

R Schmidt, CJ van Schalkwyk, P Sutherland & T Lowe

The Financial Reporting Standards Council and its role in terms of the *Companies Act* 61 of 1973 and the *Companies Act* 71 of 2008*

Summary

Both the *Companies Act* 61 of 1973 (hereinafter “the *Companies Act* 1973”) and the *Companies Act* 71 of 2008 (hereinafter “the *Companies Act* 2008”) provide for the Financial Standards Reporting Council (hereinafter “the Council”). However, its composition, function and legal form is different under each Act. While the Council was established statutorily as a juristic person under the *Companies Act* 1973, it will only be established by the Minister of Trade and Industry under the *Companies Act* 2008. Furthermore, it seems that whether the Council will be granted the status of a juristic person or not is at the Minister’s discretion. In contrast with the *Companies Act* 1973, the Council is thus no longer as autonomous. The Council’s role in standard setting has been diminished. It is to be a mere advisory forum to the Minister with nothing but non-binding drafting powers. Both the *Companies Act* 1973 and the *Companies Act* 2008 contain provisions regarding Financial Reporting Standards (hereinafter “FRSs”). In contrast to the vague provision in the *Companies Act* 1973, the *Companies Act* 2008 clearly sets out the legal status of FRSs. They will be regulations (in the form of Government Notices) and will thus be law (delegated legislation). The Council is an organ of state, however in drafting FRSs it does not perform “administrative action” in terms of section 1 of the *Promotion of Administrative Justice Act* 3 of 2000. The wording of the Acts “in accordance with the International Financial Accounting Standards” (section 440S(2) of the *Companies Act* 1973) and “consistent with the International Financial Accounting Standards” (section 29(5)(b) of the *Companies Act* 2008) allows for some discretion to be exercised in the

* This article is based on chapters of an ongoing MAcc thesis (Prof. Van Schalkwyk, Prof. Sutherland) by R. Schmidt at the Department of Accounting of Stellenbosch University. Thanks is extended to Prof. Geo Quinot, Professor in Administrative and Constitutional law, University of Stellenbosch, for his valuable comments on earlier versions of these chapters, as well as to Ms Chantel Bredenhann for the editing.

Robert Schmidt HonsBRek LL.M (Stell), Ph.D. (Munich), MAcc student (Department of Accounting, University of Stellenbosch).

Prof. Christiaan Jacobus van Schalkwyk HonsBRek, HonsBComm Taxation and MComm Taxation (Stell) CA (SA) Professor in Accounting and Taxation (Department of Accounting, University of Stellenbosch).

Prof. Philip Sutherland BComm. LLB (Stell) Ph.D. (Edinburgh), Professor in Mercantile Law (Department of Mercantile Law, University of Stellenbosch).

Thomas Lowe HonsBRek (Stell) CA (SA) Senior Internal Audit Manager, AIG Inc. (London).

drafting of South African FRSs. The current practice of the Accounting Practices Board to precisely replicate IFRSs is clearly not required by law. It is thus submitted that this practice seems too timid. Contrary to the wording “may” in section 29(4) of the *Companies Act* 2008, the Minister has no discretion as to whether or not to issue FRSs at all. Nor will an overly long delay in issuing FRSs be acceptable. This emanates from a purposive interpretation of section 29(4), read with sections 5 and 7 of the *Companies Act* 2008.

Die Raad op Finansiële Verslagdoeningstandaarde en die rol wat dit in terme van die *Maatskappywet* 61 van 1973 en die *Maatskappywet* 71 van 2008 speel

Beide die *Maatskappywet* No. 61 van 1973 (hierna “die *Maatskappywet* van 1973”) en die *Maatskappywet* No. 71 van 2008 (hierna “die *Maatskappywet* van 2008”) maak voorsiening vir die Raad op Finansiële Verslagdoeningstandaarde (hierna “die Raad”). Die samestelling, funksie en regsform van die Raad verskil egter ingevolge elke Wet. Onder die *Maatskappywet* van 1973 was die Raad statutêr as regspersoon ingestel, terwyl slegs die Minister van Handel en Nywerheid (hierna “die Minister”) onder die *Maatskappywet* 2008 die Raad sal instel. Verder blyk dit in die Minister se diskresie te wees om die status van ’n regspersoon aan die Raad toe te ken. In teenstelling met die *Maatskappywet* van 1973 is die Raad dus nie meer so outonoom soos voorheen nie. Die Raad se rol in die stel van standaarde is ook beperk — tot die formulering van nie-bindende voorstelle. Dit sal bloot as ’n raadgevende forum vir die Minister dien. Beide die *Maatskappywet* van 1973 en die *Maatskappywet* van 2008 bevat bepalinge aangaande finansiële verslagdoeningstandaarde (hierna “FVSe”). In teenstelling met die onduidelike bepalinge van die *Maatskappywet* van 1973, sit die *Maatskappywet* van 2008 die wetlike status van die FVSe duidelik uiteen. Die FVSe sal in regulasies (wat in Staatskoerantkennisgewings afgekondig word) vervat word en as sodanig (afgeleide) wetgewing wees. Die Raad is ’n staatsorgaan, alhoewel dit nie “administratiewe aksie” in terme van artikel 1 van die *Promotion of Administrative Justice Act* (No. 3 van 2000) tydens die formulering van FVSe uitvoer nie. Die onderskeie bewoordinge “ooreenkomstig die Internasionale Finansiële Verslagdoeningstandaarde” (artikel 440S(2) van die *Maatskappywet* van 1973), en “moet ... strook met die Internasionale Finansiële Verslagdoeningstandaarde” (artikel 29(5)(b) van die *Maatskappywet* van 2008) laat ruimte vir die uitoefening van diskresie in die formulering van die Suid-Afrikaanse FVSe. Die Suid-Afrikaanse Rekeningkundige Praktykeraad se huidige praktyk om die *International Accounting Standards Board (IASB)* se IFVSe egter sonder enige wysigings uit te reik word duidelik nie deur die wet vereis nie. Dit word dus voorgelê dat hierdie praktyk blyk te konserwatief te wees. Teenstrydig met die bewoording “kan” in artikel 29(4) van die *Maatskappywet* van 2008, het die Minister geen diskresie daaroor óf die FVSe enigsins uitgereik gaan word óf nie. ’n Oormatige lang vertraging sal ook onaantwoordbaar wees. Beide hierdie afleidings spruit voort uit ’n doelgerigte interpretasie van artikel 29(4), saamgelees met artikels 5 en 7 van die *Maatskappywet* van 2008.

1. Introduction

In the dying days of the *Companies Act* 61 of 1973 (hereinafter “the *Companies Act* 1973”) legal backing for Financial Reporting Standards and for the setting of such standards was, for the first time, inserted into the Act by virtue of the *Corporate Laws Amendment Act* 24 of 2006. This amendment act was assented to on April 11, 2007 and promulgated on December 14, 2007. It contributed section 285A as well as chapter XVB (“Financial Reporting Standards”) to the *Companies Act* 1973, which among other things also brought

about the existence of the Financial Reporting Standards Council (hereinafter “the Council”).¹

By this time, however, the *Companies Act* 71 of 2008 (hereinafter “the *Companies Act* 2008”) was already around the corner and in its final drafting stage (*Companies Bill* 61D-2008). The *Companies Act* 2008 brings considerable institutional reform with regard to Financial Reporting Standards (hereinafter “FRSs”), as well as their setting and their legal backing. It also mandates the re-establishment of the Council.² The Act was assented to on April 9, 2009. According to its concluding section 225, it is to come into operation on April 9, 2010 at the earliest.

