COMMENTS ON RECENT DEVELOPMENTS IN THE LAW

THE SECURITIES ACT 1978 AND THE SECURITIES REGULATIONS 1983

P E RATNER*

Although the Securities Act 1978 (the "Act") was enacted in October of 1978, and some of its provisions — principally those establishing the Commission — came into force on 1 May 1979, it was not until 1 September 1983 that the Act came fully into force. On the same day, the Securities Regulations 1983 (the "Regulations") and 18 Exemption Notices came into force so that one can, I believe, point to 1 September as the birth date of a new regime of securities regulation in New Zealand. Before venturing any further opinions, I want to make it clear that the views in this paper today are my own and do not represent those of the Commission. Those of you who are expecting to learn *the* interpretation of the Act and the Regulations will, I fear, be disappointed. There is no such animal. What I do have to offer, which I hope you will find useful, are some practical comments on the Act and the Regulations from the perspective of one of the foot soldiers.

I have attempted to fulfil my obligations as a staff member, whose responsibilities include tendering advice to the Commission on matters of policy and participating in the drafting of the Regulations and Exemption Notices which implement the Commission's decisions, as being primarily directed towards reconciling the aims of the Act — that there be full and fair disclosure of relevant information in connection with the offer and sale of securities — with the possibilities and problems of the market-place. The Commission has gone to great pains to try to devise regulations and, where necessary, exemptions which will have the effect of improving rather than impairing the flow of commerce. It is my belief that the Act and the Regulations will have this effect by creating, for the first time in New Zealand, a regulatory mechanism which will require all sellers of securities to provide to the public the facts and figures substantiating claims of "new", "bigger", and "better". In drafting the Regulations, the Commission was well aware that not all investors will understand the information required to be contained in a prospectus. However, it came to the conclusion that "some of those who are told will understand [and] the effects of their conduct in understanding will seep through to the general body of investors."[1] Further, I believe that over

* BA (Wesleyan) JD (Columbia). Mr Ratner has been employed as a Research Officer for Securities Commission since January 1981. This paper was originally prepared for a New Zealand Law Society seminar.

1 "Proposed Recommendations for Securities Regulations", Securities Commission, 20 March 1980 at 21.

time the wide dissemination of financial information will provide the raw materials that will lead to better educated consumers.

The concept of a single act which applies to all offers of securities is a new one in this country. Although prejudiced, I think that the Commission has done an excellent job in devising rules which apply to numerous different types of offers which range from ordinary share and debenture issues to more exotic forms of investments such as special partnerships and syndications of all descriptions. There remain rough edges that still need to be smoothed and in some areas we may have tried to push the square pegs of practice into the round holes established by the Act.

Earlier I described 1 September as the birthday of a new regulatory regime. I think a better analogy would be the emergence of a new species. This new creature, which has been described by some observers as *Securitas Pattersonii,* did not spring, like Pallas Athena, fully grown from the head of Zeus. It has a long evolutionary history which began in England at least as far back as 1285 with a statute of Edward I authorising the licensing of sharebrokers. I do not propose to trace that history, except to observe that if the workings of human society mirror nature, then the development of securities regulation confirms two theories concerning the way in which evolution works.

The first is that evolution is not a steady process which proceeds like the ticking of a clock with new forms replacing the old after a measured span. Rather, development occurs in fits and starts with change often resulting from cataclysmic events. In that sense, the immediate cause for the emergence of the Securities Act 1978 was the collapse of the Securitibank group leading to a call for activity-based legislation to replace the previous narrowly drawn entity-based legislation which regulated a limited number of offerors rather than offers.

The other theory is that new species arise to fill available ecological niches; a phenomenon often explained by the phrase, "Nature abhors a vacuum". In the case of the Securities Act, that niche is the numerous unregulated offers of securities which escaped its immediate forebears — the prospectus provisions of the Companies Act 1955, the Protection of Depositors Act 1968 and the Syndicates Act 1973 — all of which are due to pass from the scene on 31 March 1984 as a result of Sections 71, 74 and 75 of the Act and Regulation 28 of the Regulations.

