPLY?

The foregoing analysis suggests that it is possible to argue that only offers of securities for subscription need to be made by a registered prospectus. One basic difficulty with this argument is that it may deny any application to the statutory definition. It is imperative to show that there is scope for the application of the full s.5(1) meaning of "prospectus",

20. Ford, *op. cit.* (*supra*, n.5), 293; Baxt, Ford and Samuel, *op. cit.* (*supra*, n.5), 168.

21. There is first the question of whether s.40 has been repealed rather than amended. "Whether an Act has been repealed or amended is a matter of substance and not one of form only": *Beaumont v. Yeomans* (1934) 34 S.R. (N.S.W.) 562, 569 *per* Jordan C.J. If one accepts that s.40 has in substance as well as form been repealed then two well established principles are relevant. The first is that an enactment once repealed is to be treated as if it never existed (*Te Kloot v. Te Kloot* (1894) 15 N.S.W.L.R. (D) 1). The second is that it is permissible to have regard to repealed provisions as an aid to interpreting the remaining provisions (*Roberts v. The Collector of Imposts* [1919] V.L.R. 638; *London and West Australian Exploration Co. Ltd. v. Ricci* (1906) 4 C.L.R. 617). However the extent to which repealed provisions may influence interpretation is uncertain. There appears to be no reported case which is analogous to the problem posed by s.40 and s.46. Perhaps the most useful statement, from Professor Ford's viewpoint, to be gleaned from the reports is that of Brett L.J. in *A.G. v. Lamplough* (1878) 3 Ex.D. 214, 231: "Where in the Statute which is to be repealed there are separate and distinct enactments, and the repealing Statute simply repeals one of these enactments, it seems impossible to construe the meaning of the repealing statute to be that it thereby gives a different meaning to the enactments with which it does not assume to deal at all." However, as indicated in the text, it is very doubtful that s.40 and s.46 were "separate and distinct enactments" in the sense suggested by Brett L.J. Indeed the argument put by Professor Ford suggests that they were complementary provisions.

and in particular its reference to offers of securities for purchase. Which sections of the Act may attract the definition?

As indicated above it is difficult to sustain an argument that the definition is meant to accommodate s.43. Since s.43 deems certain offers of securities for sale to be offers for subscription the definition of prospectus would adequately relate to s.43 if the words "or purchase" in the definition were deleted. S.40's application to advertisements relating to offers of securities for subscription or purchase and s.46's remedy for subscribers and purchasers also tend against the argument.

Professor Ford, without offering any explanation, suggests that s.42 attracts the definition of prospectus.²² This is an extraordinary contention. S.42 is the pivotal prospectus provision; if "prospectus" in that section is given the s.5(1) meaning all written offers of securities to the public for subscription or purchase would have to take the form of a registered prospectus. This is the very result that Professor Ford is trying to avoid. His analysis should really depend on s.42 being shown not to attract the s.5(1) definition. That such an argument is possible has already been demonstrated.

On the assumption that it can be shown that "prospectus" as used in s.42 and, indeed, s.39, was not intended to embrace offers of securities for purchase it is suggested that full effect can be given to the s.5(1) definition in s.46. This is, of course, directly opposed to Professor Ford's view of that section. S.46 is not concerned with when a registered prospectus should be used; nor does it prescribe the contents of a prospectus. These functions are the province of ss.42 and 39 respectively. S.46 is directed at providing civil remedies for mis-statements contained in an issued prospectus. There would not appear to be any patent unfairness or commercial difficulty in s.46 applying to all offers of securities to the public for subscription or purchase irrespective of whether the offers were required to take the form of a registered prospectus. There are compelling and obvious policy reasons why there should be a statutory provision regulating liability for mis-statements contained in a document inviting the public to purchase securities. S.46 certainly singles out directors and promoters of the corporation whose securities are offered as persons who may be liable under the section. However, no director or promoter will be liable under the section if he proves that the prospectus was issued without his knowledge or consent and he gave reasonable public notice forthwith after he became aware of its issue. Thus directors and promoters would not necessarily incur liability in connection with an offer issued by a person who wished to realise an investment in the company. That the person responsible for the offer should be required to compensate a person who purchases securities on the faith of the offer for loss or damage sustained because of an untrue statement or wilful non-disclosure of a material matter seems entirely reasonable. This would be the result if s.46 attracted the definition of prospectus.

S.47 of the Act could also attract the statutory definition without any apparent difficulty. This section relates to criminal liability for untrue statements or wilful non-disclosures in an issued prospectus. Any person who authorized or caused the issue of the prospectus may be liable under

22. Ford, *op. cit.* (*supra*, n.5), 292; Baxt, Ford and Samuel, *op. cit.* (*supra*, n.5), 166.

the section. Significantly, as in s.46, no absolute liability attaches to the corporation whose securities are involved or to its directors. Thus the problem inherent in s.39(4) and s.42(3) is not encountered in these sections.

Conclusion

An argument that suggests that the statutory definition of a word does not apply to most of the sections of an Act where the word appears must be regarded as tenuous. The argument is so much more strained when it suggests that the definition does not apply to the most significant of the sections where the word is used. This is the problem with the argument that "prospectus" as used in the Companies Act rarely means what s.5(1) says it means. That the argument is necessary is due to the clumsy and inadvertent method in which the prospectus provisions were compiled. The result that the argument endeavours to achieve is no doubt desirable. It is sensible that only offers of securities for subscription, and offers deemed to be offers of securities for subscription, should have to be registered under s.42 and comply with s.39. However, the difficult and important nature of the argument demands that it be carefully thought out and articulated. It is here that Professor Ford's analysis is found wanting. His use of ss.40 and 46 is unconvincing; his concession that s.42 attracts the s.5(1) definition is fatal. The argument should instead focus on the numerous indications of an intention to displace the statutory definition to be found in ss.39 and 42. Ss.46 and 47 should be highlighted as sections where the s.5(1) definition applies. An argument mounted in this way might succeed. It would, of course, be preferable for the legislatures to put the issue beyond doubt through appropriate amendments.

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