This article examines the differences between the *Companies Act* 1973 and the *Companies Act* 2008 with regard to their provisions concerning the Council. It commences with the composition of the Council, thereafter the function of the Council is discussed, as well as the Acts’ definition of Financial Reporting Standards and the content requirements for future South African FRSs as set out in the *Companies Acts*. The legal form of the Council is examined thereafter. The final issue discussed centres around whether the Council is an organ of state and whether, in drafting FRSs, it performs administrative action in terms of the *Promotion of Administrative Justice Act* 3 of 2000 (hereinafter “the *PAJA*”).

2. Composition of the Council and removal of members of the Council

In terms of the *Companies Act* 1973 (sections 440P-440T) the Council consisted of sixteen members, divided into seven groups to represent the various stakeholders.³ Each member had one vote and twelve members formed a quorum.⁴ A simple majority was required to pass a resolution. A minimum of six members was thus able to make a valid decision.

All 16 of the members were to be appointed by the Minister.⁵ Four of them were to be nominated, two company law experts by the Minister himself and one each by the Financial Services Board and the Johannesburg Stock Exchange (JSE).⁶ Regarding the latter two, the Minister did not have any discretion and would thus have been compelled to appoint the nominated persons.⁷ The remaining twelve vacancies would have had to be advertised by

1 *Companies Act* 61/1973: section 440P.

2 *Companies Act* 71/2008: sections 203-204.

3 *Companies Act* 61/1973: section 440P(3).

4 *Companies Act* 61/1973: section 440R(2).

5 *Companies Act* 61/1973: sections 440Q(1),(2)(b).

6 Section 440P(3)(g) of the *Companies Act* 1973 (and similarly section 203(1)(h) of the *Companies Act* 2008) actually referred to persons nominated, one each by any licensed exchange (licensed in terms of section 10 of the *Securities Services Act* 36 of 2004) which imposes adherence to financial reporting standards as a listing requirement. To keep matters simple only the JSE is mentioned here.

7 *Companies Act* 61/1973: section 440Q(1) (“shall appoint”).

the Minister.⁸ There were no specific requirements set out in chapter XVB for such advertising, however, notification to the registered “interested persons” in terms of section 440T was required as a minimum.⁹ In terms of section 440T, a person wishing to receive notice of vacancies on the Council could register with the Council as an “interested person”. The Minister would then select and appoint twelve members from among the applicants.¹⁰ Selection was, however, not restricted to the pool of “registered persons”.

In terms of the *Companies Act* 2008 (section 203), the number of members on the Council increases to seventeen. The additional position is for a member nominated by the South African Reserve Bank.¹¹ There are no rules set out in the *Companies Act* 2008 as to members’ voting rights, quorum or decision-making within the Council. These matters are now presumably left for the Minister to regulate as per section 223(1)(d)(ii), being ancillary matters necessary for the proper implementation of sections 203 *et seq.* All of the members are still appointed by the Minister.¹² It is not entirely clear whether the Minister – as in the *Companies Act* 1973 – is again bound to appoint the nominated members. In contrast to the *Companies Act* 1973,¹³ this is not specifically spelled out in the *Companies Act* 2008, with the exception of the member nominated by the JSE whom the Minister must appoint.¹⁴ The *Companies Act* 2008 does not provide for the possibility of “interested persons” to register with the Council to be notified of vacancies arising. In terms of the *Companies Act* 2008, vacancies are no longer advertised at all; the entire concept of “interested persons” has been deleted.

In terms of the *Companies Act* 1973, the twelve selected members, as well as the chairman of the Council, were to serve a three-year term and were not allowed to serve for more than six consecutive years.¹⁵ Chapter XVB was silent on the four nominated members. It therefore appears as though their terms were unlimited. In practice they could have become permanent members. This might have led to an undesirable two-tier membership within the Council.

As per the *Companies Act* 2008, there are no term limits set for the members of the Council. One exception applies again, to the member nominated by the JSE,¹⁶ whose appointment is limited to three years. Re-appointments are allowed¹⁷ and this seems to include the member nominated by the JSE.

Among the different groups of stakeholders from which the members of the Council were to be drawn, the group “users of financial statements”¹⁸ stood out within chapter XVB of the *Companies Act* 1973. “Users” were to make up a full

8 *Companies Act* 61/1973: section 440Q(2)(a).

9 *Companies Act* 61/1973: section 440Q(1).

10 *Companies Act* 61/1973: section 440Q(2)(b).

11 *Companies Act* 71/2008: section 203(1)(g).

12 *Companies Act* 71/2008: section 203(2), read with section 203(3).

13 *Companies Act* 61/1973: section 440Q(1)(a).

14 *Companies Act* 71/2008: section 203(1)(h).

15 *Companies Act* 61/1973: section 440Q(3).

16 *Companies Act* 71/2008: section 203(1)(h).

17 *Companies Act* 71/2008: section 203(4).

18 *Companies Act* 71/2008: section 440P(3)(d).

quarter of the Council's members. The term "user" was vague. It is, however, entrenched in the International Financial Reporting Standards¹⁹ (e.g. in pars 9 and 25 of the Framework²⁰ and par 7 of IAS 1²¹),²² which is presumably the reason why chapter XV B gave it statutory recognition in the *Companies Act*. To overcome this vagueness and in an attempt to render it more justiciable, a statutory definition of "user" was inserted into section 1 of the *Companies Act* 1973. "User" was defined as "any person who relies on information contained in ... [a financial] report", in particular "a shareholder, prospective shareholder, creditor ... [or] regulator." In terms of this definition – particularly due to the wording "prospective shareholder" – virtually anybody could have been considered a user. The *Companies Act* 2008 has acknowledged this issue and deleted the statutory definition of "user". What was the stakeholder group "user" in the *Companies Act* 1973²³ is now rephrased in the *Companies Act* 2008 as "persons who, in their capacity as holders of securities issued by a company or as creditor of a company, are reasonably expected to rely on financial statements".²⁴ While still being very broad, this new wording is an improvement. Only existing shareholders or holders of debentures are included and not prospective ones. Furthermore, regulators are not included. This contributes to a clearer distinction between the stakeholder groups. As with the *Companies Act* 1973, the group is still made up of four members.

As a novelty over the *Companies Act* 1973, the *Companies Act* 2008 expressly aims at de-politicising the Council by disqualifying any "office-bearer of any party, movement, organisation or body of a partisan political nature" from membership.²⁵

19 Par 7 of IAS 1 defines "International Financial Accounting Standards" (hereinafter "IFRSs") as the collective term for all International Accounting Standards (IASs), International Financial Reporting Standards (IFRSs), as well as Interpretations developed by the International Financial Reporting Interpretations Committee (IFRIC-Interpretations) or the former Standing Interpretations Committee (SIC-Interpretations).