There is one very important point to be derived from this evolutionary digression. Evolution implies change; change which is responsive to the pressures of the environment. We have seen rapid changes in the financial activities of many fund raisers in the five years between the date of enactment and the coming into force of the Act and the Regulations. One obvious example is the increased use of computers and direct fund transfers employed by deposit-taking institutions. We now see machines on street corners which, when fed the appropriate bit of plastic and the proper code numbers, will deliver cash. In the United States, one can go to a department store and without ever leaving the premises purchase life, health and automobile insurance; buy a set of swings for the kids; and place orders with a stockbroker. In some States the broker can execute the order directly from a computer terminal at his desk. There

are those who predict that the cashless society is not that many years away, which implies that the concept of face to face transactions may become as outmoded and quaint seeming as glass jars of penny candy. It is a drawback of legislation that it is generally drafted to meet present conditions. I believe that the promise of our new species is that it can evolve to meet the changes which will inevitably come. There are three distinct and inter-related elements of the Securities Act 1978 which suggest that the promise will be fulfilled.

The first is section 5(5) of the Act which empowers the Commission, by notice in the *Gazette,* to exempt any person or class of persons from compliance with any provision or provisions of Part II of the Act or the Regulations. Exemptions may be granted on such terms and conditions as the Commission thinks fit and may be varied or revoked. The second is the power of the Commission pursuant to section 70 of the Act to recommend regulations to the Governor-General for enactment regulating the content of advertisements, prospectuses, trust deeds, deeds of participation and the offer to the public of interests in contributory mortgages. The Commission's power to recommend regulations is circumscribed by the very important provisions of section 70(3) of the Act. Before recommending any regulations, the Commission must "do everything reasonably possible" to inform interested parties of its intention to make recommendations and give those persons an opportunity to make submissions. Finally, and I think most importantly, there is the continuing function of the Commission under section 10(b) of the Act to keep the law relating to securities under review and to recommend to the Minister any changes thereto that it considers necessary.

I suggest that these powers were entrusted to the Commission with a view towards ensuring that it would have the necessary power to shape the law to meet the changing needs of the commercial community. In short, I think that the Securities Act and the Securities Regulations should be viewed as a process rather than a static entity.

The first aspect I would like to cover is where to find the various bits and pieces which together comprise the elements of the new regime. Attached as Appendix "A" is a list of the statutes, regulations, orders and exemption notices that together comprise the current regulatory regime.[2] The actual Exemption Notices are available from the Government Printer. In addition, the Committee of Advertising Practice (PO Box 1066, Wellington) has revised its Code of Advertising Practice which contains some additional rules for media advertising developed by the Committee in consultation with the Commission. For those of you who are concerned about the number of documents required, I understand that they will be available in an integrated form in Clearing Commerce House's *Company Secretary's Manual* and in a new book on the Securities Act by Richard Clarke and Paul Darvell to be published by Butterworths.

2 This paper was prepared on 13 September 1983. Since that date additional Exemption Notices have been notified in the *Gazette* pursuant to section 5(5) of the Act.

Before examining some specific provisions of the Act, there is a preliminary point that I would like to make concerning its administration. During the past four or five months, one of the Commission's more difficult and time consuming tasks has been to consider applications for exemptions pursuant to section 5(5) of the Act. Many of the applications which we have received contain lengthy and, in some cases, impassioned arguments as to why the Act does not apply to the applicant's particular situation. The most common argument has been that the applicant does not make offers to the public within the meaning of section 3 of the Act. While these letters are all very interesting, the Commission has no jurisdiction to give binding interpretations of the Act. Obviously, in exercising many of its powers the Commission necessarily must form an opinion as to the correct interpretation of the Act — and I am thinking specifically of the exercise of its powers of exemption under section 5(5), its power to suspend or cancel the registration of a prospectus under section 44, to prohibit advertisements under section 44A, and to recommend the enactment of regulations under section 70 — but the Commission does not have the power to hand down rulings. That is a matter for the Courts. I suggest to you that even if the Commission were to opine that interests in a particular scheme were not offered to the public, that opinion would have little or no weight in the event of a criminal prosecution brought by the Justice Department or civil litigation under sections 37 or 37A of the Act.

The Commission does, however, have the power under section 25 of the Act to state a case for the opinion of the High Court "on any question of law arising in any matter before it". It has offered to do so in connection with a number of these "applications" but thus far the offers have been declined. If you have a particularly difficult problem in this area, by all means feel free to discuss it with the staff of the Commission. But keep in mind that neither the staff nor the Commission possess a crystal ball which allows us to predict how the Courts will interpret the Act. In the end, the staff can only offer its own views as to how a matter will eventually be resolved. If you are convinced that you are right, save your arguments for the Court because no matter how compelling they may be to the staff, we cannot dispense final determinations. If an issuer requires absolute certainty, there are only two choices. Assume that there is an offer of securities to the public and comply with the Act or ask the Commission to state a case for the High Court and, at the same time, ask for a temporary exemption pending the Court's decision.