20 "Framework for the Preparation and Presentation of Financial Statements", in: *International Accounting Standards Committee Foundation (IASCF) (ed.) International Financial Reporting Standards (IFRSs) as issued at 30 November 2008*, vol. 1A, 891 *et seq.*

21 IAS 1 ('Presentation of Financial Statements'), in: *International Accounting Standards Committee Foundation (IASCF) (ed.) International Financial Reporting Standards (IFRSs) as issued at 30 November 2008*, vol. 1A, 69 *et seq.*

22 Neither the Framework (which itself is not an IFRS, cf par 2 of the Framework) nor any of the IFRSs define the term "user" in general. Instead, par 9 of the Framework merely lists a non-exclusive catalogue of categories of users (present and potential investors' employees, lenders, suppliers and trade creditors, customers, governments and their agencies and the public). Furthermore, par 25 of the Framework ("Understandability [of financial statements]") contains in its clause 2 a general assumption about users: They "have a reasonable knowledge of business and economic activities and accounting and a willingness to study the information [contained in financial statements] with reasonable diligence."

23 *Companies Act* 61/1973: section 440P(3)(d).

24 *Companies Act* 71/2008: section 203(1)(d).

25 *Companies Act* 71/2008: section 205(2)(a).

The *Companies Act* 1973 emphasised transparency and encouraged public participation (mainly through the “register of interested persons”). The Council would have had to meet at least three times a year and its meetings would have had to be open to the public²⁶. This transparency was, however, curtailed to some extent by section 440T, since only persons who had registered with the Council had to be notified in advance of meetings and proposed agendas. Public communication was apparently limited to such persons.²⁷ The *Companies Act* 2008 contains nothing about the Council’s meetings being public or about the frequency of its meetings. These matters, it seems, are left for the Minister to regulate as per section 223(1)(d)(ii) in his discretion.

Juristic persons do not seem to have been excluded from membership in the Council. By simply referring to “persons” in section 440P(3), the *Companies Act* 1973 implicitly included them. Chapter XVB did not define “person”, nor did the general catalogue of statutory definitions in section 1 of the *Companies Act* 1973. It was thus necessary to resort to the *Interpretation Act*²⁸ which defines in section 2 a person as including “any body of persons corporate or unincorporated”. A juristic person was thus a “person” in terms of section 440P(3) and could have become a member of the Council.

The *Companies Act* 2008, in contrast to the *Companies Act* 1973, defines “person” in section 1 as including juristic persons. A juristic person is thus a “person” in terms of section 205. According to section 205(2)(c), however, a person may not become a member of the Council if that person “is disqualified in terms of section 69 from serving as a director of a company”. Section 69 lists grounds which exclude a person from becoming or remaining a director, which are in turn split into grounds for ineligibility (section 69(7)) and grounds for disqualification (section 69(8)). Being a juristic person renders a person ineligible to become a director, section 69(7). Owing to the wording “persons *disqualified* in terms of section 69”, section 205(2)(c) only refers to section 69(8) and not also to section 69(7). The presumption of statutory interpretation according to which “the same words in a statute bear the same meaning”²⁹ supports this. Being a juristic person therefore does not exclude a person from becoming a member of the Council in terms of section 205(2)(c).

As regards the termination of a person’s membership in the Council, the scope of the *Companies Act* 1973 left much to be desired. An entirely too brief section 440Q(5) listed seven grounds for removal, subdivided into compulsory and discretionary grounds. Rules regarding a member’s resignation were missing entirely. The *Companies Act* 2008 vastly improves on this.³⁰ It distinguishes between initial ineligibility/disqualification and subsequent grounds for removal.³¹ Furthermore, it delineates a procedure for members who wish to resign from the Council.³² Beyond that, it expressly

26 *Companies Act* 61/1973: section 440R(4).

27 Delpont *et al* 2008:998(2).

28 *Interpretation Act* 33/1957.

29 Cf. Du Plessis 2002:194.

30 *Companies Act* 71/2008: sections 205-207.

31 *Companies Act* 71/2008: sections 205 and 207(3).

32 *Companies Act* 71/2008: section 207(1).

inserts the notion of conflict of interests, focusing on a member's "personal financial interest" that may conflict with his duty as a member.³³ It sets out the legal consequences of an existing personal financial interest for a member's membership rights³⁴ and details the disclosure required.³⁵ A statutory definition of what constitutes "personal financial interest" has been included in section 1 of the *Companies Act* 2008. There was no equivalent in the *Companies Act* 1973. This definition bears similarity to the one in the Code of Professional Conduct of the South African Institute's of Chartered Accountants (hereinafter "SAICA"),³⁶ but has been drawn considerably wider. In contrast to SAICA's definition, not only interests in equity or debt instruments are included, but also any "direct material interest ... of a financial, monetary or economic nature or to which a monetary value may be attributed". On the other hand, non-controlling interests in unit trusts or collective investment schemes are not regarded by the Act as "personal financial interests", although viewed with suspicion in terms of SAICA's definition (such interests are considered to be an "indirect financial interest" and thus a potential "self-interest threat"³⁷ which might lead to a conflict of interest).

3. Function of the Council and definition of Financial Reporting Standards

In terms of the *Companies Act* 1973, the Council's functions were twofold, viz. to establish Financial Reporting Standards for public interest companies³⁸ and to develop accounting standards for limited interest companies.³⁹ The reference to "public interest companies" was erroneous in the *Amendment Act* 24 of 2006 and should have been a reference to "widely held companies" (as defined in section 1(6)(a) of the *Companies Act* 1973). Delpont *et al*⁴⁰ observed that the reason for this error was that in a previous version of the Amendment Bill which was to become Act 24 of 2006, companies which were later referred to as "widely held companies" were defined as "public interest companies", but the Bill was not amended consistently throughout to reflect the change.

Financial Reporting Standards were defined in section 1 as "statements of Generally Accepted Accounting Practices adopted by the Accounting Practices Board"⁴¹ [i.e. the IFRSs as issued by the International Accounting Standards

33 *Companies Act* 71/2008: section 205(2)(b).

34 *Companies Act* 71/2008: section 206(2)(b),(c) (No right to attend the Council's meetings, no vote on the matter).

35 *Companies Act* 71/2008: section 206(3)(a),(4).

36 SAICA Code of Professional Conduct, April 2006: Section "Definitions", in SAICA (ed.) *SAICA Handbook*, Vol. 3: *Ethics and Circulars*.

37 SAICA Code of Professional Conduct, April 2006: section 340.1.

38 *Companies Act* 61/1973: section 440P(2), section 440S(1)(a).

39 *Companies Act* 61/1973: section 440S(1)(b).

40 Delpont *et al* 2008:549.

41 The Accounting Practices Board was the South African standard-setting body, of section 7(a)(ii) of the Constitution of the Accounting Practices Board.

Board (hereinafter “IASB”)^{42]} prior to the establishment of the Council, and thereafter issued in terms of section 440U(2)”. Accounting standards for limited interest companies were, however, left undefined. The reason why section 440S spoke of “establishing” Financial Reporting Standards for widely held companies in contrast to “developing” accounting standards for limited interest companies is simple: At the time when Act 24 of 2006 was assented to (April 11, 2007), no accounting standards for limited interest companies were yet in existence. It was only by virtue of Circular 09/07⁴³ (issued October 2007) that the Accounting Practices Board adopted the IASB’s Exposure Draft on IFRS for Small and Medium-sized Entities (hereinafter “SMEs”),⁴⁴ without any changes to the original text, as the transitional South African Statement of Generally Accepted Accounting Practices for SMEs. In the same circular, the Accounting Practices Board decided that this Statement of GAAP for SMEs may be applied to limited interest companies.⁴⁵

The *Companies Act* 2008 does not uphold the distinction between widely held companies and limited interest companies. The relevant statutory definitions have been deleted. Instead, the *Companies Act* 2008 recognises two types of companies (“profit companies” and “non-profit companies”)⁴⁶ and further divides profit companies into four categories (“state-owned companies”, “private companies”, “personal liability companies” and “public companies”).⁴⁷ Section 29(5)(c) allows for the establishment of different Financial Reporting Standards for each of the types and categories of companies. The terminological distinction that existed in the *Companies Act* 1973 between Financial Reporting Standards for widely held companies (now state-owned companies and public companies) and accounting standards for limited interest companies have accordingly been removed. The term “Financial Reporting Standards” is again statutorily defined in section 1 of the *Companies Act* 2008. This definition is of little value since it simply refers forward to section 29(4), (5).

Within the *Companies Act* 2008, section 204 sets out the functions of the Council. When compared to section 440P(2) of the *Companies Act* 1973,⁴⁸ it is apparent that at least the Council’s drafting powers regarding Financial

42 This emanates from SAICA Circular 07/04 (“Status and effective dates of statements of Generally Accepted Accounting Practice (GAAP) and interpretation of statements of GAAP”), issued June 2004. This circular clarifies that after an extended period of harmonization of South Africa’s GAAP with international standards, the Accounting Practices Board adopted the IASB’s IFRSs as Statements of GAAP without amendment.

43 SAICA Circular CC09/07 “Statement of Generally Accepted Accounting Practice for Small and Medium-sized Entities (SMEs)”.

44 Exposure Draft (ED) 225 “Financial Reporting for Small and Medium-sized Entities (SMEs) – Proposed Process” (Issued May 2007).

45 SAICA Circular 09/07: par 10.

46 *Companies Act* 71/2008: section 8(1).

47 *Companies Act* 71/2008: section 8(2).

48 *Companies Act* 71/2008: section 440(2): “The Council’s objective is to establish financial reporting standards ...”.

Reporting Standards have been retained.⁴⁹ Its position in relation to the Minister, however, has been substantially weakened under the *Companies Act* 2008. Section 440(U)(1)(c) of the *Companies Act* 1973 stated that “[t]he Council must ... submit *financial reporting standards* to the Minister”, and section 440U(2) continued, “[t]he Minister shall issue *financial reporting standards* on the advice of the Council by publication in the Gazette.” The identical wording “financial reporting standards” in both the two subsections suggested that what is submitted by the Council and what is published by the Minister is one and the same thing, without any changes. This implied that what is submitted is already the newly established set of Financial Reporting Standards. Furthermore, it implied that the Minister had no discretion but to follow the recommendation of the Council. Delpont *et al*⁵⁰ reached this conclusion, too. To reach this conclusion it is, however, necessary to construe “shall” in section 440U(2) as an imperative “shall”.⁵¹ On this interpretation of section 440U, the Minister’s function was merely to rubberstamp the Council’s Financial Reporting Standards and publicise them. That situation has changed drastically under the *Companies Act* 2008.⁵² The Minister now clearly has discretion with regard to the enactment of the Financial Reporting Standards (section 29(4) “[T]he Minister ... *may* make regulations prescribing ... financial reporting standards ...”). Contrary to the wide wording of section 29(4), this is not a full discretion as to whether or not to enact Financial Reporting Standards at all. In terms of section 5(1) of the *Companies Act* 2008, the Act must be interpreted in a manner that gives effect to its purposes set out in section 7 of Act. In terms of section 7(l), one purpose of the Act is to “provide a predictable and effective environment for the efficient regulation of companies”; a further purpose is to “promote innovation ... in the South African markets.”⁵³ The new Financial Reporting Standards that are to be established are, it is submitted, a means to achieve such an efficient regulatory environment and to promote innovation. The Minister thus has no discretion as to whether or not to enact Financial Reporting Standards at all, nor will it be in accordance with the purpose of the Act to neglect to establish Financial Reporting Standards for an extended period of time.

The Council has been diminished to a mere consultative forum,⁵⁴ since its advice is not binding on the Minister. The wording of section 204(a) further

49 *Companies Act* 71/2008: section 204(a): “[T]he ... Council must ... adapt international reporting standards for local circumstances ...”.

50 Delpont *et al* 2008:998(2).

51 The *Companies Act* 1973 used “shall” and “must” and “may” in chapter XVB. In the crucial section 440U this led to ambiguities. Section 440U(2) read: “The Minister *shall* issue financial reporting standards on the advice of the Council ...”. If this “shall” were imperative one wonders why the draftsman did not use – as in section 440U(1) – the word “must” for consistency’s sake. If this “shall” were discretionary instead, one would rather expect the word “may”. This is particular so since “shall” has only on very rare occasions been read by the courts as a permissive “may”, cf Du Plessis 2002:250.

52 *Companies Act* 71/2008: section 204.

53 *Companies Act* 71/2008: section 7(c).

54 *Companies Act* 71/2008: section 204(b) (“[To] advise the Minister on matters relating to financial reporting standards”); section 204(c) (“[To] consult with the Minister on the making of regulations establishing financial reporting standards”)

clarifies that the Council's drafts (adaptations of international reporting standards) are not themselves already regarded as the newly established Financial Reporting Standards. Instead it is the Minister who finally establishes them by virtue of regulations.⁵⁵ Finally, the legal status of the future Financial Reporting Standards is clearly stated under the *Companies Act 2008*. They will be promulgated as regulations⁵⁶ and thus – being delegated legislation – will be legal norms (law). In contrast, section 440U(2) of the *Companies Act 1973* was astonishingly vague in this regard and stated merely that the Financial Reporting Standards were to be issued by the Minister “by publication in the Gazette”. While it is true that all legislation (including delegated legislation like regulations) has to be published (“promulgated”) in the Gazette in order to become operative,⁵⁷ not everything which is published in the Gazette is necessarily law. Legal notices, reports or mere administrative directives, e.g., may also be published in the Gazette although they are not law.

Mutual consultation between the Minister and the Council is mandatory under the *Companies Act 2008*. The Council is under a statutory obligation⁵⁸ to advise the Minister and consult with him. In turn – as emanates from section 29(4) (“after consulting the Council”) – the Minister is under a similar obligation before enacting financial reporting standards.

In contrast to the *Companies Act 1973*,⁵⁹ public consultation before making regulations regarding Financial Reporting Standards is explicitly no longer provided for by the *Companies Act 2008*.⁶⁰ On the other hand, and as a novelty over the *Companies Act 1973*, the Council may now receive recommendations by the Companies and Intellectual Property Commission (hereinafter “the Commission”) for amendments to Financial Reporting Standards and must then mandatorily consider them.⁶¹

Both the *Companies Act 1973* and the *Companies Act 2008* emphasise that Financial Reporting Standards are to promote “sound and consistent accounting practices”.⁶² The *Companies Act 1973* referred in section 440P(2) only to “financial reporting standards” and not also to “accounting standards for limited interest companies”. This was a mere draftsman's error. It is trite that accounting standards for limited interest companies are to promote sound and consistent accounting practices as well.