In making its recommendations for regulations under section 70 of the Act, the Commission stated that the "cornerstone" of its recommendations was the principle that "a particular object of the law relating to public offerings is to secure that the public is informed fairly and in good time both of the terms of the offer and of the information relevant to making decisions about it."[3] This objective is achieved by four principal features of the Act:

3 Supra n 1 at 13.

(1) The requirement that offers must be supported by a registered prospectus that contains relevant information including all of the terms of the offer (except those implied by law or contained in a document that is publicly available and *referred* to in the registered prospectus);[4]

(2) The requirement that advertising relating to the offer must be consistent with the registered prospectus referred to in the advertisement and must not "contain any information, sound, image or other matter that is likely to deceive, mislead or confuse with regard to any particular that is material to the offer" (sections 38(a) and (d) of the Act; regulations 8 and 9 of the Regulations);

(3) The imposition of civil liability for untrue statements contained in advertisements and prospectuses and criminal liability for failure to comply with the Act which extends not only to the issuer but to its directors and principal officers as well as promoters and experts whose statement may be contained in the documents;[5] and

(4) The provisions of sections 37(4) and (5) of the Act which provide that if there is not a registered prospectus at the time of subscription, the subsequent allotment is *void* and the directors of the issuer are personally liable for repayment of the subscription moneys.[6] I suggest that such an allotment may not be capable of validation under the provisions of the Illegal Contracts Act 1970.[7]

The key to understanding and applying the Act is section 33 and specifically subsection (1) which provides:

> No security shall be offered to the public for subscription, by or on behalf of an issuer, unless —
> (a) The offer is made in, or accompanied by, a registered prospectus that complies with this Act and all regulations made under this Act; or
> (b) The offer is made in an authorised advertisement.

For completeness, note that if the offer relates to a debt security, subsection (2) requires the appointment of a trustee and the registration of a trust deed; if it relates to a participatory security, subsection (3) provides that a statutory supervisor must be appointed and a deed of participation registered.[8]

The remaining provisions of Part II of the Act stem from the obligations imposed by section 33. The first point to be made about section 33 is that it applies only to a specific set of circumstances which have five separate elements: (1) There must be an offer; (2) The offer must be of a security; (3) It must be made to the public; (4) It must be for subscription; and (5) It must be made by or on behalf of an issuer. If any one

4 See First Schedule to the Regulations clase 21(b), Second Schedule clause 17(b) and Third Schedule clause 19(b).

5 See section 2 of the Act for definitions of "Director", "Promoter", "Principal Officer" and "Expert" and sections 55 to 59.

6 See also section 37A(2) which provides that certain contravening allotments are voidable.

7 See Illegal Contracts Act 1970 s7(1) and (7).

8 The Act divides securities into three classes: Equity, Debt and Participatory; the definitions are contained in section 2 of the Act.

of these elements is missing, then the provisions of Part II of the Act will not apply. (Having made this general statement, I should add one minor qualification. At least on their face, sections 51 to 54 of the Act, which relate to the obligation of issuers to keep registers of security holders and proper accounting records and to issue certificates apply to any issuer of securities which are offered to the public whether or not the offer was made by the issuer or on its behalf.) As an aid to analysis, I have attached two Flow Charts[9] which provide a starting point in determining the questions which ought to be asked in considering the application of the Act. These charts were initially developed by Mr Graham Edgar, an Alternate Member of the Commission.

Before looking briefly at these elements — and I intend to concentrate on the definition of a security — I would like to give a brief illustration of how they relate to the workings of the Act. Among other things, the term "security" is defined as meaning "any renewal or variation of the terms or conditions of any existing security". In the case of debenture stock secured by a trust deed, I suggest that the provisions of the trust deed are the terms and conditions of the security. Thus, an amendment to the trust deed would result in the creation of a new security. Many trust deeds provide that certain types of amendments may be made by agreement between the company and the trustee without reference to the shareholders. If that procedure is followed, then although there may be a new security, no offer has been made to the public (or, for that matter, to anyone) so the provisions of Part II of the Act would not apply.

I do not propose to comment about the meaning of the word "offer" except to note that an "offer", as defined in section 2, includes an invitation to make an offer.