Cf. also the Explanatory Memorandum to the Companies Bill 61D-2008, Item 3, which speaks of an “advisory committee”.

55 *Companies Act 71/2008*: section 204(c); section 29(4)(a).

56 *Companies Act 71/2008*: sections 29(4), 204(c), read with section 223(1)(a),(2)-(4).

57 *Interpretation Act 33/1957*: section 13(1).

58 *Companies Act 71/2008*: section 204 (“must”).

59 *Companies Act 61/1973*: section 440U(1)(b) with regard to “interested persons”.

60 *Companies Act 71/2008*: section 223(2), read with section 223(3).

61 *Companies Act 71/2008*: section 187(3)(b).

62 *Companies Act 61/1973*: section 440P(2), *Companies Act 71/2008*: section 29(5)(a).

4. Contents of FRSs and their consistency with IFRSs

As regards the statutory requirements for the contents of the Financial Reporting Standards, neither the *Companies Act 1973* nor the *Companies Act 2008* specifies details. Both acts merely depict the, rather narrow, outer limits of permissible deviations by the future Financial Reporting Standards from the IASB's IFRSs. In terms of section 440S(2) Financial Reporting Standards had to be “*in accordance with International Financial Reporting Standards*” and in terms of section 29(5)(b) they must be “*consistent with International Financial Reporting Standards*”. The Explanatory Memorandum to the Companies Bill B61D-2008 gives no indication as to the meaning of consistency in section 29(5). In contrast, the Explanatory Memorandum to the Corporate Laws Amendment Bill B6D-2006 did so with regard to the meaning of “in accordance with” in section 440S: Clause 1 of item 4.4 of the memorandum stated that Financial Reporting Standards had to be “*comparable*” with IFRSs. Clause 2 of item 4.4 narrowed this down further to a “*tight correlation*”. Clearly then an exact replication of IFRSs was not required for the future South African financial reporting standards. Section 204(a) of the *Companies Act 2008* expands on this and grants the Council an amending role by requiring that it must “*adapt international reporting standards for local circumstances*”.

The fact that section 204(a) speaks of “international reporting standards” and not – like section 29(5)(b) – of the “International Financial Reporting Standards of the International Accounting Standards Board” seems to be merely a drafting inconsistency without further significance. The “international reporting standards” referred to in section 204(a) are the IFRSs.

It is then necessary to determine to what extent the Council may adapt IFRSs without the resultant Financial Reporting Standards being inconsistent with IFRSs. The following changes to IFRSs are, it is submitted, permitted by section 29(5)(b): To re-arrange the sequence of paragraphs of an IFRS; to delete alternative treatments allowed by IFRSs; to delete non-mandatory rules in IFRSs (in particular encouraged, but not mandatory disclosure); to insert stricter requirements encompassing IFRS-requirements as minimum standards; and to fill gaps that exist within the regulatory body of IFRSs. The following examples serve to illustrate this:

Paragraph 93 of IAS 19 (“Employee benefits”)⁶³ describes the calculation of the portion of actuarial gains or losses to be recognised per year for a defined benefit plan. An excess amount (determined as per par 92) is to be “divided by the expected average remaining working lives of the employees participating in that plan”. The standard does not specify whether this average remaining working life is to be counted as from the beginning of the current financial year or as from the end of the current financial year. Hence a gap has been left by IAS 19. A future South African Financial Reporting Standard might opt to close this gap and prescribe a mandatory way of calculation. Such a standard would be consistent with IFRSs.

63 IAS 19 (“Employee benefits”), in: International Accounting Standards Committee Foundation (IASCF) (ed.) *International Financial Reporting Standards (IFRSs) as issued at 30 November 2008*, vol. 1B, 1225 *et seq.*

The filling of gaps has also taken place by way of SAICA's Circular 09/06 ("Transactions giving rise to adjustments to revenue/purchases"). The circular (hereinafter "CC09/06") interprets paras 10, 11 and 18 of IAS 2 ("Inventories")⁶⁴ as well as par 10 of IAS 18 ("Revenue")⁶⁵ with regard to the accounting treatment by the buyer and seller respectively of cash discounts, settlement discounts, rebates and extended payment terms. It sets out which treatments are consistent and which ones are inconsistent with international practice. No equivalent interpretation has been issued by the International Financial Reporting Interpretations Committee (hereinafter "the IFRIC"). CC09/06 is, however, no independent South African interpretation of IFRSs, rather all accounting treatments prescribed in the circular as mandatory have been agreed on by SAICA with the IFRIC in advance.⁶⁶ The circular is at pains to stress that it only considers the specific topics to the extent that they were considered by the IFRIC too.⁶⁷ The IFRIC has simply not deemed it necessary to issue an interpretation of its own, because it considered the accounting treatments sufficiently clear.⁶⁸ The existence of a regulatory gap might therefore be questioned. Nevertheless, a future South African Financial Reporting Standard on inventory or revenue might incorporate the provisions of CC09/06 and would thus be consistent with IFRSs.

Excluding alternative treatment allowed by IFRSs and only allowing benchmark treatment is a further way for future South African Financial Reporting Standards to adapt IFRSs while remaining consistent with them. This is in line with the IASB's stated goal to reduce the number of acceptable alternative treatments over time.⁶⁹ The recent elimination by the IASB of the previous⁷⁰ choice between capitalising and expensing borrowing costs illustrates this. Inconsistency with IFRSs will, however, arise if – as in the case of borrowing costs – the IASB opts to eliminate the benchmark treatment (expensing) and to allow only the alternative treatment (capitalising) in the future.

IFRSs, like any written rules, suffer from the occasional draftsman's error. One such error is for instance found in par 120A(c)(iii) of IAS 19. Par 120A(c) governs the disclosure requirements with regard to the reconciliation of the opening and closing balances of the present value of the defined benefit obligation. The line item "contributions by plan participants" is not part of such reconciliation, yet par 120A(c)(iii) mentions it. In contrast, par 120A(e)(v) correctly sets out the line item "contribution by plan participants" as part of

64 IAS 18 ("Revenue") in: International Accounting Standards Committee Foundation (IASCF) (ed.) *International Financial Reporting Standards (IFRSs) as issued at 30 November 2008*, vol. 1B, 1205 *et seq.*

65 IAS 2 ("Inventories") in: International Accounting Standards Committee Foundation (IASCF) (ed.) *International Financial Reporting Standards (IFRSs) as issued at 30 November 2008*, vol. 1A, 979 *et seq.*