One of the more difficult problems under the Act is the definition of an offer to the public in section 3. I suspect that in practice the application of that section will not prove as troublesome as it seems when considered on a purely theoretical basis. One point to keep in mind is that section 3(3), which provides that a person "shall not be precluded from being regarded as a member of the public in regard to any offer of securities . . . by reason only that he is . . . a holder of securities previously issued by, the issuer", directly reverses the position prevailing under section 48(6) of the Companies Act 1955. That section exempted certain offers to holders of the issuer's securities from the Companies Act prospectus provisions. Similarly, I suggest that section 3(3), which also applies to an offer made to employees of the issuer, means that the decision in *Corporate Affairs Commissioner* v *David Jones Finance Ltd*[10], which held that an offer made to some 12,000 employees of the issuer was not an offer to the public within the meaning of the Australian legislation, will not be applicable to the Securities Act.[11]

The question of what is an offer "for subscription" has never, to my

9 See Chart I and Chart II appended to this paper.

10 (1975) 2 NSWLR 710.

11 Note also section 3(1)(b) which will probably nullify the Australian decision of *Lee* v *Evans* (1964) 112 CLR 276 that an offer made to two persons unknown to the issuer was not an offer to the public for the purpose of the South Australian legislation.

knowledge, been litigated. I would point out that the dictionary definition of subscribe includes: "To give one's assent or adhesion to: to countenance, support, favour, sanction, concur in" *(The Shorter Oxford English Dictionary)*. I suggest that this means that a circular sent to shareholders seeking their assent to an amendment to the memorandum or articles of a company is an offer "for subscription". However, section 3(7)(a) of the Act provides that: "A statement or report made to or for the purposes of a general meeting of the members of the issuer . . . shall not constitute an offer of securities to the public." In the vast majority of cases where the security holder's consent is required, that consent will be obtained at a general meeting of members. Thus a statement contained, for example, in a company's annual report notifying security holders of a proposal to amend the articles at the annual general meeting need not be supported by a registered prospectus. In the few cases where section 3(7)(a) does not apply — for example an amendment to a special partnership agreement by written consent of the partners without a meeting — there is an exemption granted by the Commission to the effect that requests to amend the terms of a security need not be supported by a registered prospectus or application forms so long as the offer does not relate to an amendment which extends the time for payment of an existing security and states — (1) the proposed amendment; (2) its purpose and effect; (3) the steps necessary to bring it into effect; and (4) any other matters material to the amendment. Those provisions are contained in clause 3 of the Securities Act (Renewals and Variations) Exemption Notice 1983.[12]

That brings me to the question of what is a security. I do not propose to give you any set answers. Rather, my purpose is to make you aware of the wide scope of the definition so that in advising clients in respect of any public offer you will turn first to the Securities Act. The starting point is the definition of a security in section 2 of the Act which provides that "security" means any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person; and includes —

(a) Any interest in or right to be paid money that is, or is to be, deposited with, lent to, or otherwise owing by any person (whether or not the interest or right is secured by a charge over any property); and
(b) Any renewal or variation of the terms or conditions of an existing security.

Certainly the definition covers the conventional forms of investment that are commonly thought of as securities — shares in a company and debentures. However, that is only the starting point. By definition, a "deposit" is a security, as would be almost any other form of debt instrument — transferable certificates of deposits, bills of exchange, promissory notes, letters of credit, etc. It should also be noted that "money" includes money's worth so that it is arguable that were it not for the exemptions contained in sections 5(1)(a) to (c) of the Act, any contract for the sale or lease of real or personal property is a security. I suggest that in most cases it is safe to assume that the instrument you are

12 SR 1983/168.

tremely wide definition by the Act. I would stress, however, that the breadth of the definition is somewhat softened by the provisions of section 33(1). The Act does not itself prohibit the distribution of non-complying advertisements; it prohibits the making of offers to the public which do not comply. So, for example, if I were to write a letter to a long-time business associate, and to no one else, offering to sell him 49 percent of the shares in my new widget manufacturing company, the letter would be an advertisement. However, the Act would not apply because the offer was not made to the public. It might be argued that section 3(4) of the Act, which provides that "Any reference in this Act to any offer of securities to the public shall be construed as including a reference to *distributing an advertisement* . . . etc", means that if I distribute an advertisement to anyone, I have made an offer to the public. My own view is that the import of that particular provision is to expand the term "offer of securities" and not the words "to the public". In other words, if an issuer distributes a form of communication "That is reasonably likely to induce [a] person [. . .] to subscribe for securities of the issuer, being securities to which that communication relates and which have been, or are to be, offered to the public for subscription" (paragraph (b), definition of "Advertisement", section 2 of the Act) then, for the purposes of the Act, that communication is an offer of securities but is not necessarily an offer to the public.

The rules relating to the content of advertisements are contained in sections 38 and 38A (which relates to statements by experts and is, I believe, self-explanatory) of the Act and regulations 8 to 23 of the Regulations. There are two forms of advertisements and issuers may choose either one. If the advertisement contains no information or matter other than the matters specified in Regulation 17(3)(a), then it may be distributed without anything further. These have been referred to as "tombstone" advertisements, but that is, I think, a misleading term. The advertisement may include, among other things, the issuer's logo, the terms of the offer, a description of the securities and interest rates. If a term of the offer is that the securities are guaranteed, the advertisement *must* include information about the guarantor; if it refers to debt securities, it *must* specify whether they are secured or unsecured; and it *must* specify the minimum amount of securities and time periods for which they must be held in order to earn a rate of interest specified in the advertisement. That is quite a lot of information for a tombstone.

With respect to the issue of what is "information or matter" for the purposes of regulation 17(3)(a), I suggest that the liberal approach adopted in the Australian decision of *FNCB Waltons Corporation Ltd* v *Corporate Affairs Commission*[15] will not be followed and the more restrictive view expressed in *Registrar of Companies* v *National Mutual Finance Ltd*[16] which held that for the purposes of section 48B of the Companies Act 1955 a picture of a calculator showing how interest mounts up is information, will prevail in New Zealand. Given the relative

15 (1980) 1 ACLR 189.
16 Unreported, District Court, Wellington, 1982.

simplicity of providing a director's certificate, and the presence of the Committee of Advertising Practice, there should not be any need for such prosecutions in the future.

Advertisements which contain information or matter which goes beyond that specified in regulation 17(3)(a) may not be distributed unless at least two directors have certified that they have reviewed the advertisement; that it complies with the Act and the Regulations; and that it is not deceptive, misleading or confusing.[17]

All advertisements, whether accompanied by a director's certificate or not, are governed by regulation 8 which provides that no advertisement "shall contain any sound, image, or other matter that is likely to deceive, mislead or confuse with regard to any particular that is material to the offer of securities contained or referred to in the advertisement." The advertising rules are relatively straightforward and generally run along the lines: if you make certain statements in an advertisement, you must provide additional information. Note that regulation 14(1) mandates that any advertisement which refers to debt securities (which includes deposits) must state either that the securities are unsecured (ie are not secured by a charge on assets, either floating or fixed) or, if they are secured, the nature and ranking in point of security of the security. I would like to add a practice note with respect to regulation 23 because it represents a small but significant departure from current procedures. If an advertisement or a registered prospectus is to contain one of the two specified statements relating to listing on the Stock Exchange, then before the advertisement is distributed the issuer must first deliver to the Registrar a document from the Stock Exchange containing the acknowledgement required by that section. In passing, I would also point out that although the Regulations refer to the Stock Exchange Association of New Zealand and to trading exchanges, pursuant to section 3(1)(g) of the Sharebrokers Amendment Act 1981 — which came into force shortly after the Securities Regulations were enacted — those words are now deemed to refer to the New Zealand Stock Exchange.

Before passing on to my final topic, which is exemptions, I would like to make two brief points concerning the prospectus provisions of the Regulations which are related to what I have to say about exemptions. The first is to draw your attention to the words of regulation 3 which specifies that a registered prospectus must contain all of the information and other matters specified in the appropriate schedule "that are applicable". That means that a prospectus need not be cluttered up with legal jargon about non-applicable items such as presently appears in most Companies Act prospectuses. Thus, for example, where clause 4 of the First Schedule requires information about certain subsidiaries of the issuer, the prospectus need not say — "there are no subsidiaries of the issuer whose total tangible assets exceed 5 percent of the total tangible assets of the issuing group". It need not say anything.

The second point is in the nature of a general observation. The Schedules look imposing and I think that many solicitors have a tendency

17 Regulations 17(1) and (2), and the Fourth Schedule to the Regulations.

to look at the bulk of them and then dive for cover. However, if you look through them carefully, you will see that in large measure the Schedules are an effort to express generally accepted accounting practice in as precise language as possible. I would guess that for companies of any size at all, 95 percent of the required information is already in their audited balance sheets and profit and loss accounts. Without exception, the individuals with whom I have talked recently who have actually done the work of putting together a prospectus have found the Schedules to be easy to use.