66 SAICA Circular 09/06: par 2.

67 SAICA Circular 09/06: par 6.

68 SAICA Circular 09/06: par 4.

69 Preface to IFRSs: par 13.

70 Cf pars 7-9 of IAS 23 ('Borrowing Costs') as at 30 November 2005, in: International Accounting Standards Committee Foundation (IASCF) (ed.) *International Financial Reporting Standards (IFRSs) as issued at 30 November 2005*, vol. 1A, 1169 *et seq.*

the reconciliation of the opening and closing balances of the present value of the plan assets. The question then arises whether a future South African Financial Reporting Standard on employee benefits which correctly omits par 120A(c)(iii) would be consistent with IFRSs. In terms of the Preface to IFRSs,⁷¹ one of the IASB's objectives is to develop a single set of high quality standards. Draftsman's errors run contrary to that objective. To leave them out would therefore, it is submitted, not render South African Financial Reporting Standards inconsistent with IFRSs. Furthermore, in terms of section 29(5) of the *Companies Act 2008*, the South African Financial Reporting Standards must promote sound accounting practices. Copying over existing draftsman's errors in IFRSs into future South African Financial Reporting Standards is not sound. Doing so would thus infringe upon section 29(5). The consequences of such an infringement are detailed below. Acts (like the *Companies Act*) are original legislation. Regulations (like the ones that will be setting out the future South African financial reporting standards) are delegated (subordinate) legislation ranking lower than Parliamentary statutes. An empowering provision within the act (section 223 of the *Companies Act 2008*) authorises their enactment. Subordinate legislation is subject to judicial review. In terms of the traditional common law tests, delegated legislation had to comply with original legislation (like section 29(5) of the *Companies Act 2008*) in order to be valid and not be struck down by the courts.⁷² The Constitution⁷³ does not expressly mention this requirement. Du Plessis nevertheless advocates retaining it.⁷⁴ It is therefore submitted that provisions of the future South African Financial Reporting Standards which incorporate a draftsman's error of the IFRSs (like par 120A(c)(iii) of IAS 19) will be open to successful challenge in court.

5. Legal form

The *Companies Act 1973* and the *Companies Act 2008* differ in respect of how the Council is established. The *Companies Act 1973* created the Council statutorily (section 440P(1) "is hereby established"), while the *Companies Act 2008* does not. In terms of the *Companies Act 2008* the Minister of Trade and Industry (hereinafter "the Minister") must establish it.⁷⁵ This leaves the Council with a considerably lower legal standing. In all probability, it will be created by virtue of a mere ministerial order or directive. In principle a ministerial regulation could also be used. Section 223 of the *Companies Act 2008* ("Regulations"), however, does not seem to allow for this. A ministerial regulation establishing the Council is neither expressly authorised or contemplated in the *Companies Act* in terms of section 223(1)(a), nor is it a regulation regarding a form required to be used (in terms of section 223(1)(d)(i)), nor a mere ancillary or incidental matter (in terms of section 223(1)(d)(ii)). By and large, the new Council can hardly be said to be as "autonomous" as the old Council.⁷⁶

71 Preface to IFRSs: par 6.

72 Du Plessis 2002:44.

73 *Constitution of the Republic of South Africa*, 1996.

74 Du Plessis 2002:55.

75 *Companies Act 71/2008*: section 203(1).

76 *Companies Act 61/1973*: section 440P(4).

The *Companies Act* 1973 classified the Council as a “body corporate”. A body corporate is a juristic person. Such bodies – referred to as *universitates* – can be established in accordance with the common law.⁷⁷ However, this was not the case with section 440P(1). This provision provided for the establishment of a statutory juristic person. “Body corporate” in terms of section 440P(1) simply meant: a juristic person which is not a company. The Afrikaans version of section 440P(1) confirmed this by using the term “*regspersoon*”.

This status seems to have been lost under the *Companies Act* 2008. The Council is now to be a mere administrative entity within the Department of Trade and Industry, without a separate legal personality of its own. This seems to emanate from comparing the wording of section 203(1) of the *Companies Act* 2008, on the one hand, with section 185(1) and section 193(1) of the *Companies Act* 2008, on the other hand. These three provisions govern the establishment of the Council, the Commission and the Companies Tribunal respectively. Both section 185(1) and section 193(1) expressly state that “[there] is hereby established a *juristic person*”, whereas such reference is conspicuously absent from section 203(1).

6. “Administrative action” and the Council’s activities

Whether or not the Council’s decisions amount to “administrative action” (in terms section 1 of the *PAJA*) is relevant because the *Companies Act* 2008 and the *PAJA* contain conflicting provisions as regards the judicial review of decisions. The time limitations prescribed by the two Acts for the institution of judicial review proceedings differ. Section 7(1) of the *PAJA* allows up to 180 days, which may even be extended,⁷⁸ but not shortened. According to section 6(1) of the *PAJA*, read with the statutory definition of “tribunal” in section 1 of the *PAJA*, the term “judicial review” includes reviews by an adjudicative body like the Companies Tribunal.⁷⁹ In contrast, section 172(1)(a) of the *Companies Act* 2008 allows only 15 business days for submitting review applications to the Companies Tribunal regarding a decision made by the Commission subsequent to a complaint brought to it in terms of section 168 of the *Companies Act* 2008. As per section 5(4)(b)(dd) of the *Companies Act* 2008, section 7(1) of the *PAJA* trumps the conflicting section 172(1)(a) of the *Companies Act* 2008. This issue would arise if the Council’s activities are classified as “administrative action” in terms of the *PAJA* and if a reason for a complaint in terms of section 168(1)(b) can be substantiated as regards the Council’s activities.

The term “*administrative action*” is not defined in the Constitution. The *PAJA*, however, defines it in section 1 as (for current purposes)

any decision taken ... by (a) any organ of state, when ... exercising a public power or performing a public function in terms of any legislation; or (b) [by] a natural or juristic person, other than an organ of state, when

77 Joubert 2003:462; Pienaar 2003:462.

78 *Promotion of Administrative Justice Act* 3/2000: section 9(1)(b).

79 *Companies Act* 71/2008: section 172(4).

exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ...

This definition further lists a catalogue of exclusions (in particular executive, legislative and judicial functions) which are, however, not relevant for current purposes. An “*organ of state*” is defined in section 239 of the Constitution as (for current purposes) “(a) any ... administration in the national ... sphere of government; or (b) any other functionary or institution ... exercising a public power or performing a public function in terms of any legislation ...”

Neither the *Companies Act* 1973 nor the *Companies Act* 2008 expressly states whether or not the Council is an organ of state. From section 239 it clearly emanates that an organ of state need not be a juristic person, and the Council could thus be an organ of state regardless of whether it will be established with a separate juristic personality or not.

The term “*administration*” is not defined in either the *Constitution* or in the *PAJA*, but includes – as emanates from section 195(2)(b) of the *Constitution* – organs of state.⁸⁰ The terms “*any institution*” and “*any functionary*” are the broadest and most encompassing among the terms “administration”, ‘institution’, and “functionary” and can, it is submitted, easily include the Council since the Council has a function (viz. the drafting of FRSs).

To be an organ of state the Council must “*exercise a public power*” or “*perform a public function*”. The Constitution does not give a ready answer to the question of what makes a power or function “public”, nor have the South African courts given a clear answer as yet.⁸¹ Van Dijkhorst J in *Korf v Health Professions Council of SA*⁸² held that, in the definition of an “organ of state” the term “public function” means “engaged in the affairs or service of the public.” Hoexter,⁸³ as well as Burns and Beukes,⁸⁴ referring to Currie & De Waal⁸⁵ and (in a similar way) De Ville⁸⁶ emphasise that what is relevant is whether the power or function is performed in the public interest rather than for private gain. The drafting of FRSs by the Council furthers the public interest and the Council has no private gain from its drafting activities. The Council thus exercises a public function.