I read in a US Securities and Exchange Commission Report a few years ago that Texas Gulf Sulphur Company claimed that every time it filed a statement with the SEC under section 13 of the Securities and Exchange Act of 1934 (which is the 5 percent beneficial ownership rule in the States) it cost them $20,000 in legal fees. Now I cannot prove it, but having done some SEC work myself, I would guess that at least $15,000 of that was paid for advice on how the company could avoid, rather than make, the required disclosure.

Turning to the exemptions themselves, to date the Commission has granted 21 exemptions pursuant to section 5(5) of the Act.[18] These are in addition to the exemptions contained in sections 3(6), 3(7) and 5(1) to 5(4) of the Act. It would take too long to go through all of them individually so I will confine myself to a few general observations.

The first is that in interpreting the exemptions you will discover that you have to learn to think backwards to a certain extent in order to apply them. As an example of what I mean, the Continuous Issues Exemption Notice[19] exempts all issuers from compliance with the provisions of sections 37A(1)(a) to (d) and 38(a) and (b) of the Act subject to certain conditions. Now to apply that, you have to go back to the Act to see what sections do apply. In this case, section 33(1) continues to apply so the offer must be made in a registered prospectus or an authorised advertisement. Section 37(1) also continues to apply so that there must be a registered prospectus at the time of subscription for the securities and section 37A(1)(e) applies so the date of allotment of the security cannot be more than nine months after the date of any balance sheet contained in the registered prospectus. Section 38(c) also continues to apply so any advertisement must specify the place or places where the registered prospectus can be obtained. However, section 38(b) does *not* apply so that it appears that allotments can be made on application forms which are not attached to a registered prospectus. Turning to section 37A(1)(c) — which also does *not* apply — we see that there is no longer a requirement that the allotment can be made on an application form that was given to the subscriber along with a registered prospectus. Now you run the tape forwards — subject to the conditions of the exemption, offers may be made either in an authorised advertisement or a registered prospectus, but the prospectus need not actually be handed to the subscriber at the time he applies for the security.

18 There are 23 notices but two of these are amendments to earlier notices.
19 The Securities Act (Continuous Issues) Exemption Notice 1983 (S.R. 1983/159).

Ten of the exemptions are class exemptions — that is, if the issuer fits within the class described in the notice it is exempt so long as the conditions are fulfilled. The remaining 11 identify the issuers to which they apply by name. All of the exemptions are revocable and subject to amendment by the Commission by notice in the *Gazette*. Unlike the exercise of its power to recommend regulations, the Commission is under no duty to consult with interested parties before granting, revoking or amending any exemption notice. Nonetheless, the Commission has attempted to consult with interested parties and, except for some eleventh hour amendments, most of which resulted from eleventh hour applications, drafts of the exemption notices were circulated as widely as possible.

To the best of my knowledge, none of the members of the Commission are mind readers and that is why I believe that the commercial community, in general, and solicitors in particular have a vital role to play in the successful administration of the Act. The Commission is too small and has too many projects in hand to send out teams of investigators to find where the problems exist. It is up to you to come to us. We will not always agree with you but if we do not know about your difficulties we cannot even consider the situation.

The Commission presently operates on a fairly informal basis, but applications for exemption must go before the Commission itself. Verbal requests for exemption are not acceptable. We will, however, be more than happy to spend some time either on the telephone or in person discussing a problem, but we cannot do your job for you. It is up to you to identify the problem. If you want an exemption, specify the particular sections of the Act or the Regulations from which you believe an exemption would be appropriate. The staff is not going to take it upon itself to comb through the Act to try to determine what sections, if any, are applicable to your situation. Remember also that the philosophy of the Act and Regulations is one of disclosure and not merit regulation. The Commission is not going to be impressed by an argument that your client has been in business for 100 years and has not been in any financial difficulty yet. If that is the case, then say so in a registered prospectus.