Furthermore, the Council does so “*in terms of any legislation*”, viz. section 204 of the *Companies Act* 2008 and section 440S of the *Companies Act* 1973, respectively.

The Council is thus an “organ of state”. Yet this begs the question as to whether the Council also performs “*administrative action*” in terms of section 1 of the *PAJA*.

80 Burns & Beukes 2006:41.

81 Hoexter 2007:3.

82 2000 (1) SA 1171 (T) 1177H.

83 Hoexter 2007:3.

84 Burns & Beukes 2006:137.

85 Currie & De Waal 2005:48.

86 De Ville 2005:44.

“Administrative action” requires a “*decision*” made by the Council. “Decision” in turn is defined in section 1 of the *PAJA* in very broad terms and can easily encompass the Council’s decisions to establish and/or develop specific standards;⁸⁷ to submit FRSs to the Minister;⁸⁸ to adopt international reporting standards for local circumstances;⁸⁹ to advise the Minister on matters relating to FRSs⁹⁰ and to consult with the Minister.⁹¹

It must then be determined whether these decisions are “*of an administrative nature*”. De Ville,⁹² as well as Burns and Beukes,⁹³ submit that this requirement simply serves to exclude private action and Hoexter⁹⁴ concludes that it “is a harmless attempt to underscore the point already made by the list of specific exclusions [as set out in the *PAJA*]: that executive, legislative and judicial action is not administrative power.” In terms of either interpretation, the Council’s decisions are thus “of an administrative nature”.

As stated earlier, the Council is an *organ of state* and does *perform a public function*. Furthermore, it does so “*in terms of any legislation*”, viz. section 204 of the *Companies Act* 2008 and sections 440S, 440U of the *Companies Act* 1973, respectively.

Administrative action in terms of section 1 of the *PAJA* further requires that the decision taken “*adversely affects the rights of any person*”. This phrase has turned out to be one of the most intricate in the *PAJA* over the past decade.⁹⁵

The verb “affect” can have two meanings, either “taking away rights” (referred to as “the deprivation theory”) or, more broadly, “determining rights” (referred to as “the determination theory”). South African courts have begun to give effect to the determination theory. Nugent JA in *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works*⁹⁶ suggested that the phrase “adversely affect the rights of any person” should not be read literally and that administrative action is rather to be understood more broadly as “action that [merely] has the capacity to affect legal rights.” Cloete JA suggested in *Bullock NO v Provincial Government, North West Province*⁹⁷ that “the concept of ‘rights’ ... should not be restricted to rights enforceable in a court of law” and quoted a remark made by O’Regan J in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*⁹⁸ which follows a similar trend: “It may be that a broader notion of ‘right’ than that used in private law may well be appropriate.”⁹⁹ Quinot observes from *Van Zyl v New*

87 *Companies Act* 61/1973: section 440S(1).

88 *Companies Act* 61/1973 section 440U(1).

89 *Companies Act* 71/2008: section 204(a).

90 *Companies Act* 71/2008: section 204(b).

91 *Companies Act* 71/2008: section 204(a).

92 De Ville 2005:40.

93 Burns & Beukes 2006:133.

94 Hoexter 2007:190.

95 Quinot 2007:381 and 231; Hoexter 2007:186 and 199.

96 2005 (6) SA 313 (SCA): par 23.

97 2004 (5) SA 262 (SCA): par 19.

98 1999 (2) SA (CC) par 31.

99 1999 (2) SA CC par 31, quoted in *Bullock v Provincial Government* 271C.

*National Party and Others*¹⁰⁰ (which in turn quotes Coetzee J in *Secretary for Inland Revenue v Kirsch*¹⁰¹) that this decision “seems to recognise that the term ‘rights’ can even be as broadly understood as ‘legally recognised interest[s]’.”¹⁰² As regards the term “adversely”, Burns and Beukes say that an “adverse effect” has the same meaning as an “onerous effect”, i.e. the administration must impose a burden on the individual.¹⁰³ Hoexter raises the question whether the adverb “adversely” could be intended to exclude from the definition of “administrative action” any beneficial administrative conduct (such as issuing a license). If not, she reasons, the adverb adds nothing to the definition and is superfluous.¹⁰⁴ Quinot goes even further and emphasises, referring to *Grey’s Marine*, that the distinction between adverse and beneficial impact is no longer relevant.¹⁰⁵

As to whether the Council’s decisions “adversely affect the rights of any person”, either the rights of the Minister or the rights of any company which will have to comply with the future FRSs come to mind. The Minister has – at any rate under the *Companies Act 2008*¹⁰⁶ – the power to amend or reject the Council’s submissions and is not obliged to issue FRSs based on the Council’s submissions. His rights are thus not determined by the Council’s decisions. The situation is different for companies which have to comply with FRSs. Their rights and obligations as to financial reporting will be determined by the future FRSs. The Council, however, merely drafts these. Given the considerably weakened role of the Council under the *Companies Act 2008* the Council’s drafts as such have, it is submitted, no determining effect on companies’ rights or obligations. Companies’ rights are thus not determined by the Council’s submissions either.

The Council’s decisions thus do not affect the rights of any person. Even if they did, they would in addition – in terms of the definition of “administrative action” in section 1 of the *PAJA* – have to have a “direct, external legal effect”. This part of the definition of the *PAJA* has also caused much controversy. The phrase “direct, external legal effect” has been copied into the *PAJA* straight from German administrative law.¹⁰⁷ In the Constitutional Court decision *Minister of Health v New Clicks SA (Pty) Ltd*,¹⁰⁸ Chaskalson CJ pointed out that “certain of its [i.e. the *PAJA*’s] provisions have been borrowed from German ... law. *PAJA* must, however, be interpreted by our Courts in the context of our law and not in the context of the legal systems from which provisions may have been borrowed.”

100 2003 (3) All SA 737 (C) par 79.

101 1978 (3) SA 93 (T) 94.

102 Quinot 2007:232.

103 Burns & Beukes 2006:144.

104 Hoexter 2007:204.

105 Quinot 2007:234.

106 The situation was possibly different under section 440U(2) of the *Companies Act 1973*, cf. *supra* ch 2.

107 Pfaff & Schneider 2001:70; Burns & Beukes 2006:147; Hoexter 2007:204.

108 2006 (2) SA 311 (CC) par 142.

In the South African context the phrase “*legal effect*” means, according to De Ville, that the decision has to have “a discernable effect on an individual”. This is a broader meaning than the original German meaning “legally binding”.¹⁰⁹ According to Hoexter, the phrase “*direct effect*” refers to “immediacy” or “finality”¹¹⁰ and is, in the South African context, able to capture the common-law idea that administrative action must be “ripe” before it can be reviewed.¹¹¹

“*External effect*”, under German law, is “aimed at excluding administrative measures that are taken within the sphere of public administration. This means that only administrative action that affects a person different from the authority that has engaged in the action can be said to have external effect.”¹¹² Thus the measure must affect outsiders and should not be a purely internal matter of departmental administration. Hoexter is of the opinion that, in the South African law context, the word “external” adds nothing and rather that to distinguish between internal and external acts is “a non-issue at [South African] common law.”¹¹³ De Ville supports this view.¹¹⁴ Burns and Beukes submit that the entire phrase ‘direct, external legal effect’ limits the scope of the constitutionally guaranteed right to just administrative action and therefore question whether this phrase is indeed constitutional at all.¹¹⁵

There thus seems to be an emerging consensus among South African academics that the requirement of “external effect” should, contrary to its original German meaning as expressed by Pfaff and Schneider, rather be read down or even ignored entirely. Case law is not settled as yet in this regard: *SAPU v National Commissioner of the SAPS*¹¹⁶ reasoned broadly in the line of the German meaning of the requirement, while *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services*¹¹⁷ read the requirement down.