Looking through the exemptions, I think that two principal themes can be found to lend some guidance in putting a case for an exemption. In one group are clubs, charities and similar organisations. In these cases, it can be argued that the primary interest of an investor is of a non-commercial nature. That is, he is concerned to see that when he pays, for example, $25 to join a bridge club, his money will be used to purchase cards and not to send the Treasurer of the club to Acapulco. In most cases, he is probably not aware that upon dissolution of the club he has a right to share in any assets left after the creditors have been paid. The Commission has, I think, accepted that in such cases a prospectus will be of such limited value in proportion to its cost that exemptions are appropriate.

The other class of cases resets on considerations of practicality and the

Commercial Bill Dealers exemption is a good example of that class.[20] A bill of exchange is a security. Pursuant to section 6 of the Act, if a bill is made by ABC Company and then endorsed by the XYZ Merchant Bank which sells it to the public, the issuer is the ABC Company (assuming, of course, that the original allotment was made "with a view" to the security's being offered for sale to the public — section 6(2) of the Act). That means that without an exemption, the merchant bank could only sell bills on the basis of an application form which was contained in a prospectus of the ABC Company. It was recognised by the Commission that such a procedure would result in the rapid demise of the bill market. However, in considering an appropriate exemption, the first question that the Commission asked was "What sort of disclosure is practical?" In this case, the exemption was limited to named bill dealers who accept liability on the bills and provide information about themselves. So if you are seeking an exemption from a particular provision on the basis of practicality, I suggest that you should consider what alternatives are available and put them forward in your application.

That brings me back, in perhaps a roundabout way, to my theme of evolution and the important role that solicitors have to play in the development of our new species. I have no doubt that experience will show up flaws in the Act and the Regulations. They may be too harsh in some areas and not go far enough in others. Practices will change which will require different rules from those we have now. I suggest to you that the best way to overcome these deficiencies is for you to bring them to the attention of the Commission in a constructive manner. You ought to take it upon yourselves not only to find the problems but to try to suggest workable solutions. The Commission has, I believe, demonstrated a willingness on its part to adapt the Act and the Regulations to commercial realities within the framework of promoting timely disclosure of relevant information. In doing so it has listened to a great deal of evidence from concerned individuals and groups and has, I believe, reacted in a responsible and concerned fashion. It has demonstrated a willingness to engage in a dialogue directed towards finding solutions to difficult problems. I suggest that one of the mose useful services you, as solicitors, can provide to your clients is to hold up the other end of that dialogue.

20 The Securities Act (Commercial Bill Dealers) Exemption Notice 1983 (S.R. 1983/157); Amendment No. 1 (S.R. 1983/186).

APPENDIX A

Sources of the Law:

Securities Act 1978
Securities Amendment Act 1979
Securities Amendment Act 1982
Official Information Act 1982, section 50
Securities Act Commencement Order 1979 (SR 1979/94)
Securities Act Commencement Order 1983 (SR 1983/119)
Securities Regulations 1983* (SR 1983/121)
Securities (Fees) Regulations 1983 (SR 1983/120)
NZ Gazette, 28 July 1983, No. 109, page 2390
Supplement to the *NZ Gazette,* 30 August 1983, No. 137, page 2825**
Securities Act (Bishopspark) Exemption Notice 1983 (SR 1983/154)
Securities Act (Charitable and Other Purposes) Exemption Notice 1983 (SR 1983/155)
Securities Act (Charitable Trust Boards) Exemption Notice 1983 (SR 1983/156)
Securities Act (Commercial Bill Dealers) Exemption Notice 1983 (SR 1983/157)
Securities Act (Compromises and Arrangements) Exemption Notice 1983 (SR 1983/158)
Securities Act (Continuous Issues) Exemption Notice 1983 (SR 1983/159)
Securities Act (Credit Reference Association Limited) Exemption Notice 1983 (SR 1983/160)
Securities Act (Current Offers) Exemption Notice 1983 (SR 1983/161)
Securities Act (Friendly Societies and Credit Unions) Exemption Notice 1983 (SR 1983/162)
Securities Act (General Properties Consolidated Limited) Exemption Notice 1983 (SR 1983/163)
Securities Act (Options and Convertible Securities) Exemption Notice 1983 (SR 1983/164)
Securities Act (Overseas Companies) Exemption Notice 1983 (SR 1983/165)
Securities Act (The Public Service Investment Society Limited) Exemption Notice 1983 (SR 1983/166)
Securities Act (Religious Organisations) Exemption Notice 1983 (SR 1983/167)
Securities Act (Renewals and Variations) Exemption Notice 1983 (SR 1983/168)
Securities Act (Statutory Bodies) Exemption Notice 1983 (SR 1983/169)
Securities Act (Trustee Companies) Exemption Notice 1983 (SR 1983/170)
Securities Act (Trustee Company's Bank Deposit Plan) Exemption Notice 1983 (SR 1983/171)
Supplement to the NZ Gazette, 23 September 1983, No. 157, page 3209**
Securities Act (Commercial Bill Dealers) Exemption Notice 1983, Amendment No. 1 (SR 1983/186)
Securities Act (Contributory Mortgage Brokers) Exemption Notice 1983 (SR 1983/187)
Securities Act (Current Offers) Exemption Notice (No. 2) 1983 (SR 1983/188)