Hence, the decisions of the Financial Reporting Standards Council are not subject to administrative review as they have no “direct, external legal effect” in the sense explained. Their effect is not “legal”, since no rights are determined by them in a legally binding way. Their effect is not “external” – provided this criterion is relevant at all in the South African context – since the Council’s drafts and submissions are not directed towards outsiders, i.e. persons outside the administration. Rather, they are merely communications between the Council and the Minister. Finally, their effect is not “direct” since they are not ripe (final). Rather, they are merely preparatory and serve as working papers for the Minister. Overall, under the *Companies Act* 2008, the Council’s role and the impact of its activities on individuals’ rights and

109 De Ville 2005:55.

110 Hoexter 2007:205.

111 Hoexter 2007:206 and 519.

112 Pfaff & Schneider 2001:73.

113 Hoexter 2007:206.

114 De Ville 2005:58.

115 Burns & Beukes 2006:149.

116 [2005] 26 ILJ 2403 (LC): par 57.

117 [2006] 10 BLLR 960 (LC): par 74.

obligations appear to be considerably weaker than the typical role of a body in a two-stage decision process. They also seem considerably weaker than, for instance, the impact of an inspector's activities (report or recommendation) during a (preliminary) administrative investigation whose assessment of a situation feeds into the final decision of another administrator. The situation may have been different under the *Companies Act 1973*.¹¹⁸

In summary, the Council is an organ of state and exercises a public function. Its actions are, however, not "administrative action" in terms of section 1 of the *PAJA*. The *PAJA* does not apply. The issue as to how the differing provisions of the *PAJA* and the *Companies Act 2008* regarding time limitations affect each other does thus not arise.

7. Conclusion

As regards the Financial Reporting Standards Council, the following differences have emerged between the *Companies Act 1973* and the *Companies Act 2008*.

The *Financial Reporting Standards Council* is to be re-established under the *Companies Act 2008*, although with weakened competencies and weakened status. While the Council was established statutorily as a juristic person under the *Companies Act 1973*, under the *Companies Act 2008* it is only established by the Minister (or 'will be' at the time of writing this article). Furthermore, it seems to be at the Minister's discretion whether or not the Council will be granted the status of a juristic person. In contrast to the *Companies Act 1973*, the Council is thus no longer as autonomous. The Council's role in standard setting has been diminished. It is to be a mere advisory forum to the Minister with nothing but non-binding drafting powers. The working of the Council has also become less transparent. A "register of interested persons" is no longer provided for under the *Companies Act 2008*. It is submitted that juristic persons may become members of the Council under the *Companies Act 2008* as well.

Both the *Companies Act 1973* and the *Companies Act 2008* contain provisions regarding *Financial Reporting Standards (FRSs)*. In contrast to the vague position in the *Companies Act 1973*, the *Companies Act 2008* clearly sets out the legal status of the FRSs. They will be regulations (in the form of Government Notices) and will thus be law (delegated legislation). The Council is an organ of state. In drafting FRSs, however, it does not perform "administrative action" in terms of section 1 of the *PAJA*, while the Minister, in promulgating FRSs, does. The issue as to how the differing provisions of the *PAJA* and the *Companies Act 2008* regarding time limitations affect each other does thus not arise.

Different FRSs may be established for each and every type and category of companies.

The Acts' wordings "in accordance with International Financial Reporting Standards" and "consistent with International Financial Reporting Standards"

118 Cf. *supra* ch 2.

respectively allows for some discretion in drafting South African FRSs. The Accounting Practices Board's current practice of precisely replicating IFRSs is clearly not required by law. This practice of the Accounting Practices Board seems too timid. Contrary to the wording "may" in section 29(4) of the *Companies Act* 2008, the Minister has no discretion as to whether or not to issue FRSs at all. Nor will an overly long delay be acceptable. This emanates from a purposive interpretation of section 29(4), read with sections 5 and 7 of the *Companies Act* 2008. With regard to standard setting, the Minister of Trade and Industry is the strong man under the *Companies Act* 2008. His powers have been extended considerably. The uncertainty under the *Companies Act* 1973 as to whether the Minister had to rubberstamp the Council's FRS drafts has disappeared. The Minister has now been granted full discretion.

Bibliography

- BURNS Y AND BEUKES M
2006. *Administrative law under the 1996 Constitution*. Durban: LexisNexis.
- CURRIE I AND DE WAAL J
2005. *The Bill of Rights Handbook*. Landsdowne: Juta.
- DE VILLE J
2005. *Judicial review of administrative action in South Africa*. Durban: LexisNexis.
- DELPORT P, KUNST A AND VORSTER Q (EDS)
2008. Service Issue 28. *Henochsberg on the Companies Act*. Vol. 1. Durban: LexisNexis.
- DU PLESSIS LM
2002. *Re-interpretation of statutes*. Durban: Butterworths.
- HOEXTER C
2007. *Administrative law in South Africa*. Durban: LexisNexis.
- INTERNATIONAL ACCOUNTING STANDARDS COMMITTEE FOUNDATION (IASCF) (ED)
2008. *International Financial Reporting Standards (IFRSs) as issued at 30 November 2008*. London: IASCF.
2007. *Exposure Draft (ED) 225 "Financial Reporting for Small and Medium-sized Entities (SMEs) – Proposed Process* (Issued May 2007). London: IASCF.
2005 *International Financial Reporting Standards (IFRSs) as issued at 30 November 2005*. London: IASCF.
- JOUBERT WA (Ed)
2003. *The Law of South Africa (LAW-SA)*. Vol. 1 (Second Edition) Butterworths: Durban.
- PIFAFF R AND SCHNEIDER H
2001. The Promotion of Administrative Justice Act from a German perspective. *SAJHR* 17: 59-86.
- PIENAAR GJ
2003. Associations. In Joubert (Ed) 2003: 461-497.
- QUINOT G
2007. The judicial regulation of state commercial activity. Stellenbosch University (Unpublished PhD thesis).
- THE SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS (ED)
2007. Circular CC09/07: "Statement of Generally Accepted Accounting Practice for Small and Medium-sized Entities (SMEs) (issued October 2007)". Johannesburg: SAICA.
2006. Circular CC09/06: "Transactions giving rise to adjustments to revenue/purchases" (issued May 2006). Johannesburg: SAICA.
2006. Code of Professional Conduct (issued April 2006). Johannesburg: SAICA.
2004. Circular 07/04: "Status and effective dates of statements of Generally Accepted Accounting Practice (GAAP) and interpretation of statements of GAAP" (issued June 2004). Johannesburg: SAICA.