Securities Act (Sharebrokers) Exemption Notice 1983 (SR 1983/189) *Supplement to the NZ Gazette,* 20 October 1983, No. 173, page 3509**
Securities Act (Short Form Prospectus) Exemption Notice 1983 (SR 1983/209)

* See also, Sharebrokers Amendment Act 1981, section 3(1)(g).
** See also, Regulations Act 1936, section 6A.

APPENDIX B

General Information on the Securities Commission

Membership of the Commission:

The Commission consists of five members appointed by the Governor-General on the recommendation of the Minister of Justice. The Chairman is engaged on a full-time basis, and the other members and alternate members on a part-time basis. The members are:

	Term Expires 30 April
Mr C I Patterson, Chairman, Barrister and Solicitor of Wellington	1984
Mr C J Fernyhough, Barrister of Auckland	1988
Mr K E F Grenney, Company Director of Auckland	1985
Mr A W Mann, Chartered Accountant of Christchurch	1986
Mr P S Stannard, Chartered Accountant of Wellington	1987

The alternate members are:

Mr J E Aburn, Sharebroker of Wellington	1985
Mr G C Edgar, Chartered Accountant of Auckland	1987
Mr T N Johnston, Barrister and Solicitor of Auckland	1988
Mr L M Papps, Barrister and Solicitor of Wellington	1984
Mr J A Valentine, Chartered Accountant of Dunedin	1986

Executive Staff:

Mr M J Walsh — Executive Director
Mr T J Doyle — Director of Research
Mr P E Ratner — Research Officer

Address:

Securities Commission
PO Box 1179
Wellington.
Telephone: (04) 729-830

For general information on the Securities Commission's current programme, see Fourth Annual Report of the Securities Commission for the Year Ended 31 March 1983, presented to the House of Representatives pursuant to section 30(1) of the Securities Act 1978.

CHART 1

The Securities Act 1978 and Amendments
The Securities Regulations 1983 and
The Securities Act Exemption Notices

Does the Act apply?

(Refer generally, section 33 of the Securities Act 1978)

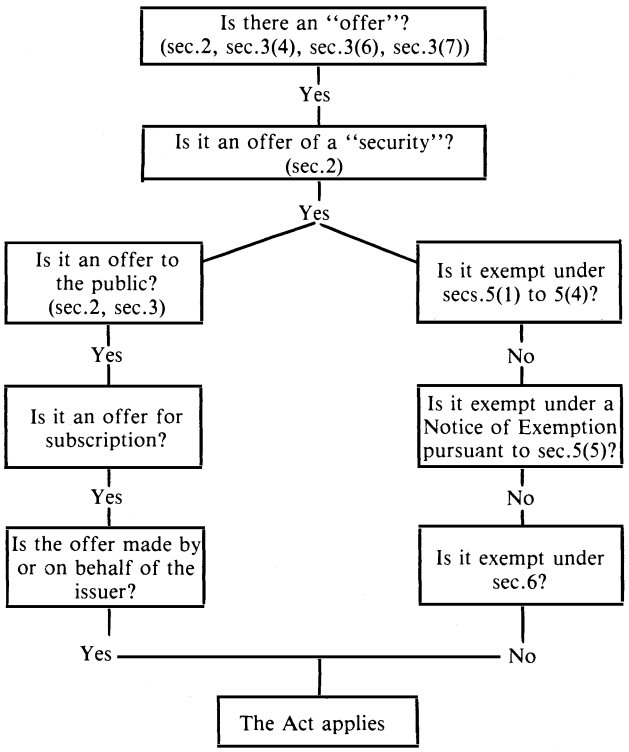

CHART 2

The Securities Act 1978 and Amendments
The Securities Regulations 1983 and
The Securities Act Exemption Notices

How may an Offer be made to the Public?